



Opinion on a notification for Prior Checking received from the Data Protection Officer of the Office for Harmonization in the Internal Market (OHIM) concerning "Analytical accounting and performance reports"

Brussels, 2 March 2011 (Case 2009-0771)

1. Proceedings

On 20 November 2009, the European Data Protection Supervisor ("EDPS") received from the Data Protection Officer ("DPO") of the Office for Harmonization in the Internal Market ("OHIM") a notification for prior checking concerning "Analytical accounting and performance reports".

The notification was accompanied by several background documents including a document from OHIM's Director dated 14 September 2009 describing the new analytical accounting and performance report ("AA&P report"), a quick guide to fill in the AA&P report, and copies of the Excel sheets on which AA&P reports are produced.

On 4 December 2009, the EDPS sent a request for additional information to the DPO, who responded on 17 February 2010. The draft opinion was sent to the DPO for comments on 17 March 2010 and these were received on 21 April 2010. Additional questions were asked by the EDPS on 11 June 2010, which were partially answered on 7 July 2010. A request for detailed information was sent on 15 July 2010, which was answered on 25 February 2011.

2. Facts

The present case deals with the automatic processing by OHIM of analytical accounting and performance reports. The analytical and accounting performance report is a new tool introduced by the Department for Designs and Register ("DD&R") on 1st October 2009, which allows for the measurement of the productivity of staff and which will also serve as a basis for performance appraisals.

Until October 2009, each section of the DD&R was using its own tool for measuring performance. Such diversity in the tools used within the DD&R for measuring performance was not considered satisfactory and the DD&R therefore decided to introduce a new single harmonized AA&P reporting system.

AA&P reports are used as a tool to monitor employees' performance progressively during the year; they allow for a regular dialogue between the staff member and the line manager concerning the staff member's performance progress. AA&P reports will furthermore serve as one of the base for the annual appraisal procedure, as key data of AA&P reports will be used in the annual appraisal report.

The *purpose* of the data processing is to measure employees' work effectiveness using objective criteria and to monitor performance, with a view to ensuring the effective functioning of the organisation. The AA&P report is used for tracing the productivity of the Department for Designs and Register and as a basis to improve the analysis in the performance appraisals of staff members which are produced annually in October.

The *data subjects* are OHIM staff members working in the Department for Designs and Register.

The *data processing* is performed through automated means. AA&P reports are compiled in Excel format on the basis of individual sheets filled in by each staff member. One part of the processing, i.e. design examination, is however not based on self declaration but is generated automatically; the figures concerning production activities with no self declaration are indicated in the performance report.

Both individual and group reports are generated. Each staff member uses an individual table; an individual AA&P report covers 12 months of the appraisal period. Every head of group is provided with a table that shows an accumulated view of the entire group. The DD&R secretariat assures the central creation and management of tables for the entire system.

Reports are usually used online and not printed out; an AA&P report is used by the person examined and his/her line manager to monitor performance progressively during the year. While it is not foreseen to annex the AA&P report to the appraisal report, key data of the AA&P report will be used as explanatory elements in the appraisal report.

The *categories of data processed*: The AA&P report consists of three main blocks: (i) analytical accounting data, (ii) production data, and (iii) productivity level calculation.

- **Analytical accounting data**: the staff member indicates in that section of the table the number of days or hours spent in each of the following categories of activities: production activities, direct support to DD&R production, horizontal department activity, other activities; the maximum number of working days of the month; the number of days of absence other than vacation and parental leave; the number of days of vacation and parental leave; and the number of recuperation days taken. This part of the table must be filled in once per month. It allows the management to understand how the available time of the staff member has been used.
- **Production data**: the production data table consists in a break down of the "production activities" in specific tasks. In this part of the table, the staff member must fill in on a weekly basis the daily quantities of tasks accomplished in production activities. An open line at the end of the table allows for the collection of comments from the staff member concerning the production of a particular day. The production data table allows an easy monitoring of the quantity of work done by staff members per specific type of task.
- The **productivity level calculation** is fully automated and calculates an approximate level of performance for the period, based on the minimum different targets established for the different activities and the days during which these activities were carried out. Time devoted to other types of activities outside of

Regarding the *retention periods*, AA&P reports are stored on computers for 2 years. OHIM justifies this retention period on the basis that it would allow resolving appeal procedures related to appraisals.

Individuals have been *informed* of the processing notably through the circulation of a document about AA&P reports dated 14 September 2009, and a note to the staff dated 12 February 2010. The note to the staff provides information about the identity of the data controller, the purpose of the processing, the data processed, the recipients of the data, the data subjects' rights under Articles 13 to 16 and 18 of Regulation 45/2001, and the right to have recourse to the EDPS.

