

## **Opinion on the notification for prior checking received from the Data Protection Officer ("DPO") of the Office of Harmonization for the Internal Market ("OHIM") on 14 July 2008 regarding OHIM's ex-ante quality checks**

Brussels, 22 October 2008 (Case 2008/437)

### **1. Proceedings**

On 14 July 2007, following a request from the European Data Protection Supervisor ("EDPS"), which had been triggered by staff complaints against OHIM, OHIM's DPO submitted a prior-checking notification to the EDPS about OHIM's data processing operations related to its planned ex-ante quality checks ("**Notification**").

On 7 September 2008 the EDPS requested further information from OHIM, enclosing a preliminary draft of the "Facts" section of the EDPS Opinion. OHIM replied on 1 October 2008. On 7 October 2008 the EDPS sent the draft Opinion to OHIM for review and comments. OHIM provided its comments on 13 October 2008.

### **2. Facts**

**2.1. The Office of Harmonization for the Internal Market.** OHIM is the official European Union agency responsible for registering trade marks and designs that are valid in all 27 countries of the EU.

**2.2. Scope of the Notification.** The Notification concerns the ex-ante quality checks of selected documents drafted by OHIM's trademark examiners. These quality checks will be carried out by designated staff members who will (i) review the work products of the trademark examiners before they are officially issued by OHIM and (ii) report the results of their review via a database created for this purpose ("**MS Access Database - Ex-ante Quality Check Tool**").

The quality checks will form part of OHIM's internal quality management system and their primary purpose is to improve the overall quality of OHIM's work products. However, the results of the quality checks (i) will also be used to evaluate the quality of work of each examiner and (ii) will inform management decisions regarding measures that may individually affect the examiners, such as performance appraisals, promotion, contract renewals, disciplinary measures, or training.

The Notification and the Opinion cover only OHIM's so-called ex-ante checks. Ex-post checks, which are not intended to individually evaluate the examiners, do not come under the scope of the Notification. The differences between ex-post and ex-ante checks are described in Section 2.5.

The Notification and the Opinion also do not cover the quality checks carried out by the Boards of Appeal, which are also not aimed at individual evaluation.<sup>1</sup>

Finally, the Notification and the Opinion also do not cover any other quality management tools that OHIM may have developed in the past or may develop in the future and which might also be used for performance evaluation. In this respect, the EDPS calls OHIM's attention to the fact that if such additional quality management tools exist, OHIM must submit them for prior checking.<sup>2</sup>

OHIM's plans for its ex-ante quality checks are outlined below in Sections 2.3 through 2.14, whereas the history of its quality checks, including previous pilot periods, is discussed in Section 2.15.

**2.3. Decisions subject to quality checks.** Trademark examiners prepare various documents, including formal decisions, during their work. Among these, the ex-ante quality checks will cover the following types of documents: (i) objection letters on absolute grounds, (ii) final refusals on absolute grounds, and (iii) decisions in opposition procedures.

OHIM explained that it chose these three types of documents to be subject to the ex-ante quality checks because these decisions have an immediate impact on the trade mark rights of the parties concerned and may be appealed to the Boards of Appeal, and must therefore be particularly well founded and reasoned. OHIM further explained that, in general, these documents are also more complex and more difficult to draft than other types of documents, for example, deficiency letters. Therefore, they are more prone to errors. Objection letters and final decisions also involve a thorough assessment of the facts and applicable laws and are therefore representative of the overall quality of the work of the examiner. Based on the foregoing and in order to concentrate resources on the most important areas it was decided to limit ex-ante quality checks to these decisions, at least for the time being.

**2.4. Quality criteria.** The ex-ante quality checks will be carried out on the basis of specific, transparent quality criteria, which are published on OHIM's website, at

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<sup>1</sup> OHIM described these checks as follows:

*These checks relate to decisions taken by examiners in the Trade Mark Departments which are being appealed before the Board of Appeals. The purpose of these checks is to collect information on the quality of the appealed decisions. No names of examiners are collected (see attached a sample form). Even more, the decisions are identified by the number of appeal and not by the number of decision taken by the examiner.*

*The procedure is as follows: A paper form (sample attached) is filled in by the members drafting the appeal decisions and inserted into the paper file of appeal. When the appeal is decided and file is closed, the sheet is sent to a person at Documentation and Support Service of BOAs. She fills the information into an ACCESS database. She is the only person to have access to this database. Based on the data, a report is made on the statistics of the quality of appealed decisions. The draft report is discussed at the Presidium of the BOA and the President of BOA will give feedback to the TMDs on the general trends on the quality of appealed decisions. The first such report from BOA to TMDs is due for October 2008.*

*We were informed by the BOA that as neither the sheet, the ACCESS database or the report to the TMDs contains personal data, no notification has been made about these statistics.*

<sup>2</sup> The EDPS specifically calls OHIM's attention to the fact that in the first year of the institutional existence of the EDPS, at the time of preparing an initial inventory of cases that might be subject to prior checking by OHIM, OHIM informed the EDPS that among others, it is planning to submit a notification for prior checking with regard to certain quality management tools (OHIM reference DPN-2005-068). The EDPS, as was his practice at that time with respect to items included in the inventory, assigned a case number to the case, awaiting notification from OHIM (EDPS reference 2004-0290). No notification has been submitted to the EDPS based on this particular inventory entry since then.

[http://oami.europa.eu/ows/rw/resource/documents/QPLUS/serviceCharter/qualitychecklist\\_en.pdf](http://oami.europa.eu/ows/rw/resource/documents/QPLUS/serviceCharter/qualitychecklist_en.pdf).

The criteria cover a range of issues pertaining to both the content and format of the decisions drafted by the trademark examiners. For example, requirements include that relevant templates and standard paragraphs must be used, objection decisions must clearly identify the contested mark and the contested goods and services, decisions must not breach the parties' rights of defence, and decisions must be proofread.

**2.5. Ex-post and ex-ante checks.** The quality checks will consist of ex-post and ex-ante checks. Of these, only the ex-ante checks come under the scope of the Notification because the results of the ex-post checks are not intended to be used for performance evaluation. However, for the sake of completeness, ex-post checks are also briefly described here.

Ex-ante checks will be carried out before the decisions are formally adopted and notified to the parties to the procedure. They will be carried out on a relatively large random sample (approximately three quarters of all decisions and three quarters of each category of decisions drafted by each individual trademark examiner - the exact figures are based on the targets set for the examiner and are thereafter adjusted according to actual production figures). OHIM explained that checking large samples of this size with respect to each individual examiner allows the samples to be representative of the overall quality of the three types of documents drafted by each individual examiner, with only a 5% allowance for error.

Ex-post checks will be carried out after a decision has already been formally adopted and communicated to third parties. This type of check was previously carried out on a comparatively small randomly chosen sample (approximately 7% of all examination decisions and 15% of all opposition decisions). As of June 2008, OHIM started to use a larger sample, and follow the same method of calculation as in case of ex ante checks.

**2.6. Trademark examiners and quality checkers.** This Section briefly explains who the quality checkers are and whose work products they check.

**Objection letters and final refusals on absolute grounds in ex-ante checks.** Objection letters and final refusals on absolute grounds are drafted and prepared by one examiner and will be checked either by a legal adviser or by a designated examiner during ex-ante checks.

There are about 90 examiners involved in decision taking (although not all of them 100%). The quality checks are performed by eight legal advisers, one in each of the eight services dealing with trademark registration and cancellation, and by up to three other designated examiners in each of the eight services.

The legal advisers are experienced and qualified senior examiners (often, although not always, lawyers) who act as reference persons for all questions concerning the examination process both for absolute and relative grounds. They give advice, discuss files, train and coach the members of their service and harmonize decisions within their service and via the weekly meetings with other legal advisers. By supervising the work of the examiners, legal advisers used to be already in the past responsible for the quality of the work in their service. However, the new system of ex-ante checks will organize this in a more systematic and harmonized way for all services.

OHIM explained that ideally only the legal advisers should perform ex-ante checks. However, in reality, because of the workload and language requirements, additional persons are

necessary to do the checks. The designated examiners are chosen for this task because of their knowledge, experience, language skills and capability.

**Opposition decision in ex-ante checks.** Opposition decisions are drafted by one examiner and are reviewed, co-signed and if necessary, corrected by two other examiners, one of whom must be a lawyer. These requirements are set forth in Article 127(2) of the CTMR.<sup>3</sup>

The role of the co-signers is to help ensure the quality and consistency of the decisions. The decision is formally taken by the three-member team (the "opposition division") and therefore, all three examiners have to agree on the content of the decision, and are jointly responsible for its accuracy.

The members of these three-member teams are chosen from the members of a service according to their qualifications (at least one co-signer must be a lawyer), language skills (decisions may have to be taken in any of the five languages of the Office) and workload. Usually the lawyer (in many cases the legal adviser, in some cases the head of service) or another very experienced member will take the role of the second co-signer and will perform the ex-ante quality check at the same time.

**Ex-post checks.** Initially ex-post checks were carried out by eight legal advisers. Later, in order to increase consistency of the review, a smaller group of four persons took over this task, including three heads of services. A classification expert is also involved. No specific information was provided to the EDPS regarding future plans for staffing ex-post checks. However, OHIM confirmed that the results of the ex-post checks are not used for appraisal purposes. They are not intended to either influence the appraisal of (i) those who drafted the documents checked or (ii) the ex-ante quality checkers.

**Quality checks by direct hierarchical superiors.** In some cases, the person performing the quality check will be the direct hierarchical superior of the examiner, who will subsequently evaluate the examiner's performance during the annual appraisal process.

**2.7. Database and data entries.** As noted in Section 2.2, OHIM will use a new electronic database, the MS Access Database - Ex-ante Quality Check Tool, for recording and storing the results of the ex-ante checks.

OHIM explained that this new MS Access database is not yet available "in production", but that "there is a test version of it in the pilot phase".

Those carrying out the checks will have password-protected access to the database and will enter the data into the database themselves. Data resulting from the ex-ante checks are collected and stored in a stand-alone database and are not exported or linked to any other database. This also means that the results of the ex-post and ex-ante checks are collected and stored separately in two different databases.

The database will contain the following entries with respect to each decision that was subject to an ex-ante check: CTM or Opposition number, Date, Quality Checker, Examiner, Type of draft (L110, 123 or opposition decision), Legal Grounds (article/rule), Type of Mistake (reference to the quality criteria), Explanation/Correction, Reference to the Office Practice (e.g. Guidelines).

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<sup>3</sup> Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.

No other entries are made in the ex-ante database. In particular, it is not foreseen to make a special mention of outstanding quality. Neither is there a possibility to mark files for training. (This latter possibility is foreseen only in the ex-post database, which is not subject to the Notification and this Opinion.)

**2.8. Purposes and intended uses of the database.** The ex-ante database is intended to provide OHIM management with information about the errors made during trademark examination by the individual examiners, teams and the organization as a whole. Management then will be able to take both global and individual measures to improve the quality of OHIM's performance. (Aggregate information about error rates in ex-post quality checks will also be published to inform the users of OHIM's services how OHIM complies with its quality objectives. No information will be published with regard the ex-ante quality checks.)

Information obtained from the ex-ante quality checks can also be used when taking decisions relating to performance of staff, such as to promote staff, to renew or not to renew contracts for temporary or contract staff, to take disciplinary measures, to dismiss staff members for underperformance and to offer/require specific training of the employee.

These decisions will be made within the framework of the appropriate procedures. For example, heads of services will be able to use the findings when drafting appraisal reports. However, they are expected to analyse the data very carefully and take all other relevant circumstances (training and experience of the examiners, timeframes, types of error detected, etc) into consideration.

Each examiner will also be informed about the errors found in order to prevent repetition of errors. This exchange is informal and the staff member, if he so wishes, may discuss the mistake with the quality checker and/or challenge it.

## **2.9. Recipients of the data**

**Staff members.** Staff members will have no on-line access to the ex-ante database. Neither will they receive any printout or report containing the data collected in the database relevant to their work. However, as noted above in Section 2.8, they will receive feedback from those carrying out the quality checks in order to help them avoid repetition of the same types of mistakes in the future.

**Access to the database by quality checkers, management and others.** The following persons have direct, password-protected access to the ex-ante database:

- Directors of the Trade Marks and Cancellation Department ("**TMCD**") and the Trade Marks and Register Department ("**TMRD**"),
- all legal advisers and the senior examiners designated to do quality checks,
- all heads of services,
- and the quality check administrator (who is one of the heads of services).

In addition, members of the Information Technology and Quality Management departments who are directly involved in ex-ante database development and maintenance have the necessary access to the tool.

No other person has either direct, password-protected access to the database or indirect access (e.g. in the form of printouts or downloads).

The heads of services, the legal advisers and the senior examiners designated to do quality checks only have access to data of examiners in their own services.

Others with so-called "administrator" rights, however, have unlimited read-access to the database.

