

## **Opinion on the notification for prior checking received from the Data Protection Officer of the Office for Harmonization for the Internal Market ("OHIM") concerning OHIM's Quality Management System - Ex-post Quality Checks**

Brussels, 29 January 2013 (Case 2012-0999)

### **1. Proceedings**

On 16 November 2012, the European Data Protection Supervisor ("EDPS") received from the Data Protection Officer ("DPO") of the Office for Harmonization for the Internal Market ("OHIM") a notification for prior checking concerning the "Quality Management System - Ex-post Quality Checks (EPQC)".

On 3 December 2012, the EDPS sent a request for additional information to the DPO, who responded on 5 December 2012. The draft Opinion was sent to the DPO for comments on 7 January 2013 and these were received on 22 January 2013.

### **2. Facts**

A system of **ex-post quality checks** ("EPQC") has been operational since 2010<sup>1</sup> at the OHIM to control the quality of trademark and design first instance decisions<sup>2</sup> produced by OHIM's examiners. The processing operation at hand consists of checking the quality of decisions and tasks produced by the examiners of the Operations Department in charge of the procedure occurring during the life of community trademarks or designs.

EPQC are carried out under the responsibility of the Director of the Operations Department representing OHIM for two main **purposes**:

- a) As regards data processed in the EPQC database, these are linked to overall quality management, notably (i) controlling and making public the quality of trademark and design first instance decisions produced and tasks performed by the Office; (ii) obtaining feedback information about the reasons of errors, their frequency, their pattern, etc. in order to design quality improvement tools; (iii) identifying best practices.
- b) As regards data used as a basis for the annual appraisal, the purpose is the evaluation of the performance quality of the concerned staff.

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<sup>1</sup> Quality checks were initially performed in an *ex-ante* scenario, which was subject of a prior-check in case **2008-0437** (Opinion of 22 October 2008). Following the change to an *ex-post* scheme, a new notification was submitted in November 2010 (case **2010-0869**, Opinion of 9 June 2011). In the course of implementing the recommendations made, it was decided to discontinue the processing in the notified form following a reorganisation at OHIM.

<sup>2</sup> Ex-post quality checks are carried out with respect to trademark first instance decisions taken in the following fields: classification, absolute grounds (positive and negative), opposition and cancellation.

The OHIM has provided a draft "Decision concerning the Ex Post Quality Checks carried out with respect to trademarks and designs first instance decisions in the Operations Department at the OHIM" (draft "**EPQC Decision**"), which in its Section 2 contains a **description of the processing**:

- a) Under Article 4 of the EPQC Decision, a sample of decisions or tasks to be checked, which is statistically representative at the level of the OHIM as well as of individual examiners, shall be extracted from the EPQC Database and allocated regularly on a random basis to so-called EPQC Groups, who are in charge of performing the EPQC and whose composition is defined in Article 3 of the EPQC Decision.
- b) The quality of the decisions or tasks extracted is assessed by reference to criteria, which are defined in a Manual or Guidelines once updated (Article 5(1) of the EPQC Decision)<sup>3</sup>. Those criteria considered "objective", i.e. deemed "*not suitable for interpretation or discussion*" (Article 2(4) of the EPQC Decision: "Objective EPQC Data"), which are used for staff appraisal purposes are listed in Annex 2 to the EPQC Decision (see Article 5(2) of the EPQC Decision).
- c) Under Article 7 of the EPQC Decision, the International Cooperation and Legal Affairs Department (ICLAD) shall use the EPQC data for drafting reports on all areas of OHIM Operation activities (Quality Reports). These reports shall identify best practices, describe the error patterns, make suggestion for correction and contain a list of recommendations for actions to be taken in order to improve the quality of the decisions and tasks. A time limit for implementation will be agreed with the Department in charge for the follow-up. The following report shall assess the actual implementation. The Quality Reports will be produced and published on a quarterly basis by ICLAD. These reports will not allow for an identification of the member(s) of staff responsible for a quality issue.
- d) Under Article 8(1) of the EPQC Decision, "*Objective EPQC Data of each Data Subject shall be used by the Department concerned as one of the elements taken into consideration for the annual appraisal report of the Data Subject concerned, as well as the respective management responsible*" (emphasis added). Under consideration 9 of the EPQC Decision, staff must be informed before the beginning of the appraisal exercise about the EPQC Data that will be taken into account as a factor among others in the individual appraisal exercise.