Regarding the *rights of the data subjects*, the notification indicates that no procedure exists concerning the exercise of the right of rectification and blocking, and that only data entered by the staff can be erased. However, the note to the staff dated 12 February 2010 indicates that OHIM staff is granted the right to access, rectify, erase, or block their personal data.

The data processed are *disclosed* within OHIM to the following DD&R staff: director, line managers concerning the files supervised by them, quality assistant, and department secretary. Data are not transferred outside the institution to any other parties.

As concerns *security measures*, (...)

3. Legal aspects

3.1. Prior checking

Applicability of Regulation No 45/2001 ("the Regulation"): The processing of data relating to staff by OHIM constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). The data processing is performed by OHIM, an EU body in the exercise of activities which fall within the scope of EU law (in the light of the Lisbon Treaty). The processing of the data is done through automatic means. Therefore, Regulation No 45/2001 is applicable.

Grounds for prior checking: According to Article 27 (1) of the Regulation, "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purpose shall be subject to prior checking by the European Data Protection Supervisor*". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes Article 27 (2) (b): "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". The processing of analytical accounting and performance reports clearly represents such a processing operation and is therefore subject to prior checking by the EDPS.

Ex-post prior checking: The processing operations were already in place at OHIM before the EDPS was notified. The opinion of the EDPS should, as a rule, be requested

and given prior to the start of any processing of personal data. Any recommendations made by the EDPS in this opinion must be fully implemented accordingly.

Deadlines: The notification of the DPO was received on 20 November 2009. According to Article 27 (4) of the Regulation, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 442 days. Consequently, the present opinion must be delivered no later than on 8 March 2011.

3.2. Lawfulness of the processing

Article 5 of the Regulation provides criteria for making the processing of personal data lawful. One of the criteria provided in Article 5 (a) is that the processing is necessary for the performance of a task carried out in the public interest or in the legitimate exercise of official authority vested in the institutions or bodies. The processing of personal data for performance of tasks carried out in the public interest includes *"the processing necessary for the management and functioning of those institutions and bodies"* (recital 27).

The processing of reports measuring productivity and performance falls within the legitimate exercise of official authority vested in OHIM. The processing is necessary for purpose of ensuring the effective functioning of the DD&R. The AA&P report is used as an evaluation method to seek the measurement of employee work effectiveness using objective criteria in an accurate and fair manner.

The AA&P report is further used as a support tool for individuals' annual performance appraisals. While it may be considered legitimate for the DD&R to monitor the individual productivity of staff members, **the AA&P report should however not be the sole tool relied upon for the annual evaluation of employees.** In principle, the EDPS considers that such processing is legitimate and may be used as a support for the annual appraisal exercise provided, however, that other means of evaluation are implemented that take into account the point of view of the data subject.

Furthermore, the EDPS notes that the data processing is not based upon any specific legal basis. In view of the specific risks that the data processing raises, i.e. the impact of the data processing on performance appraisals, the EDPS strongly advises that OHIM adopts an internal decision concerning the data processing performed for "Analytical accounting and performance reports" which should describe the data processing taking place and its impact on performance appraisals. This decision should provide for adequate guarantees for staff members concerned to rectify inaccurate data and/or to provide justifications for certain figures.

3.3. Data Quality

Adequacy, relevance and proportionality: According to Article 4 (1) (c) of the Regulation, personal data must be *"adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed"*. The information presented to the EDPS on the data processed appears to meet those requirements. The processed data are, in principle, necessary to evaluate the productivity of staff and to draw performance reports.

Accuracy: Article 4 (1) (d) of the Regulation provides that personal data must be *"accurate and, where necessary, kept up to date"* and that *"every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified"*.

Most of the data processed are provided directly by staff members, through self-declaration, which contributes to keeping the data accurate and up-to-date. The rights of access and rectification are furthermore important means of ensuring accuracy of the data that should be available to data subjects at all times, both when data are collected on the basis of self-declaration and in cases they are generated automatically (cf. points 3.6).

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

3.4. Data retention

Article 4 (1) (e) of the Regulation states that personal data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*".

AA&P reports are stored in a shared computer drive for 2 years; they are usually not printed out, thus there should be no retention of the AA&P reports in paper files. OHIM justifies this retention period on the basis that it would allow resolving appeal procedures related to appraisals.

The EDPS considers that the 2 year retention period of personal data is reasonable in the light of the justification that such retention may help resolve appeal procedures relating to appraisals. The EDPS further reminds OHIM that such retention period should also be applied to paper based documents in cases where AA&P reports are printed out.

3.5. Transfer of data

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

The notification indicates that data are only transferred within the DD&R (i.e. the data controller), which would mean that there are no transfers of data *stricto sensu* within the meaning of Article 7 of the Regulation.