OHIM explained that for the test period, the persons with administration rights are:

- a business analyst at the PMU (Performance Management Unit) who is "responsible for setting up the samples",
- the quality check coordinator (a head of service, as noted earlier) and
- the programme manager at the Quality Management department who was involved in setting up the tool.

When the pilot phase ends, the directors of the two trademark departments concerned and the quality check coordinator will be granted administrator rights.

Each person with direct, password-protected access noted above can browse individual error records and can see what type of errors a particular examiner made in a particular decision (subject to the access limitations as noted above).

The database is also searchable. For example, a user can make a search to retrieve all documents in which the examiners breached the parties' rights of defence. (The access limitations noted above will also apply to the searches. For example, the heads of services, the legal advisers and the senior examiners designated to do quality checks can only search data of examiners in their own services.)

In addition, the database can also be used to generate, download and print the following three types of aggregate and individual reports:

- summary report (number of decisions checked and number of correct/incorrect decisions),
- detailed report (showing assessment date, letter category, case number, language, examiner and assessor names, number of correct/incorrect decisions),
- detailed report with error description (showing details of errors made and comments).

All three reports can be generated on three levels of aggregation: departmental level, service level, or by individual examiner. Access to these reports, again, is subject to the access limitations noted above.

**Internal use.** No transfer of data is foreseen to third parties. The content of the database is for OHIM's internal use only. Only aggregate data are made available externally, and only with regard to the ex-post checks, in the form of periodic publications on OHIM's internet site. These contain no personal data. No data regarding ex-ante checks is published or otherwise made available to third parties outside OHIM.

**2.10. Measures taken to ensure the accuracy of the data.** When asked to explain what measures OHIM plans to take to ensure that the results of the ex-ante checks, as reported in the MS Access Database - Ex-ante Quality Check Tool, will indeed provide reliable and comparable information regarding the performance of the individuals evaluated, OHIM provided the following information:

*All checkers apply the same quality criteria. Differences in perception will be discussed and clarified in the regular meetings or on demand. The [legal adviser] and other checkers involved may discuss results among them and with the staff and share information.*

*For the time being we do not plan to issue special guidelines or conduct training courses. If discussions show that the criteria agreed on need clarifications or changes, this will be decided and communicated accordingly. Ex-ante quality checks are done by the checkers in their responsibility.*

OHIM further confirmed that there is no specific procedure for rectifying mistakes in the quality checks, but if the examiner provides good reasons and convinces the quality checker, the result of the check may be changed.

In addition, OHIM pointed out that although OHIM did not establish a specific appeal procedure for the ex-ante quality check exercise, there are means for staff members to appeal against the final decisions that are based on the quality check exercise. For example, there is an appeal procedure for the appraisal and for other significant decisions individually concerning staff members (promotions, dismissals, disciplinary measures, etc.) OHIM further argued that the quality check exercise constitutes a "preparatory measure", and as such, does not require any specific appeal procedure. In other words, OHIM claims that the results of the ex-ante checks can ultimately be challenged by the official/agent through an appeal against the appraisal decision and/or by lodging a complaint under Article 90 (2) of the Staff Regulations.

OHIM further explained the following:

*The plan of the OHIM is to introduce an ex-ante check based on a representative sample following these guidelines:*

*A reliable random number generation algorithm generates random numbers for assignment to each produced item subjected to quality checks. Based on these random numbers, a selection algorithm decides whether this item should be checked or not. To that end, a check ratio is calculated (as noted above in Section 2.5), rather than an absolute amount of files to be checked. If the random number of an item is below this check ratio threshold value, the item is to be checked – if not, not.*

*Before the appraisal, however, real production figures and required sample sizes are re-calculated and compared in absolute terms. If the sample size turns out to be too small, the amount of missing checks is calculated and checks are carried out on previously unchecked items. The selection goes as follows: Sorting the item list by the random number and taking the top X to check, with X indicating the amount of missing checks for a representative sample. This is also automated in an algorithm.*

**2.11. Rights of access, rectification, blocking, erasure and objection.** As noted above in Sections 2.8 and 2.9, staff members will have no systematic access to the data in the database. OHIM has also no specific policy or established procedure which would implement the provisions of Regulation 45/2001 regarding these rights. The Notification merely confirms that access rights will be granted within three months whereas rectification requests will be granted immediately.

However, as also explained in Sections 2.8 and 2.9, staff members will be given feedback from those carrying out the checks about the mistakes they made, and thus, will know about the mistakes entered "under their names" in the database and will be able to discuss or challenge any entry.

**2.12. Information provided to data subjects.** Staff members were informed about the ex-ante and ex-post quality checks in a management note to staff on 6 February 2008 as discussed in Section 2.15. For now, OHIM has no further plans to issue any further communications to staff regarding the ex-ante checks.

**2.13. Conservation period.** Information will be kept for a period of 15 (fifteen) months in the MS Access Database - Ex-ante Quality Check Tool. After this period all data will be deleted from the system.

OHIM explained that the 15 months conservation period is linked to its appraisal system. Information for a calendar year "n" will be maintained 15 months from the end of December of year "n", that is, until the end of March of year "n+1". After that date all data will be deleted from the tool relating to year "n".

OHIM further explained that the appraisal period runs 1 October through 30 September and not through 1 January through 31 December. The actual appraisal interviews are held thereafter, as of October each year. OHIM also explained that an appeal against an appraisal decision can be filed by the 70th working day after the starting date of the appraisal exercise. For example, in the 2007 exercise the appraisal exercise started on 1 October 2007 and the deadline was on 18 January 2008.

OHIM confirmed that the length of the conservation of data is set to ensure that both management and the staff members evaluated during the appraisal could use the data in the database and that staff would also have access to the data when preparing an eventual appeal against the appraisal decision.

No data will be stored for historical, scientific or statistical purposes.

**2.14. Security.** All data will be stored in a protected area of the OHIM servers. Data will not be accessible without a username and password. Access rights will be allocated to a limited number of persons on a need-to-know basis, as described in Section 2.9.

## **2.15. Deployment of the ex-post and ex-ante checks, pilot phases**

**2.15. 1. Quality checks prior to February 2007.** Since the beginning of OHIM's existence, it was part of the task description of legal advisers to read and correct the drafts of newcomers and examiners in training to ensure that the decisions were of good quality. However, initially no formal notes were taken and no information was systematically stored.

As of the reorganisation of the trademark departments in July 2006, the legal advisers started to perform a mix of ex-post and ex-ante quality checks. However, these checks were also not systematic and no data were stored.

A designated group of experienced trademark examiners within OHIM, the so-called classification expert group (or "CEG") were involved already at this time in performing ex-post (but not ex-ante) quality checks.