Article 8(2) of the EPQC Decision stipulates that "*The Director of the Department where the activities subject to EPQC are carried out shall define before every appraisal period how the Objective EPQC data will be taken into account for the annual appraisal exercise. Appropriate consideration shall be given to other aspects which are not covered by the EPQC. As set out in the Decision ADM-04-18- Rev of the President of the Office for Harmonization in the Internal Market of 27th July 2005 establishing provisions for implementing Article 43 of the Staff Regulations as regards the periodical appraisal report, aspects such as ability, efficiency and conduct in the service shall be taken into account*".

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<sup>3</sup> The OHIM noted in this respect that both are publicly accessible documents (<http://oami.europa.eu/ows/rw/pages/CTM/legalReferences/legalReferences.en.do>) which outline registration procedures, explain the underlying Regulations and recompile case law. Both documents are constantly updated to reflect the case law of the CJEU and will be merged into one single document (Guidelines) in the future (2013).

Under Article 8(3) of the EPQC Decision, "*An annual report containing a summary of the Objective EPQC data by individual shall be issued by the Director of the Department concerned at the end of the appraisal period and sent to the respective Reporting Officers and the staff concerned to that end*".

- e) Under Article 12(3) of the EPQC Decision, data subjects shall be informed immediately of errors recorded in the EPQC database. An email indicating individual errors is sent by the EPQC Group only to the data subject concerned. According to Article 12(4) of the EPQC Decision, data subjects shall be entitled to discuss and challenge alleged erroneous entries that might arise during the EPQC. In particular, they are encouraged to raise any issue in writing upon reception of an individual error email and ask for its verification. Data subjects are further encouraged to provide the EPQC Group and their line manager with an explanation of any error that may have occurred.

The following **data** are collected and processed:

- a) EPQC Data (Article 2(3) of the EPQC Decision): The data processed in the course of the EPQC scheme are mainly evaluations obtained from quality check reviewers at individual level and at group level, which indicate whether or not mistakes have been made in a particular decision. This includes the identification of the file concerned; the type of decision or task analysed; the date when the extraction point has been reached; the date of the extraction; the organisational service where the decision was taken or the tasks performed; the outcome of the evaluation of the decision (correct/mistake); if mistaken, the type of mistake (objective/subjective) as well as a description of the mistake or of the best practice as the case may be.
- b) Data used as a basis for the evaluation of the work of individuals and for their annual appraisal: Under Article 8(3) of the EPQC Decision, "Objective EPQC Data" (Article 2(4) and Annex 2 of the EPQC Decision) shall be used by the Department concerned as one of the elements taken into consideration for the annual appraisal report of the Data Subject concerned, as well as the respective management responsible.

The OHIM uses a database, the EPQC Database (called Unified Quality Check Tool Database or UQCT), for recording and storing the results of the ex-post checks. The content of the database is for internal use only.

The **recipients** of the data are:

- a) EPQC data may be disclosed to the Head of Legal Practice Service of the International Cooperation and Legal Affairs Department (ICLAD) and the Deputy Director for Legal Affairs of ICLAD, the Director of the Department concerned with regard to Objective EPQC Data, one expert in statistics from the Quality Management Service (QMS), two experts (database administrators) from the Information Technologies area of the Infrastructure Department, the UQCT project Manager, one of the Department Quality Officers/Data Miners (Article 11(1) of the EPQC Decision);
- b) The summaries of the Objective EPQC data by individual are accessible to the Director and Heads of services and Sectors of the Department where the EPQC

is carried out as well as to the Department Quality Officer/Data Miner, responsible for preparing the data for the hierarchy of the Department. (Article 11(2) of the EPQC Decision);

- c) The emails indicating objective individual errors are accessible to the members of the EPQC Group, to each examiner and eventual co-signers, to the corresponding Head of Service and the corresponding Head of Sector of the relevant examiner and eventual co-signers as well as to the Director of the Department concerned by the Appraisal (Article 11(3) of the EPQC Decision)

Regarding **information** to staff, Article 9(1) of the EPQC Decision stipulates that the Deputy Director in charge of Legal Affairs in the ICLAD shall ensure that Data Subjects are informed of at least the following information before starting to record the EPQC data:

- the identity of the controller;
- the purposes of the processing operation;
- the categories of data concerned;
- the recipients or categories of recipients as mentioned below;
- the existence of the right of access to, and the right to rectify, the data concerning him or her;
- any further information such as:
  - (i) the legal basis of the processing operation for which the data are intended,
  - (ii) the time-limits for storing the data,
  - (iii) the right to have recourse at any time to the European Data Protection Supervisor,
  - (iv) the origin of the data<sup>4</sup>.

