

Executive summary of the Opinion of the European Data Protection Supervisor on the proposal for a directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (recast) and the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 207/2009 on the Community trade mark

(The full text of this Opinion can be found in English, French and German on the EDPS website <http://www.edps.europa.eu>)

(2014/C 32/11)

1. Introduction

1.1. Consultation of the EDPS

1. On 27 March 2013, the Commission adopted two legislative proposals in the field of trade marks: a proposal for a directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (recast) ⁽¹⁾ and a proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 207/2009 on the Community trade mark ⁽²⁾ (hereafter jointly referred to as 'the proposals'). These proposals were transmitted to the EDPS on that same day.

2. The EDPS takes note that the main aim of these proposals is to harmonise further all aspects of substantive trade mark law as well as procedural rules within the EU. Although at first sight it may seem that these proposals do not carry any substantial consequences for data protection, he however notes that both instruments establish a few processing operations, which may have an impact on individuals' right to privacy and data protection. The EDPS therefore regrets that he was not consulted informally prior to the adoption of these proposals.

3. Pursuant to Article 28(2) of Regulation (EC) No 45/2001, the EDPS wishes to highlight below a few specific issues that the proposals raise from a data protection perspective. The EDPS recommends that a reference be made in the preamble of the proposals to the consultation of the EDPS.

1.2. General background

4. The proposed directive aims at harmonising further within the EU substantive rules relating to trade marks — including clarifications on the rights conferred by a trade mark and the rules applicable to collective marks — as well as procedural aspects such as registration, fees, and procedures regarding opposition, revocation or declaration of invalidity of a trade mark. It also sets forth provisions enhancing the administrative cooperation of national central industrial property offices between themselves and with the European Union Trade Mark and Design Agency (Articles 52 and 53).

5. The proposed regulation amends the current legal framework applicable to the Community trade mark set forth in Regulation (EC) No 207/2009. The Office for Harmonization in the Internal Market ('OHIM') is renamed 'European Trade Marks and Design Agency' ('the Agency'). The proposed regulation clarifies substantive and procedural rules that apply to the European trade mark. It provides for the establishment by the Agency of a register and of an electronic database (Article 87). It also clarifies the role and tasks of the Agency, in particular in relation to its cooperation with the national central industrial property offices in the EU (Article 123).

3. Conclusions

27. Although these proposals deal with the harmonisation of substantive trade mark law as well as procedural rules within the EU and, at first sight, do not seem to have substantial consequences for data protection, they however establish a few processing operations which may have an impact on individuals' rights to privacy and data protection.

28. The EDPS underlines that the collection and processing of personal data by the Member States' central industrial property offices and the Agency in the performance of their tasks must be carried out in compliance with applicable data protection law, in particular the national laws implementing Directive 95/46/EC and Regulation (EC) No 45/2001.

⁽¹⁾ COM(2013) 162 final.

⁽²⁾ COM(2013) 161 final.

29. As to the proposed directive, the EDPS recommends to:

- insert a substantive provision underlining the need for any processing of personal data carried out by national industrial property offices to respect applicable data protection law, in particular national laws implementing Directive 95/46/EC, and add a reference to the proposed general data protection regulation in a recital,
- underline in a substantive provision that any processing of personal data by the Agency in the context of the cooperation between national offices and the Agency is subject to compliance with the rules set forth in Regulation (EC) No 45/2001,
- clarify in a substantive provision whether the common or connected databases and portals planned under Article 52 and recital 37 involve the processing of personal data as well as their scope and purpose(s), in particular whether they bring additional purposes to the original ones of each database and portal, and if so, what is the legal basis for these additional purposes,
- clearly establish in a substantive provision the modalities for the exchanges of information through the common or connected databases and portals, in particular by determining the authorised recipients of personal data, the types of data, the purpose of such exchanges, and the length of the retention of the data in those IT systems.

30. As to the proposed regulation, the EDPS recommends to:

- set forth the modalities for the processing of personal data in the register and the electronic database in a substantive provision of the proposal and not in delegated acts,
- insert a substantive provision specifying the types of personal data to be processed in the register and the electronic database, the purpose of their processing, the categories of recipients who are authorised access to the data (with the specification of which data), the data retention time limit(s), and the modalities for the information and the exercise of data subjects' rights,
- clarify in Article 123c whether or not the exchanges of information between the Agency and national offices would include personal data, and if so, which ones. It should also specify: (i) that exchanges of personal data between the Agency and national offices must be carried out in compliance with applicable data protection law, in particular Regulation (EC) No 45/2001 as regards the processing by the Agency and Directive 95/46/EC as regards the processing by national offices; (ii) the purpose of such exchanges, in particular whether they bring additional purposes to the original ones of each database and portal, and if so, what is the legal basis for these additional purposes; and (iii) the types of data exchanged, the authorised recipients of the data, and the length of the retention of data in these IT systems,
- assess the necessity and proportionality of disclosing personal data in the context of the publication of information contained in the electronic database. If it is the intention of the legislators to provide for the publication of personal data for carefully assessed purposes, the EDPS recommends including explicit provisions to that effect in the proposed regulation. As a minimum, a substantive provision should clarify what kind of personal data may be made public and for what purpose(s),
- clarify in a substantive provision whether or not the means of cooperation would include the publication of court decisions relating to trade marks. If so, this substantive provision should define the conditions under which the publication of court decisions may take place. In this respect, the EDPS recommends that the publication of judgements on the Internet by the Agency and/or national central industrial property offices should take place under the condition that the indexing of judgments (and personal data contained therein) on external Internet search engines is technically prohibited or otherwise that it is considered whether the publication should be done on a no-name basis.

Done at Brussels, 11 July 2013.

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor
