

Opinion on the notification for prior checking from the Data Protection Officer of the Court of Justice regarding the "certification procedure" dossier

Brussels, 3 October 2007 (File 2007-434)

1. Procedure

In a letter received on 25 June 2007, notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 was given by the Data Protection Officer (DPO) of the Court of Justice to the European Data Protection Supervisor (EDPS) concerning the certification procedure insofar as it contains data concerning evaluation of personal aspects relating to the data subject, including his or her ability, efficiency and conduct (Article 27(2)(b)). The letter is accompanied by several annexes on the subject. The DPO was given 7 days in which to comment on the draft EDPS opinion.

2. The facts

2.1. The procedure

Article 45a of the Staff Regulations of the Officials of the European Communities (hereinafter "the Staff Regulations"), as amended by Regulation No 723/2004, enables officials in function group AST to be appointed to a post in function group AD on condition that, firstly, they have been selected by the institution to take part in a training programme, secondly, they have completed the training programme and, thirdly, they have passed examinations demonstrating that they have successfully taken part in the training programme.

Article 45a(5) provides that the institutions are to adopt general implementing provisions. These are adopted in accordance with Article 110 of the Staff Regulations. The Court adopted general implementing provisions by decision of the Court's Administrative Committee of 15 June 2005 and entered into force on 1 July 2005. They have been published on the intranet site of the Court's Personnel and Finance Directorate. All the institutions have adopted similar general implementing provisions.

Pursuant to Article 45a and the abovementioned general implementing provisions, the Court of Justice organises the annual selection of officials who are entitled to take part in the training programme. The training is given by the European Administrative School (see below). The examinations are evaluated by the European Personnel Selection Office (see below).

The certification exercise starts in September and closes in the autumn of the following year.

Working procedures

Each year, by a decision of the Court's Registrar (so far, the Registrar adopted such a decision on 19 October 2005 and 16 November 2006), the Court determines the number of officials entitled to following the training programme in the context of the certification exercise and the criteria for the evaluation of applications. A staff note is published each year, setting the deadlines for submitting applications and the supporting documents required.

The stages in this procedure are:

1. establishment of the number of officials authorised to take part in the training programme and publication of a call for applications;
2. assessing the admissibility of the applications;
3. drawing up by the Appointing Authority (hereinafter the "AA") of the list of officials authorised to take part in the training programme each year;
4. taking part in the training programme provided by the European Administrative School;
5. organisation of written and oral examinations and the drawing up of the list of officials who have passed the examinations which certify that they have successfully completed the training programme;
6. publication by the AA of the list of officials who have passed the examinations.

Applications

Every year, after consultation of the Joint Committee provided for in Article 10 of the Court's Decision of 15 June 2005, the AA 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.

Applications for certification may be made by officials in function group AST from grade 5 upwards who are appointed to an established post on the staff of the Court in accordance with Article 1a of the Staff Regulations and who hold one of the following positions, to which reference is made in Article 35 of the Staff Regulations, when the call for applications is published: in active service, seconded in the interests of the service, on parental leave or family leave.

However, the following officials may not apply:

- (a) those who will be retired automatically, pursuant to Article 52 of the Staff Regulations, during the year in question or the following year;
- (b) those who are the subject of a decision leading to termination of their service within the meaning of Article 47 of the Staff Regulations;
- (c) those who have been granted an invalidity allowance pursuant to Article 78 of the Staff Regulations.

Following receipt of the applications, the Personnel Division of the Personnel and Finance Directorate makes a file for the exercise concerned. The file includes paper index cards concerning each candidate. These index cards include data that are extracted from the Personnel Division's databases. Throughout the procedure, the file is locked up in a secure cupboard after use. At the end of the exercise, the documents are transferred to the relevant personal files.

Admissibility of applications

Interested persons must complete an application form containing the following data: name, forename, present position, grade, assignment, building and office, date of access to the category and detailed curriculum vitae (title, qualifications, training, professional experience and language knowledge).

Applicants for the first exercise (2005) are not required to complete application forms again; they need only send an email to the Personnel Division to renew their applications for the following year.

Applications fulfilling the following conditions are considered admissible:

- Three of the last five annual staff reports must certify that the official concerned has the potential required to carry out the duties of administrator.
- The official concerned must have at least six years' seniority in function group AST (i.e. B, C, B* or C*). The minimum period of seniority must have been acquired by 31 December of the year preceding the year during which the certification procedure is opened. Account is taken of seniority acquired as a temporary staff member, provided that there has been no interruption between the periods of employment in that capacity and the periods of employment as an official.

The AA draws up and publishes internally (Intranet) a draft list of officials whose applications have been deemed admissible on the basis of the two aforementioned criteria.

Officials whose names are not included on the draft list may refer the matter to the Joint Committee within ten working days of its publication.

The appeal must state grounds and be accompanied by all relevant supporting documents and information.

The Committee issues a reasoned opinion on any disputes within 15 working days of the appeal. It makes all the consultations it considers relevant.

The AA adopts the final list of eligible officials and publishes it on the Intranet.

Establishment of the list of officials selected to take part in the training programme

Classification of the eligible candidates is carried out on the basis of the following criteria:

- the assessments included in the latest annual staff reports;
- the level of education and training,
- if particular requirements have been identified in certain areas, professional experience within the institutions and vocational training acquired in these areas.

The precise content, value and weighting of the above criteria are determined by the AA before publication of the call for applications and after receiving the Joint Committee's opinion. They are notified to staff.

The AA establishes a draft list of the officials selected to take part in the training programme and publishes it on the Intranet. The draft includes officials listed in order of priority; the number of officials on the list matches the number admitted to the training programme.

Officials whose applications are considered eligible but who are not included on the draft list may refer the matter to the Joint Committee within ten working days of its publication. The appeal must state grounds and be accompanied by all relevant supporting documents and information.

The Committee issues a reasoned opinion on any disputes within 20 working days of the appeal. It makes all the consultations it considers relevant.

The AA adopts and publishes the list of officials authorised to take part in the training programme, taking into account the opinion of the Committee.

Officials placed on the list 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, and who is unable to take part in it for that reason may be authorised to follow the training the following year without the need to submit a fresh application.

Participation in the training programme

Pursuant to Article 2(2) of the Staff Regulations, powers have been delegated to the European Administrative School (hereinafter "the School"), to devise and organise the training programme 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 School.

Examination

The content of the written and oral tests is established by the European Personnel Selection Office (hereinafter "EPSO"). Pursuant to Article 2(2) of the Staff Regulations, powers have been delegated to EPSO and to the School to organise the written and oral examinations and draw up the list of officials who have passed those examinations.

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

Officials certified by the School as having followed the training programme but who are not on the list of officials having passed the examinations are authorised to take the examinations in subsequent years.

Drawing up and publication of the list of officials selected

The AA publishes the list of Court officials who have passed the written and oral examinations, as drawn up by EPSO. The names of those officials and their curricula vitae are loaded into an interinstitutional database managed by EPSO which can be consulted by all the institutions so as to facilitate the mobility of officials between institutions.

Other provisions

Officials on the list of officials who have passed the tests may apply for vacant posts in the AD function group corresponding to their grade, in accordance with the terms of Article 29(1)(a)(ii) and (b) of the Staff Regulations.

The AA ensures, in accordance with Article 45a of the Staff Regulations, 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.

2.2. Other information from the notification

Categories of persons concerned

Officials in the AST function group from grade 5 up, in service, on family leave, parental leave or seconded in the interests of the service, with at least six years' seniority and meeting the criteria set out in Articles 3 and 4 of the Court Decision of 15 June 2005 adopting general implementing provisions for Article 45a of the Staff Regulations.

Categories of data

The data needed to select officials are:

- the data given in the application (name, forename, present position, grade, assignment, building and office, date of access to the category) and in the candidate's detailed curriculum vitae (title, qualifications, training, professional experience and language knowledge);
- the annual staff reports covering the last five years.

Information given to the persons concerned

A staff note (see Staff Notes CJ 24/05 and 24/06) informs the candidates as to the procedure for each exercise. The call for applications contains information about the documents to be supplied in order to make an application and the practical arrangements for the procedure. For subsequent exercises, it also contains a data protection information note containing the information referred to in Articles 11 and 12 of Regulation No 45/2001.

Procedures safeguarding the data subject's rights

The data subject is entitled to check and correct his individual file for the certification procedure on the basis of which the AA adopts its draft list. Officials who contest the draft list may submit an appeal setting out their reasons for doing so to the Joint Certification Committee before the final list is adopted.

The data subject may also make a complaint under Article 90(2) of the Staff Regulations.

Automated/manual processing

The processing procedure is partly manual and partly automated. Physical storage of data in the files and automated storage of data on personal data sheets is carried out for the certification procedure.

Recipients of the data:

- Personnel management (the Director-General for Personnel and Finance, the Director of Personnel and the Head of the Employment, Recruitment and Careers Section).
- The members and the secretary of the joint committee for certification. The AA. The legal adviser on administrative matters and the complaints committee in the event of a complaint under Article 90 of the Staff Regulations of Officials.

The list of the names of the persons selected and their administrative addresses are sent to the Director of the European Administrative School (EAS).

The lists of names (surname and forename) of the persons who are entitled to take part in the training programme and the persons who have successfully completed the training are published on the Intranet (on the Personnel Division's display page).