Under Article 9(2) of the EPQC Decision, the Director of the Department concerned shall ensure that Data Subjects have access to the information above with regard to Objective EPQC Data to be used for individual appraisal.

As concerns the **rights of individuals with respect to their personal data**:

- a) Article 10 of the EPQC Decision regulates the right of **access** of staff concerned and stipulates that "*Access to the individual data in the EPQC database is granted upon request within three months to the Data Subject concerned. The summaries of the data by individuals described in article 8 are made available to the Data Subject concerned at the end of each appraisal exercise. The e-mails indicating individual errors are sent only to the Data Subject concerned. The periodical Quality Reports described in article 7 are available upon publication*".
- b) Under Article 13 of the EPQC Decision, data subjects are entitled to **rectification** of incorrect data recorded in the EPQC database. The request for rectification shall be submitted in writing to the EPQC Group and the respective line manager and, where justified, the rectification is made not later than one month upon request and before being taken into account for the appraisal.

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<sup>4</sup> The OHIM noted on 5 December 2012 that the wording of Article 9(1) of the EPQC Decision as initially notified ("*iv*) the origin of the data, except where the controller cannot disclose this information for reasons of professional secrecy, insofar as such further information is necessary, having regard to the specific circumstances in which the data are processed, to guarantee fair processing in respect of the data subject") had been thus shortened / amended.

- c) Article 14 of the EPQC Decision stipulates the right of data subjects to **block** inaccurate data.
- d) Under Article 15 of the EPQC Decision, the data subjects shall be entitled to the **erasure** of personal data "*which has been collected or processed in a manner incompatible with the legitimate purposes pursued by the Director of the Department concerned and the manner in which that data was obtained*" by submitting a written request to the EPQC Group.

**Retention period:** Personal data in the EPQC database shall be kept for a period of no longer than two years after the end of the appraisal period. After this period, all personal data in electronic form shall be deleted and hard copies destroyed including any copies that may have been archived.

With respect to **security measures**, (...)

### **3. Legal aspects**

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

**Applicability of Regulation (EC) No 45/2001 ("the Regulation"):** The processing by the OHIM of data relating to staff 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 the OHIM, an EU body, in the exercise of activities which fall within the scope of EU law (Article 3(1) of the Regulation in the light of the Lisbon Treaty). The processing of data is done through automatic means (EPQC Database called UQCT). Therefore, the Regulation 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 "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (Article 27 (2)(b) of the Regulation). The EPQC scheme is intended to evaluate the quality of the work of individuals and will be used to measure their ability, efficiency and conduct in the context of their annual performance appraisal.

**Deadlines:** The notification of the DPO was received on 16 November 2012. 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 17 days. Consequently, the present Opinion must be delivered no later than 4 February 2013.

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

Article 5 of the Regulation provides criteria for making the processing of personal data lawful. According to Article 5(a), the processing is lawful if it is "*necessary for the performance of a task carried out in the public interest on the basis of the Treaties...or other legal instruments adopted on the basis thereof*".

a) The processing operation is performed in the context of a **task carried out in the public interest** in the context of the role of OHIM in the registration of Community trade marks and registered Community designs.

b) **Existence of a legal basis:** As regards the use of the EPQC data for performance appraisals, in line with one of the recommendations made in the Opinion in case 2010-0869, the OHIM has provided a draft "Decision concerning the Ex Post Quality Checks carried out with respect to trademarks and designs first instance decisions in the Operations Department at the OHIM" (draft "**EPQC Decision**") as *legal basis* (see Article 1(1) of the EPQC Decision).

In order to reinforce the legal basis of the processing operation<sup>5</sup>, the EDPS invites OHIM to actually *adopt* such an "EPQC Decision".

c) As to the **necessity of the processing**, it appears that the performance of EPQC for purpose of verifying and improving the quality of the decisions adopted in the field of trademark is necessary for ensuring the effective functioning of the OHIM.