In an 8 February 2007 note to the attention of the personnel of the Trade Mark Departments, which was emailed to staff on 12 February 2007, OHIM management explained the purpose of these checks as twofold, to "improve the quality of OHIM's decisions" and to "ensure that these decisions are consistent".

Thus, although this was not specifically stated with regard to the period prior to February 2007, these checks were intended by management to be used to learn details about the quality of OHIM's work products and potential sources of errors and not to evaluate the work product of individual examiners. Feedback was nevertheless given to the examiner by the legal adviser of his service whenever a mistake was detected by the legal adviser's group in order to help avoid repetition of the same mistake in the future.

**2.15.2. Quality checks between February 2007 and February 2008.** According to the 8 February 2007 note the previous system "worked reasonably well" but "the way it was set up made it more difficult to make a conclusion on quality in general terms". Therefore, "in order to improve the reporting on the performed checks, as well as to make the process more transparent", OHIM management decided to change the process and develop a reporting tool to report on the results.

Following the decision taken by management, as of February 2007, thus, OHIM began to carry out checks in a different way and started to use a reporting tool to report the results.

As declared in the note, "mainly ex-post checks [were to be] performed". The note added, however, that ex-ante checks will continue to be performed by the legal advisers who will give direct feedback to the examiner and the head of service.

The note further explained that "keeping the results in an electronic form will make it possible to generate reports on quality. These reports will only be used for statistical purposes." In particular, the reports were intended to serve two purposes: (i) to give information on where the quality of work can be improved or where the decisions were inconsistent, and (ii) to draw statistically correct conclusions from the quality of OHIM's work in general. This was meant to enable OHIM to report to its customers on its performance against the service standards to which they were committed.

OHIM explained that during the period February 2007-February 2008:

- the reporting tool consisted of an MS Access database;
- the database only contained the results of the ex-post quality checks (but not the results of the ex-ante quality checks); and
- no examiner names were entered the database, only file numbers.

The 12 February 2007 email accompanying the 8 February note emphasised that "the sample of about 100 files which is checked weekly allows statistical measurement of error rates, but is not meant to provide valid information on individual performance. Therefore, the information provided by the new quality check system will not be used to appraise the quality of the work of individual examiners."

The note itself also stated that "the results of the quality checks will be used to give feedback to the examiners, but is not a tool to check the quality of the work of individuals. Therefore, the information will not be used in appraisals of the work of individuals." The note added that

"in fact, all data which relates the findings of the quality checks to the applications will be deleted from the database after 6 months."

Subsequently, in a 20 December 2007 email, management explained to staff that as of 1 November 2007 the quality check on classification, performed by the classification experts, had been coordinated by the legal adviser group. The email went on to explain that previously, when a mistake was found the examiner would receive an email from the classification expert group containing an explanation whereas from now on, the legal advisers of the service concerned, co-responsible for quality issues, will be put in copy.

Despite this change, the email was intended to reassure data subjects that the quality check data will not be used for appraisals: "please be reminded that the quality check tool has never been conceived as a tool to measure quality of individuals, does not serve this purpose and will not be used to do so. Rather, it should give the legal advisers the possibility to see if help is needed and where we can improve our classification policy". OHIM explained to the EDPS during the prior checking process that there were no cases prior to 2008 where legal advisers would have been the examiners' evaluators in the annual appraisal process.

As regards the quality of the information contained in the database, the note provided that "only if there was unanimity in the CEG or among the CEGs or LAs, was an error considered a mistake". To ensure this, whenever a mistake was found or suspected, it was brought to the weekly meeting of CEGs or legal advisers, as the case may be, and discussed.

Neither the ex-ante, nor the ex-post checks, at this time, covered the majority of decisions. However, OHIM confirmed that the sample size for ex-post checks was statistically relevant for OHIM's work as a whole and the results of the ex-post checks allowed the publication of quarterly error rates for OHIM.

**2.15.3. Quality checks between February and April 2008 (pilot period).** The results of the checks carried out as described above prompted management to take additional measures to ensure adequate quality management within the organization.

As part of these efforts, OHIM introduced, as of 1 February 2008, a pilot project for a limited three months period (1 February 2008 through 30 April 2008) to carry out comprehensive ex-ante quality checks on the final work products of examiners in all eight services of the two Trademark Departments. Ex-ante checks were to cover 100% of all (i) objection letters on absolute grounds, (ii) final refusals on absolute grounds, and (iii) decisions in opposition procedures before they were communicated to outside parties in the opposition and registration procedures.

Management announced this pilot project to staff in a note on 6 February 2008. The note itself was dated 1 February 2008. The note explains that management plans to carry out the ex-ante checks for the "next 3 months" with the purpose of obtaining more information on the quality of the decisions. Depending on the findings, management intends to "decide how to organise the ex-ante and ex-post checks in future".

The most important novelty, from the perspective of data protection, was that the purpose of the quality checks had been considerably expanded. Pursuant to the note, reporting officers (heads of services) will now be able to use the findings when drafting appraisal reports. Indeed, the note provides that "data collected with a 100% ex-ante control provides a clear picture of the quality of the examiner", and therefore, "the results may be used for appraisals". However, it also states that "the reporting officer will have to analyse very carefully the data

and take all other relevant circumstances (training and experience of the examiners, timeframes, type of error detected, etc) into consideration".

In this respect, in a separate complaint procedure, on 9 July 2008 the President of OHIM specifically explained to the EDPS that the quality management system's "primary purpose is to be a tool designed to improve the quality standards of OHIM's decisions". As regard its impact on staff appraisal reports, he stressed that "it will be one element among several others taken into account to assess the examiners' overall performances. In other words, the [quality management tool] is not intended to replace the present appraisal system but to constitute an objective element for the appraisal of the staff members concerned with a specific regard to the qualitative aspects of their performance."

The 6 February 2008 note to staff confirmed that in the revised procedure heads of units will also carry out ex-ante checks, in addition to the CEGs and legal advisers.

The note also refers to a pre-existing system of ex-post quality checks, which had been in operation for approximately one year. However, it does not describe these checks in any further detail and merely states that they will "continue as usual, although with less staff involved".

Further, the 1 February 2008 note declared that "results of ex-post checks will be compared with those of the ex-ante check" and that the "findings will be used to decide upon individual or general measures (training, coaching, practice notes, etc)". No further information was provided in the note about how and for what purpose OHIM management planned to compare these results. This raised staff concerns, considering especially that the ex-post checks were random, carried out for a longer period and for non-appraisal purposes only whereas the 100% ex-ante checks were meant to be carried out for three months only, on all decisions, and for purposes which also included appraisal.