However, should any data transfer occurs -e.g. to HR for purpose of the annual appraisal- the EDPS emphasizes that the data may only be transferred to other recipients within OHIM when the data are necessary for the legitimate performance of the tasks performed by the given recipients.

3.6. Rights of the data subjects

Articles 13 to 19 of the Regulation establish a number of rights for data subjects. These notably include the right to access data upon request by the data subject and the right to rectify, erase or block personal data.

The notification indicates that no procedure exists concerning the exercise of the right of rectification and blocking, and that only data entered by staff can be erased. However, the

note to the staff dated 12 February 2010 indicates that OHIM staff is granted the right to access, rectify, erase, or block their personal data.

The EDPS notes with satisfaction that the note to the staff grants data subjects with all their data protection rights. This means that, contrary to what the notification says, procedures should be put in place to ensure that data subjects can effectively exercise these rights. The EDPS thereby reminds OHIM of its obligation to guarantee **the effective exercise** by data subjects of their rights of access, rectification, erasure and blocking, pursuant to Articles 13 to 16 of the Regulation.

Certain data of the AA&P reports are produced automatically, i.e. design examination data and productivity level calculation. They fall under the scope of Article 19 of the Regulation, which provides that *"the data subject shall have the right not to be subject to a decision which produces legal effects concerning him or her or significantly affects him or her and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him or her, such as his or her performance at work, reliability or conduct, unless the decision is expressly authorised pursuant to national or Community legislation or, if necessary, by the European Data Protection Supervisor. In either case, measures to safeguard the data subject's legitimate interests, such as arrangements allowing him or her to put his or her point of view, must be taken."*

The EDPS stresses that it is crucial that data subjects are granted the right to access and rectify material errors in respect of all data generated on an automatic basis. The EDPS further underlines that staff members must understand the logic involved in the processing so they understand how such data are generated and so they can have the data rectified if they are not correct. Moreover, guarantees should be put in place to ensure that the data subjects' legitimate interests are taken into account. In particular as concerns the productivity level calculation, which can be adjusted manually by line managers, employees should be granted the right to provide justification for certain figures so that the performance calculation can be adjusted in an accurate manner. In this view, the EDPS would particularly welcome the possibility of implementing a procedure by which data subjects would be able to contest the accuracy of the data generated automatically prior to the evaluation exercise.

3.7. Information to the person concerned

Articles 11 and 12 of the Regulation provide for information to be given to data subjects in order to ensure the transparency of the processing of personal data. Article 11 provides that when the data is obtained from the data subject, the information must be given at the time of collection. When the data has not been obtained from the data subject, the information must be given when the data is first recorded or disclosed, unless the data subject already has it (Article 12).

In the present case, data are mainly collected directly from staff members, but certain data are generated indirectly through an automated process, thus both Articles 11 and 12 apply.

The EDPS notes that a data protection note was distributed to the staff in February 2010 for purpose of complying with Articles 11 and 12 of the Regulation. For such data protection note to be complete the EDPS recommends adding the time limit for storing data, as well as information on the origin of the data and the logic involved in the processing for data generated on an automatic basis (i.e. design examination activities).

Furthermore, the EDPS recommends that this data protection note is displayed in a manner accessible to the staff at all times, such as for example through posting on the Intranet.

3.8. Security measures

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

On the basis of the information available, the EDPS has no reason to believe that the measures implemented by OHIM are not adequate in the light of Article 22 of the Regulation.

4. Conclusion:

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

- adopt a legal basis for processing "Analytical accounting and performance reports", which should describe the data processing taking place and its impact on performance appraisals and which should provide for adequate guarantees for staff members concerned to rectify inaccurate data and/or to provide justifications for certain figures;
- refrain from using the AA&P report as the sole tool supporting the annual evaluation of staff members but ensure that other means of evaluation are implemented that take into account the point of view of the data subject;
- ensure that all AA&P reports whatever their format - computer based or paper based - are deleted at the end of the 2 years retention period;
- where applicable, ensure that only the data necessary are transferred within OHIM to recipients who need them for the legitimate performance of their tasks;
- ensure that staff members can effectively exercise their rights of access, rectification, deletion and blocking of their data (Articles 13 to 16 of the Regulation). These rights should be guaranteed in respect of all data in the AA&P report, including those data produced on an automatic basis;
- adopt appropriate guarantees in respect of data produced on an automatic basis to ensure that the data subjects' legitimate interests are taken into account, such as by allowing data subjects to provide justification for certain figures. The possibility of a specific procedure by which data subjects may contest the accuracy of the data generated automatically prior to the evaluation exercise should be examined;

- modify the data protection notice in accordance with section 3.7 of this Opinion and display it at a place where it is accessible at all times (e.g. posting it on the Intranet).

Done at Brussels, 2 March 2011

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