The names of the successful candidates and their curricula vitae are forwarded to EPSO to be included in the database mentioned in section: Working procedures/Drawing up and publication of the list of officials selected.

Period for which data is stored

The files are kept for 15 years from the date of the creation of the file.

Security

During the procedure, the data are kept in a special file locked in a secure cupboard. Only staff directly concerned with the processing has access to the data.

As for the individual files, they remain permanently stored in an electronic file (in the possession of the AA), restricted access to which is protected by a login system.

3. Legal aspects

3.1. Prior checking

The notification received on 25 June 2007 constitutes processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)). The data processing in question is carried out by an institution in the exercise of activities which fall within the scope of Community law (Article 3(1)).

The processing for the certification procedure is partly by automatic means, insofar as the lists of candidates are drawn up in-house in Word and/or Excel, for the purpose of managing the applications and so that the Appointing Authority can publish a list of applicants. Data are also kept on paper in the Careers and Skills Development Unit. Article 3(2) therefore applies in this case.

The processing thus falls within the scope of Regulation (EC) No 45/2001.

The EDPS does not carry out prior checking of the phase during which the European Administrative School and EPSO act, as they are data managers during the phase for which they are responsible. That is the subject of a separate notification for prior checking.

Article 27 of Regulation (EC) No 45/2001 makes subject to prior checking by the EDPS processing operations likely to present specific risks to the rights and freedoms of data subjects. Article 27(2) contains a list of processing operations 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 procedure for certification of officials of the Court of Justice is an operation for the processing of personal data for the purpose of assessment, and is therefore covered by Article 27(2)(b), and as such is subject to prior checking by the EDPS.

In principle, checks by the EDPS should be performed before the processing operation is implemented. In this specific case, the processing was set up before consultation of the EDPS, so the check necessarily has to be performed ex-post. This does not alter the fact that the recommendations issued by the EDPS should be implemented.

The formal notification was received through the post on 25 June 2007. In accordance with Article 27(4) of the Regulation, the EDPS will give his opinion by 26 August. The EDPS informed all Data Protection Officers by email on 10 July 2007 that he was suspending the time-limit for prior checking under way in August 2007. This means that the month of August will not count in the calculation of the two-month time-limit. The DPO was given 7 days in which to comment on the draft EDPS opinion. The EDPS will therefore deliver his opinion on 3 October 2007.

3.2. Legal basis and lawfulness of the processing operation

The lawfulness of the processing must be examined in the light of Article 5(a) of Regulation No 45/2001, which stipulates that the 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 procedure for certification of the staff of the Court of Justice, which involves collecting and processing personal data relating to officials, falls within the legitimate exercise of official authority vested in the institutions. The data processing as presented is necessary for carrying out the certification procedure. The processing operation is therefore lawful.

The legal basis for the data processing operation in question is to be found in:

- Article 45a of the Staff Regulations (certification procedure);
- the Decision of the Court of Justice of 15 June 2005 laying down general implementing provisions concerning Article 45a of the Staff Regulations;
- the Decisions of the Registrar of 19 October 2005 and 16 November 2006 concerning the application of Article 45a of the Staff Regulations.

The legal basis (Staff Regulations of Officials of the European Communities) is sufficiently clear, raises no particular issues and supports the lawfulness of processing.

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 beginning of this opinion should be regarded

as satisfying these conditions as regards processing. The data required are administrative in nature and are necessary to assess the work of officials. The EDPS considers that Article 4(1)(c) of Regulation (EC) No 45/2001 has been fulfilled in this respect.

The data must also be processed "*fairly and lawfully*" (Article 4(1)(a) of Regulation (EC) No 45/2001). The lawfulness of the processing has already been discussed (see section 2 above). As regards fairness, this relates to the information given to the data subjects. Here, see point 3.8 below.

Under Article 4(1)(d) of the Regulation, "*data must be accurate and, where necessary, kept up to date*". The data subject has the right to access and the right to rectify data, so that the file is as comprehensive as possible. This also makes it possible to ensure the quality of data. These rights are discussed in section 3.7 below.

3.4. Conservation of data

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 are collected or for which they are further processed*".

It will be recalled that all the documents necessary for the certification files are kept for 15 years after the creation of the file.

The certification files of successful applicants will be added to their personal files. The fifteen-year retention period therefore does not apply. In this hypothesis, Article 26 of the Staff Regulations applies, especially: "*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*".

Data are thus conserved for a long, but unspecified period. The EDPS emphasises the need to set a period during which data may be stored. In a similar case¹, the EDPS considered that it was reasonable to set the storage period at 10 years, starting from the moment when the staff member leaves or after the last pension payment.