In response to these concerns, in an 11 March 2008 email to the Staff Committee, OHIM management explained that they never intended to compare the new ex-ante data with the results of the previous year. Instead, they explained, they wished to check how the results of the ex-ante check and the results of the ex-post check performed on the same files match. Ideally, they said, there should not be any ex-post errors when a 100% ex-ante check had already been performed. If there remain any such errors, this needs to be looked into. OHIM thereafter confirmed to the EDPS that a detailed internal report was indeed made on the errors found in these checks and that measures on training were undertaken, guidelines were clarified and new practice notes were implemented. The results of the comparison were not used for evaluation purposes.

Finally, the note also provided that "no statistical data (error rates) collected during ex-ante checks will be published".

**2.15.4. Extension of the pilot period until the end of summer 2008.** On 15 July 2008 OHIM management notified staff that it extended the three-month pilot period (as well as the practice of ex-post quality checks) for the duration of the summer. In the note, management declared that the exercise has been successful, however, a 100% ex-ante check needs considerable resources, and therefore, management wishes to consider discussing possibilities which organize OHIM's resources in a more efficient way, with the main idea being to allow head of units to organise the ex-ante checks in a way that best suits the needs and resources of the services and at the same time guarantees a harmonized approach and a common minimum standard that the future ex-ante checks will have to comply with. It also declared that it is

working together with OHIM's DPO to address data protection issues and is in the process of developing an IT tool for the reports on ex-ante checks.

As for the ex-post checks, the note informed staff that in order to ensure a harmonized application of the quality criteria, ex-post checks are now within the responsibility of a group of only four persons who have to give a precise and reasoned report in writing on errors found.

**2.15.5. Further extension of the pilot period.** The "pilot" continued following the end of summer 2008. OHIM explained that staff was informed about the continuation of the pilot via their heads of services, but despite specific request by the EDPS, did not provide further details, such as the date when the notice was given or the form in which the notice was given (the EDPS specifically requested a copy of the notice). Presumably this means that no formal notice was given, but heads of services were requested to tell their staff informally that the pilot period was extended further.

**2.15.6. Plans for ex-ante quality checks after September 2008.** Building on the experience and lessons learned from the ex-post quality checks and the extended pilot period, OHIM management now wishes to implement a new version of its ex-ante quality checks, as described in Sections 2.2 through 2.14 of this Opinion.

### **3. Legal aspects**

#### **3.1. Prior checking**

**3.1.1. Applicability of Regulation 45/2001.** Pursuant to its Article 3(1), Regulation 45/2001 applies to the processing of personal data by Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law. Personal data are defined as any information relating to an identified or identifiable natural person. Article 3(2) further provides that the Regulation applies, among others, to the processing of personal data wholly or partly by automatic means.

OHIM is a Community body, quality management forms part of the management of its own internal activities and, therefore, it is within the scope of Community law. There is also no doubt that the data collected during the ex-ante quality check exercise constitute personal data. Finally, the fact that the data are collected through an IT database means that the processing is carried out by automatic means. The Regulation, therefore, applies.

**3.1.2. Grounds for prior checking.** Article 27(1) of Regulation 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) contains a list of processing operations that are likely to present such risks. This list specifically includes, under paragraph (b), processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency, or conduct.

OHIM notified the ex-ante quality check system under Article 27(2)(b) on grounds that the data may be used to evaluate personal aspects of data subjects and that one of the intended uses of the database is for performance appraisals. OHIM further explained that information obtained from the ex-ante quality checks can also be used when taking decisions relating to performance of staff, such as to promote staff, to renew or not to renew contracts for

temporary or contract staff, to take disciplinary measures, to dismiss staff members for underperformance and to offer/require specific training of the employee (see Section 2.8).

Based on the foregoing, OHIM's ex-ante quality checks are subject to prior checking on grounds that the data collected are used to evaluate personal aspects relating to the data subject, in particular, his or her ability, efficiency, and conduct.

**3.1.3. Notification to the EDPS.** The Notification was received on 14 July 2008. According to Article 27(4) of Regulation 45/2001 this Opinion must be delivered within a period of two months. The procedure was suspended for a total of 30 days, plus the month of August. Thus, the Opinion must be rendered no later than 14 November 2008.

OHIM plans to deploy the final version of its ex-ante checks following the issuance of the EDPS Opinion. This final deployment was preceded by an extended pilot phase since February 2008, which is still ongoing at the time of the issuance of this Opinion.

The EDPS emphasizes that since prior checking is designed to address situations that are likely to present risks, the opinion of the EDPS should be requested and given prior to the start of the processing operation, which also means, prior to the start of any pilot periods. Therefore, notifications should be submitted at the planning stage, in such time that considering the time available for the EDPS to issue his Opinion, as well as the eventual time needed for OHIM to fulfil any requests for information, the case could be brought to an end before the processing operations begin. Timely notifications may also help prevent controllers investing efforts and resources in setting up processing operations which will subsequently need to be significantly modified to comply with data protection rules.

The EDPS expects OHIM to implement the recommendations made in this Opinion in the shortest possible timeframes and in any event, before any decision is made on the basis of the results of the quality checks that may individually affect staff members, including, without limitations, appraisals, promotions, contract renewals, dismissals, disciplinary measures or training decisions.

## **3.2. Lawfulness and proportionality of the processing**

Article 5(a) of Regulation 45/2001 provides that personal data may be processed if "processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties ... or other legal instrument adopted on the basis thereof".

The first issue under Article 5(a) is to determine whether the processing is instituted to serve a specific public interest task provided for in a Treaty provision or another legal instrument adopted on the basis of the Treaties. The second issue is to determine whether the processing operation is indeed necessary for the performance of such a task. When analysing this second issue, Article 4(1)(c) of the Regulation must also be taken into account, which requires that data must not be "excessive in relation to the purposes for which they are collected and/or further processed."

To address the first issue in the present case, Recital 27 of the Regulation needs to be taken into account, which specifies that "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". Taken together, thus, the issue in the present case is whether the processing is necessary for the management and functioning of OHIM.

Based on the foregoing, and the facts as presented to him by OHIM, the EDPS does not question the legal basis, proportionality and lawfulness of the notified processing operation. Indeed, OHIM has the obligation of guaranteeing the quality of its decisions and, as to staff evaluation, Articles 43 of the Staff Regulations and 15(2) of the Conditions of Employment of other Servants provide the legal basis to use data as objective as possible.