As regards the use of EPQC for staff appraisal purposes, the EDPS had highlighted in the Opinion in case 2010-0869 that "*the use of EPQC data for annual performance appraisal is **only legitimate provided that EPQC data are not the sole basis for the evaluation**. Appropriate consideration should be given to other defined indicators measuring the quality of the work of examiners as well as to the justifications provided by examiners concerning all the circumstances of a given case (e.g. complexity of the case). This is all the more important that only a sample of decisions is being checked and therefore the data processed in the context of EPQC may not reflect accurately and fully the level of quality of the decisions of a given examiner*". In line with the respective recommendations made, such an EPQC Decision should "*describe in detail the impact of the processing on performance appraisals and the data protection guarantees implemented in that respect*" in order to provide clarity and certainty to staff members.

Article 8(2) of the EPQC Decision stipulates that the "Objective EPQC data" that will be taken into account for the annual appraisal exercise shall be defined before every appraisal period and that "*appropriate consideration*" shall be given to other aspects which are not covered by the EPQC. However, in this context, it mere refers to aspects "*such as ability, efficiency and conduct in the service*" as set out in Decision ADM-04-18- Rev of the President of the Office for Harmonization in the Internal Market of 27th July 2005 establishing provisions for implementing Article 43 of the Staff Regulations as regards the periodical appraisal report. The above recommendation in Opinion in case 2010-0869 was already made against the background of this particular 2005 Decision. The repeated reference to aspects "*such as ability, efficiency and conduct in the service*" does thus not "*describe in detail the impact of the processing on performance appraisals and the data protection guarantees implemented in that respect*" and fails to provide the required degree of clarity and certainty to staff members.

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<sup>5</sup> As outlined in the Opinion in case **2010-0869**, an additional legal basis can be found in the Council Regulation on the Community trade mark, and in particular Article 131 of Council Regulation (EC) No 207/2009 and Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Design, in particular Articles 45 to 49 (Title V – Registration Procedure).

The EDPS therefore invites the OHIM to amend the draft EPQC Decision so as to *"describe in detail the impact of the processing on performance appraisals and the data protection guarantees implemented in that respect"* in order to provide clarity and certainty to staff members.

The EDPS further invites the OHIM to consider updating Decision ADM-04-18-Rev of the President of the Office for Harmonization in the Internal Market of 27th July 2005 establishing provisions for implementing Article 43 of the Staff Regulations, so as to include a reference to the EPQC.

### 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"*.

**Adequacy:** The EPQC data processed in the EPQC database as well as the data used as a basis for the annual appraisal (listed in Annex 2 to the EPQC Decision) seem adequate, relevant and non excessive for the purpose for which they are collected.

**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"*.

- a) Firstly, the EDPS notes that the evaluation of the quality of the work of examiners will be carried out by using a set of defined criteria that will be made public (Annex 2 to the EPQC Decision, Article 5(2) of the EPQC Decision), which contributes to a fair evaluation process and which should reinforce the accuracy of the evaluation undertaken.
- b) The EDPS further notes that, under Article 12 (3) and (4) of the EPQC Decision, data subjects shall be informed immediately of errors recorded in the EPQC database and will be entitled to discuss and challenge alleged erroneous entries that might arise during the EPQC. The EDPS welcomes that this will provide the examiner to justify a mistake, which, due to the involvement of several persons at different stages of the process may not be solely imputable on him/her in certain cases.
- c) The EDPS recommended in the Opinion in case 2010-0869 that the accuracy of data be ensured inter alia by *"defining clear criteria for the designation of the members of the expert groups"*.

Under Article 3 of the EPQC Decision, the composition of EPQC Groups is defined in as follows: *"...2. The Members of the EPQC Groups are elected by examiners among a list of candidates composed of experienced examiners previously agreed between the Deputy Director of the Legal Affairs Area and the Director of each Department concerned. The EPQC Groups are chaired by ICLAD. 3. The composition of the EPQC Groups will be published before the beginning of the appraisal exercise"*.

The EDPS notes that no clear criteria have been defined as to how the list of candidates composed of experienced examiners is previously agreed between the Deputy Director of the Legal Affairs Area and the Director of each Department concerned.

The EDPS therefore recommends that OHIM defines clear criteria for the list of candidates preparing the designation of the members of the EPQC Groups.

**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 (see above Section 3.2) and fairness will be dealt with in relation to information provided to data subjects (see below Section 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"*.

According to Article 16 of the EPQC Decision, EPQC data shall be kept for a period of no longer than 2 years after the end of the appraisal period in order to allow the management to use the data for the annual appraisal of the staff members concerned and the latter to exercise their rights as provided in Decision ADM-04-18-Rev and/or in Article 90(2) of the Staff Regulations. After this period, all individual data in electronic form shall be deleted and no longer archived. In the Opinion in case 2010-0869, the EDPS considers that the retention for a period of two years after the end of the appraisal period seems proportionate in view of the lifecycle of the appraisal exercises.