This long-term data storage should, moreover, be flanked by appropriate safeguards (in particular Article 22 of Regulation No 45/2001 continues to be applicable). The data conserved are personal. The fact that they are archived for long-term conservation does not divest them of their personal nature. For that reason, data conserved over a long period must be covered by adequate measures for transmission and conservation, as with any other personal data.

The EDPS considers it desirable that a time-limit be set also for the files of candidates who are not selected. He also recommends that the information notice for the data subjects be amended accordingly (see point 3.8 below).

There is no plan to retain data for statistical purposes.

¹ Case 2004/274 – Staff appraisal procedure – European Central Bank.

3.5. Change of purpose/Compatible use

Data are retrieved from or entered in the staff databases. The processing being reviewed involves no overall change to the specified purpose of staff databases, the certification procedure being merely a part of that purpose. Accordingly, Article 6(1) of Regulation (EC) No 45/2001 does not apply in this instance and the conditions of Article 4(1)(b) are fulfilled.

3.6. Transfer of data

The processing operation must also be examined 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 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"*.

The data will be circulated between various departments within the Court of Justice, namely personnel management (the Director-General for Personnel and Finance, the Director for Personnel and the Head of the Employment, Recruitment and Careers Section), the members and the secretary of the Joint Committee for certification, the AA, the legal adviser on administrative matters and the complaints committee in the event of a complaint under Article 90 of the Staff Regulations of Officials.

Personal data may not be transferred within an institution unless they are necessary for the legitimate performance of tasks falling within the competence of the recipient.

In this instance, data transfer to all of these recipients is necessary for the legitimate performance of the tasks of the various parties.

Moreover, data relating to officials authorised to follow training are forwarded to the European Administrative School (EAS), which is attached to EPSO. After the training courses, EPSO forwards data concerning officials who have successfully completed the training programme to the AA. The names of the successful candidates and their curricula vitae are forwarded to EPSO for inclusion in the interinstitutional database managed by EPSO which can be consulted by all the institutions so as to facilitate the mobility of officials between institutions. OLAF, the EPDS and the Court's internal auditor and DPO may also receive those data. Finally, files may be sent to the Court of First Instance (CFI) in connection with appeals to the CFI².

These transfers are legitimate in this instance since they are necessary for the legitimate performance of tasks falling within the competence of the recipient.

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

3.7. Right of access and of 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. In the case in point, the data subject has access to his or her certification file in order to fill in all the sections required for the procedure.

² The European Union Civil Service Tribunal, set up by the Council Decision of 2 November 2004 (2004/752/EC, Euratom), is competent instead of the Court of First Instance. The latter is the appeal body.

The right of rectification of data subjects is provided for in Article 14 of Regulation (EC) No 45/2001. In the same way that the data subject has a right of access, he or she may also directly change factual personal data or have them changed, if necessary.

In this case, such rights are safeguarded by the information notice on data protection containing all the information referred to in Articles 11 and 12 of the Regulation which forms part of the application required for the certification procedure. The notice also gives the full text of Articles 13 and 14 of Regulation No 45/2001.

In this case, there is compliance with these articles.

3.8. Information for data subjects

Regulation (EC) No 45/2001 provides that the data subject must be informed where his or her personal data are processed and lists a series of specific items of information that must be provided. In the present case, some of the data are collected directly from the data subject and others from other persons.

The provisions of 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 apply in this case. Inasmuch as the official or staff member personally fills in the data required of him or her, the data subject provides the data himself or herself.

The provisions of 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 apply in this case because information is obtained from the various parties involved in the process (AA and Joint Committee).

It will be recalled that in this case the data subjects are supplied with information by the data protection information note containing the information referred to in Articles 11 and 12 of Regulation No 45/2001, which forms part of the application required for the certification procedure.

Only the point concerning Article 11(d) (whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply) is not mentioned in the note. The EDPS recommends that this indication be incorporated into the various documents giving information regarding the certification procedure, as well as the amendment concerning the data retention period.

3.9. Security

In accordance with Article 22 of Regulation (EC) No 45/2001 on 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*".

Other organisational and technical measures are taken to ensure maximum security of data processing.

In the light of all these measures, the European Data Protection Supervisor considers that they can be considered as appropriate within the meaning of Article 22 of Regulation (EC) No 45/2001.

Conclusion

The proposed processing does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001, provided that the comments made above are taken into account. This implies, in particular, that the Court of Justice should:

- set a period during which the data of candidates who have not been selected may be stored;
- amend accordingly the information note for data subjects;
- in connection with long-term data storage, establish appropriate measures for the transfer and storage of personal data;
- mention the provisions concerning Article 11(d) of Regulation No 45/2001 in the data protection information note containing all the information referred to in Articles 11 and 12 of the Regulation which forms part of the application required for the certification procedure.

Done at Brussels, 3 October 2007

Peter HUSTINX
European Data Protection Supervisor