The EDPS nevertheless recommends the adoption of a clear and formal internal decision by the appropriate level of management to strengthen the legal basis of the operation and provide much needed clarity and certainty to staff members.

This decision should clearly describe the system of the ex-ante quality checks, including their intended purpose, and provide for appropriate data protection safeguards, as recommended elsewhere in this Opinion.

### **3.3. Data Quality**

**3.3.1. Adequacy, relevance, and proportionality.** According to Article 4(1)(c) of Regulation 45/2001 personal data must be "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed."

Section 2.4 referred to the quality criteria published on OHIM's website on the basis of which the ex-ante quality checks are carried out. The quality criteria appear to be *prima facie* adequate, relevant, and proportionate, considering the purposes of the processing.

Section 2.7 listed the entries that the database contains with respect to each decision that was subject to an ex-ante quality check. There is no entry which appears to be *prima facie* inadequate, irrelevant, or disproportionate, considering the purposes of the processing.

**3.3.2. Fairness and lawfulness.** Article 4(1)(a) of Regulation 45/2001 requires that data must be processed fairly and lawfully. The issue of lawfulness was analysed above (see Section 3.2). The issue of fairness is closely related to what information is provided to data subjects (see Section 3.5).

**3.3.3. Accuracy.** According to Article (4)(1)(d) of Regulation 45/2001, personal data must be "accurate and, where necessary, kept up to date", and "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."

**3.3.3.1. Introduction.** To put the requirement of accuracy into context, the EDPS, first, emphasizes that concerns regarding the accuracy of data often arise in connection with assessments relating to the staff members' performance. Indeed, certain subjectivity is inherent in most types of evaluations of staff performance, including most quality check systems and most management decisions which are based on the evaluation of an employee's work such as appraisal, promotion, contract renewals, and others.

Second, the EDPS also underlines that in the evaluation context the consequences of the use of inaccurate data may be very serious, both for the individuals and for the organization as a whole. Processing inaccurate data may lead to, among others, failing to hire, promote, or renew contracts of, deserving candidates or staff members on an erroneous basis.

These two factors, in combination, explain why Article 27(2)(b) of Regulation 45/2001 subjects to prior checking, and thus, heightened scrutiny, processing operations intended to

evaluate personal aspects relating to the data subject, including his or her ability, efficiency, or conduct.

For this reason, the EDPS has jurisdiction to supervise the processing of personal data as necessary to apply the provision of, among others, the Staff Regulations, to make sure that all fundamental rights and freedoms are respected

As regards the facts of this case, it is indeed difficult to measure objectively the quality of documents the drafting of which requires a complex assessment of facts and law, and it may often be the case that the opinion of two different evaluators looking at the exact same document will significantly differ.

That is why it is very important (i) to be aware of certain inherent limitations on the accuracy of the MS Access Database - Ex-ante Quality Check Tool to measure performance; and (ii) to take measures to limit, to the extent possible, the subjectivity involved in the evaluation process.

Therefore, on one hand, (i) management must recognize that the number of mistakes recorded do not conclusively determine whether the examiner performed his tasks better or worse than another examiner, and, on the other hand, (ii) management must take measures so that entries made by different quality checkers would be as comparable and consistent across the organization as possible.

**3.3.3.2. Measures already taken to ensure accuracy.** OHIM already took considerable steps to ensure the accuracy of the data included in the database.

First, as discussed in Sections 3.3.1 and 2.4, the quality criteria is transparent, clear, *prima facie* adequate, and is set to be applied across the organization.

Second, as discussed in Sections 2.6 and 2.10, the quality checkers regularly meet on a weekly basis and discuss all potential mistakes and any mistakes may only be entered into the database in case of agreement among all participants at the meeting.

Third, although following the pilot period, OHIM plans to stop the practice of checking 100% of the decisions, the size of the sample that it will use to measure performance (approximately 75% of each type of documents drafted by each examiner) will be sufficiently large and will be calculated, as OHIM explained, following standard statistical methods with a view of guaranteeing an appropriate level of accuracy.

Fourth, as explained in Section 2.3, OHIM chose the most significant documents to be reviewed by the examiner to subject to quality check. Performance in these drafts should reasonably accurately reflect the overall performance of the examiner.

Based on these efforts, and also considering that certain further improvements can still be made to increase the objectivity of the quality check exercise (see some of the recommendations further in this Section), the EDPS, as explained in Section 3.2 above, does not question the lawfulness of the quality check exercise.

### **3.3.3.3. Remaining concerns and recommendation for the use of the data**

The most significant remaining concerns are as follows:

First, it is not always a single person (the legal adviser of the service), who carries out all quality checks within a given service. Indeed, up to four different persons carry out quality checks within each service (a legal adviser and three designated examiners). Thus, it is possible that one of the two evaluators applies the quality criteria in a more or less strict way than the other. Furthermore, it is unavoidable that examiners in different services are evaluated by different persons, and thus it is difficult to ensure consistency across the services. These concerns, common to most evaluation procedures, underline a certain degree of subjectivity and therefore the relativity of the accuracy of the data.

Second, as explained in Section 2.6, opposition decisions are drafted by one examiner and are reviewed, co-signed and if necessary corrected by two other examiners. The second co-signer is usually also the quality checker. In these cases, the database attributes any mistakes to the "drafter", rather than the first co-signer. This may also lead to unequal treatment. For example, a first co-signer who carries out a thorough and in-depth review of the draft may detect and correct the majority of the mistakes, and thus, the second co-signer will be reviewing a very good final product, despite the fact that the drafter himself did a poor job. In another case, in contrast, a first co-signer who is particularly pressed for time, or trusts the drafter that he does a good job, may carry out only a superficial review. This may lead to actually more mistakes detected in the end by the quality checker despite the fact that the quality of work of the drafter was consistently better than in the first case described.

Third, quality checks are not anonymous, and therefore, in borderline cases, some quality checkers may decide not to bring to the weekly meeting barely acceptable documents prepared by examiners whose work they themselves have a good general opinion of, or whom they otherwise favour.

Fourth, although the examiners may informally discuss any alleged mistakes with the quality checkers, there is no formal appeal procedure. The fact that an appraisal decision (or other decision such as a promotion or a disciplinary measure) can ultimately be appealed does not mean that the quality of the data in the database is the same as it were if direct appeals could also be made against decisions taken during the quality check exercise.

Fifth, although the randomly chosen samples are relatively large, OHIM itself admitted that there is an approximately 5% statistical error rate in the results. Although it is acceptable from the perspective of social sciences, this margin can lead to one person's (examiner A) database results, in extreme case, showing 5% more mistakes than he actually makes, while another person's (examiner B) database entries showing 5% less mistakes. This could mean that examiner A may come across as performing 10% worse than examiner B, even though the two examiners, as a matter of actual fact, make the same number of mistakes.

As a result of these problems, and notwithstanding the efforts already made to ensure the objectivity of the exercise, **the contents of the database should not be the only base informing management decisions individually affecting staff members.** Depending on what use the data gathered during the quality check exercise will be put, different levels of inaccuracies and inconsistencies can be tolerated. From the data protection perspective, it is especially important to ensure a high level of accuracy for data whose use may directly and individually affect the data subject.

While the data in the database can give meaningful information to management as to overall performance of the staff member, the quality check data can only be used for purposes that may individually affect data subjects after careful consideration, and also taking into account all other available sources of information regarding the performance of a staff member. In



other words, data included in the database should only be used as one of several factors to be considered in any decision-making process that may individually affect data subjects.

The EDPS emphasizes that a multi-factor evaluation is a difficult task. This is particularly so where one factor, in this case the information derived from the database, stands out as seemingly fully accurate and objective data compared to other less structured sources of information, such as a manager's own first-hand experience in inter-acting with the employee. Therefore, OHIM should ensure that all managers are aware of the inherent limitations on the reliability of the data.

In addition, whenever data stored in the database are used for purposes which may individually affect staff members, staff members must also be heard and be given the opportunity to put forward their positions. This opportunity is systematically provided in connection with the annual appraisals. However, it must be ensured with respect to other uses of the database as well, for example, decisions about contract renewals or selection of teams for particular tasks.

**3.3.3.4. Recommendations to improve data quality.** In any event, and in addition, the EDPS also makes certain recommendations to improve data quality:

- To help ensure consistency across the organization, OHIM should introduce clear benchmarks for what is considered to be "acceptable" document, and what is considered to be a "mistake". For example, regarding the quality criteria that decisions must be proofread, would a single, minor typo place a document into the just about "acceptable" category? Or perhaps would it even be considered a "mistake"? A set of "Frequently Asked Questions" developed based on the discussions at the weekly meetings and shared with staff may be a good form for publicising these practical recommendations and alleviate the anxiety of staff regarding the accuracy and fairness of the assessment.
- If and when organizational constraints permit, it would be advisable to have the same quality checker review the work of each examiner within one and the same service.
- If feasible, a certain degree of anonymity could also be introduced in the first phase of evaluation. For example, a quality checker, when reviewing a document, should not have access to information in the database which would allow him to identify who drafted the document. If a potential mistake were to be taken to the weekly meeting, the participants, likewise, should also not be able to identify who drafted the document. Only once the weekly meeting decided upon the mistake and an entry has been made into the database, the identity of the examiner who made the mistake would be revealed, so he could be contacted for feedback.

### **3.4. Recipients of the data.**

The EDPS welcomes OHIM's efforts to restrict access to a limited number of persons on a need-to-know basis and that access is password-protected.

The EDPS also welcomes that further specific limitations will be placed on individual access rights, and the restrictions on access will be built into the database accordingly.

For example, direct hierarchical superiors need to have read access to individual data relating to the work products of examiners whose work they supervise. Quality checkers need to have both read and write access to data relating to the work products of examiners whose work products they check. However, neither quality checkers nor hierarchical superiors need to

have any access to data of other examiners. Hierarchical superiors, unless in their capacity as quality checkers, also need no write-access at all.

The EDPS also welcomes the specifications and limitations, on a need-to-know basis, regarding the rights of the two trademark department directors, as well as the staff of other departments (e.g. staff in the Quality Management and IT Department).

The EDPS emphasises that the number of persons with access to the database should be kept to the minimum necessary. As data are entered to the database directly by the quality checkers, reports can be generated automatically, and data deletion at the end of the conservation period is automated, there appears to be no reason why staff in the Quality Management department should have access to individual data at all. If any access is necessary, for example, to monitor use of the database in view of its further development, then access could be given in a manner which would ensure that the examiners remain anonymous. That is, certain staff in the Quality Management Department could have a read-only access to the entire database but they could not see, when browsing the database, which examiner was the one who drafted a particular document, and could not generate individual error reports for a specific employee.

**Recipients outside OHIM.** The EDPS welcomes that the use of data is strictly limited to the internal use of OHIM.

### **3.5. Information provided to data subjects.**

Articles 11 and 12 of Regulation 45/2001 require that certain information be given to data subjects in order to ensure the transparency of the processing of personal data.

Article 12 of the Regulation provides that when the data are not obtained from the data subject (as is the case here), the information must be given at the time of recording the data, or at the latest, no later than the time when the data are first disclosed.

Article 12 of Regulation 45/2001 provides a detailed list of information that needs to be provided to data subjects. In essence, the controller must inform data subjects about who processes what data and for what purposes. The information must also specify the recipients of data, and must alert the data subjects to the existence of the right of access and rectification. Further information, including the legal basis of processing, the time limits for storing the data, the right of recourse to the EDPS, and the origins of the data must also be provided if necessary to guarantee fair processing. This may depend on the circumstances of the case.

Finally, Article 12 allows certain exceptions from the notification requirement. Considering that (i) none of the Article 12 exceptions apply to the facts of the case and that (ii) all items listed in Article 12 (including the legal basis of processing, time-limits for storing the data, and the right of recourse to the EDPS) are necessary to guarantee fair processing, the EDPS is of the opinion that all items listed under Article 12 must be provided in the data protection notice.

As explained in Sections 2.12 and 2.15, Staff members were informed about the operational objectives and the use of the database and the ex-ante and ex-post quality checks in a management note to staff on 6 February 2008. For now, OHIM has no further plans to issue any further communications to staff regarding the ex-ante checks.

The EDPS, first, emphasises that the 6 February 2008 email, which referred to a three-month trial period and to 100% ex-ante checks, at a time when the currently available Ex-ante Quality Check Tool was not yet available, is at least partially outdated. Neither does this communication contain all items required under Article 12 of Regulation 45/2001. Therefore, OHIM needs to issue a new communication to staff.

Due to the importance of this processing operation for individual management decisions that may have a significant impact on the staff members' careers (appraisals, promotion, contract renewals, etc), it is particularly important to provide a clear and unambiguous notice to data subjects.

The EDPS recommends the inclusion of the data protection notice in the text of the management decision, the adoption of which the EDPS recommended in Section 3.2 above. To ensure transparency and availability of the notice at all times to all staff members, the decision should also be emailed to staff and prominently displayed at an appropriate part of OHIM's intranet. This will enable data subjects to embark upon the exercise with the reassurance that their data will be processed fairly and lawfully.

The new notice should include all items required under Article 12 of Regulation 45/2001 (items (a) to (f)). When drafting the new notice, OHIM should pay particular attention to the following:

- The purposes and permissible uses of the database should be very clearly specified. In particular, the notice should explain that the database is intended to provide OHIM management with information about the errors made during trademark examination by the individual examiners, teams and the organization as a whole. Management then will be able to take both global and individual measures to improve the quality of OHIM's performance. It should be specifically stated that information obtained from the ex-ante quality checks can also be used for performance appraisal and when taking other decisions relating to performance of staff, such as to promote staff, to renew or not to renew contracts for temporary or contract staff, to take disciplinary measures, to dismiss staff members for underperformance and to offer/require specific training of the employee. At the same time, it should be pointed out that these decisions will be made within the framework of the appropriate procedures. For example, heads of services will be able to use the findings when drafting appraisal reports. In this context, the notice should also emphasize that management is expected to analyse the data very carefully and take all other relevant circumstances (training and experience of the examiners, timeframes, types of error detected, etc) into consideration. In addition, data included in the database should only be used as one of several, only informative, rather than decisive, factors to be considered in the decision-making process. The notice should also clarify that each examiner will also be informed about the errors found in order to prevent repetition of errors. This exchange is informal and the staff member, if he so wishes, should be encouraged to discuss the mistake with the quality checker and/or challenge it.
- The notice should also be very clear and specific as regards the recipients. It should specify that the following persons have direct, pass-word-protected access to the ex-ante database: Directors of the Trade Marks and Cancellation Department ("TMCD") and the Trade Marks and Register Department ("TMRD"), all legal advisers and the senior examiners designated to do quality checks, all heads of services, and the quality check administrator (himself a head of service). In addition, it should also be stated that members of the Information Technology and Quality Management departments

who are directly involved in ex-ante database development and maintenance have the necessary access to the tool. To reassure data subjects, it should be clearly stated that no other person has either direct, password-protected access to the database or indirect access (e.g. in the form of printouts or downloads). Further, any limitations, such as limitations to management to have access to data of those they manage only, should be specifically stated.

All items not specifically mentioned here, but required under Article 12 of Regulation 45/2001 including the identity of the controller, the categories of data concerned, access rights, legal basis, time-limits, and the right of recourse to the EDPS must also all be clearly stated.

Finally, the EDPS emphasizes that staff members should be provided notice in sufficient time before any significant aspects of the processing operation changes again in the future.

### **3.6. Right of access and rectification.**

According to Article 13(c) of Regulation 45/2001, the data subjects have the right to obtain from the controller, without constraint, communication in an intelligible form of the data undergoing the processing and any available information as to their source.

In this respect, the EDPS welcomes OHIM's practice that feedback is given to examiners in an informal manner. However, as regards the time limits for providing access, the EDPS finds the current three-months period excessive, considering (i) the ease with which data can be provided (push of a button should be sufficient to generate the necessary individual reports) and (ii) the prejudice the staff member may suffer in case access is delayed (e.g. if he runs out of time to submit an appeal against an appraisal decision because he had no timely access to his data in the database).

In fact, and additionally, the EDPS recommends that OHIM provides more structured feedback to the examiner about his performance, at least once a year, ahead of the annual appraisals, in the form of a detailed individual report over his work, as reported in the database (see Section 2.9, detailed report, with breakdown by the individual concerned). This could be accompanied by an aggregate report (at service and departmental level and containing no personal data of colleagues) so that the examiner would know how his performance compares with those of his peers.

Article 14 of Regulation 45/2001 provides the data subject with a right to rectify inaccurate or incomplete data. In this respect, the EDPS welcomes OHIM's practice that any errors (mistaken entries) can be corrected in the database without delay if noticed by the data subject.

### **3.7. Conservation of data.**

The general principle in Regulation 45/2001 is that personal data may 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 (Article (4)(1)(e) of the Regulation).

As discussed in Section 2.13, information will be kept for a period of 15 (fifteen) months in the MS Access Database - Ex-ante Quality Check Tool. After this period all data will be deleted from the system. OHIM also explained that the length of the conservation period is

linked to the appraisal system. Data are designed to be kept in the database as long as necessary to allow (i) management to use the data during the annual appraisals, and (ii) staff to eventually use the data to launch appeals against the appraisal decisions.

The EDPS finds the conservation period adequate and welcomes that the data will not be deleted until after the deadline for appeals against the appraisal decisions has passed.

### **3.8. Security.**

According to Article 22 of the Regulation, the controller must implement the appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. These security measures must in particular prevent any unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other forms of unlawful processing.

The EDPS has not encountered any facts which would suggest doubts about the adequacy of the security measures OHIM took in the framework of safeguarding the security of its quality check database.

## **4. Conclusion**

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the considerations noted in Sections 3.2 through 3.8 are fully taken into account. The recommendations of the EDPS include, most importantly, the following:

- **Legal basis:**
  - The EDPS recommends the adoption of a clear and formal internal decision by the appropriate level of management (for example, a joint decision by the directors of the two Trademark Departments) to strengthen the legal basis of the operation and provide much needed clarity and certainty to staff members.
  - This decision should clearly describe the system of the ex-ante quality checks, including their intended purpose, and provide for appropriate data protection safeguards, as recommended elsewhere in this Opinion.
- **Data quality and purpose limitation:**
  - All possible efforts should be made, as described in this Opinion (3.3.3.4.), to improve the level of accuracy, reliability, and consistency of the data.
  - In any event, data included in the database should only be used as one of several factors to be considered in the decision-making process.
  - Whenever data stored in the database are used for purposes which may individually affect a staff members, he/she must also be heard and be given the opportunity to put forward his/her positions
- **Rights of access:**

- More structured feedback should be given to the examiner about his performance, at least once a year, ahead of the annual appraisals (this should also include aggregated data enabling him/her to compare his/her performance with that of his peers).
  - The three-months provided for OHIM to grant access should also be significantly reduced.
- **Information to data subjects:**
    - The information provided to data subjects must be supplemented to include clear and unambiguous notice with respect to all items set forth in Article 12 of Regulation 45/2001. First and foremost, communication of the purposes and uses of the database must be improved. Further, instead of fragmental email-communications, a formal data protection notice should be adopted and made available permanently on OHIM's intranet site.

Done at Brussels, on 22 October 2008

(signed)

Joaquín BAYO DELGADO  
Assistant European Data Protection Supervisor