However, concerning the retention of emails and corresponding files by each individual involved in the EPQC, the EDPS recommends that the OHIM define appropriate measures concerning the retention and deletion of emails exchanged between members of the EPQC Groups.

### 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 shall process the data *"only for the purposes for which they were transmitted"* (paragraph 3).

Personal data are disclosed to internal recipients within the OHIM who have a need to know these data for the performance of their tasks. The EDPS notes that data subjects do not have access to the EPQC database. All transfers between the recipients identified in Section 2 are considered necessary for the legitimate performance of the tasks covered by the competence of the 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.

- a) The EDPS notes that Article 10 of the EPQC Decision gives data subjects' the rights to **access** the evaluations made by the members of the EPQC Group during the review process.
- b) Regarding the rights to **rectify** data, the EDPS notes that under Article 12(4) of the EPQC Decision, data subjects are encouraged to provide the EPQC Group and



their line manager with an explanation of any error that may have occurred. This shall help ensure the accuracy and completeness of the data.

However, under Article 13 of the EPQC Decision, the rectification is made "*not later than **one month** upon request and before being taken into account for the appraisal*" (emphasis added). The EDPS invites the OHIM to align this with the delay stipulated in Article 14 of the Regulation, i.e. to ensure that rectification takes place "*without delay*".

- c) As regards the right to **erasure**, the EDPS notes that under Article 15 of the EPQC Decision, this right only applies for data processed "*in a manner incompatible with the legitimate purposes pursued by the Director of the Department concerned*" (emphasis added). The EDPS would invite the OHIM to ensure that the right to erasure applies where data are processed in a manner incompatible with the legitimate purposes pursued by the OHIM under the EPQC system as stipulated in recital 2 of the EPQC Decision (see Section 2).

### **3.7. Information to the person concerned**

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

- a) Regarding the EPQC data processed in the EPQC database, the EDPS notes that under Article 9(1) of the EPQC Decision, it falls upon the Deputy Director in charge of Legal Affairs in the International Cooperation and Legal Affairs Department to inform data subjects of all pieces of information listed in Article 12 of the Regulation.
- b) Concerning data used as a basis for the annual appraisal (Objective EPQC Data), the EDPS notes that under Article 9(2) of the EPQC Decision, it falls upon the Director of the Department concerned to ensure that data subjects have access to all pieces of information listed in Article 12 of the Regulation.

Additionally, once adopted, the EPQC Decision itself contains some of the pieces of information listed in Article 12 of the Regulation. The EDPS therefore invites the OHIM to ensure that, once adopted in line with the recommendations made in this Opinion, the EPQC Decision is made readily available to data subjects (for example by publishing it on the intranet).

### **3.8. Security measures**

(...)

## **4. Conclusions**

The EDPS considers that there is no violation of Regulation (EC) No 45/2001 provided that OHIM fully takes into consideration the above considerations before the system can be used for purpose of staff evaluation. In particular, OHIM should:

- adopt the "EPQC Decision", which should describe in detail the impact of the processing on individual performance appraisals and the data protection guarantees implemented in that respect so as to ensure that EPQC data are not the sole basis for the annual performance appraisal and that appropriate consideration should be given to other defined indicators measuring the quality of the work of examiners as well as to the justifications provided by examiners concerning all the circumstances of a given case;
- consider updating Decision ADM-04-18- Rev of the President of the Office for Harmonization in the Internal Market of 27th July 2005 establishing provisions for implementing Article 43 of the Staff Regulations, so as to include a reference to the EPQC;
- ensure the accuracy of the data by defining clear criteria for the list of candidates preparing the designation of the members of the EPQC Groups;
- define appropriate measures concerning the retention and deletion of emails (and corresponding files) exchanged between members of the EPQC Groups;
- ensure that rectification takes place "*without delay*";
- ensure that the right to erasure applies where data are processed in a manner incompatible with the legitimate purposes pursued by the *OHIM* under the EPQC system (rather than the *Director of the Department concerned*);.
- ensure that, once adopted in line with the recommendations made in this Opinion, the EPQC Decision is made readily available to data subjects (for example by publishing it on the intranet);

Done at Brussels, 29 January 2013

**(signed)**

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