

Opinion on a notification for Prior Checking received from the Data Protection Officer of the OHIM regarding the "follow-up of individual productivity and timeliness"

Brussels, 18 March (2013-0680)

1. Proceedings

On 19 June 2013, the European Data Protection Supervisor (**EDPS**) received a notification for prior checking relating to the processing of personal data in the "follow-up of individual productivity and timeliness" from the Data Protection Officer (**DPO**) of the OHIM.

Questions were raised on 19 July 2013 to which the DPO of the OHIM replied on 5 August 2013; additional questions were sent the following day, to which the OHIM replied on 8 November 2013. The draft Opinion was sent to the DPO for comments on 19 February 2014. The EDPS received a reply on 05 March 2014.

2. The facts

The processing operation is carried out under the joint responsibility of OHIM's Operations Department and Operations Support Department.

It serves to generate summaries of the productivity and timeliness of staff members in OHIM's Operations and Operation Support Departments.

These summaries are generated by extracting the information (type of task, date of attribution, date of completion, deadlines for completion, finished on time yes/no, person concerned, organisational unit) from the production databases of the different tools¹ used by staff using the "IP tool" and stored in spreadsheets.

Afterwards, these summaries are taken into account for the appraisal of the staff concerned. The overviews are communicated to the data subject during and at the end of the appraisal exercise. Data subjects are informed about this processing via an official Decision and an internal communication to that effect.

Persons having access to the IP Tool and relevant SAP databases are:

- 1) two database administrators from the IT department (for administration of the databases);
- 2) two quality officers/data miners from the concerned department (for preparing the summaries).

¹ OHIM uses a number of tailor-made applications.

The summaries will be accessible to:

- 1) the head of sector, head of service and director of the data subject;
- 2) the quality officer/data miner responsible.

The summaries will be stored for two years following the appraisal period, after which they and all copies will be destroyed.

OHIM plans to adopt a Decision of the President of the Office to serve as an additional legal basis for the processing operation. A draft of this Decision was supplied to the EDPS (the Draft Decision).

[...]

3. Legal analysis

3.1. Prior checking

The processing of data constitutes a processing of personal data by a Unionbody in the exercise of tasks falling under Union law. The processing of the data is done at least partly through automatic means. Therefore, Regulation (EC) No 45/2001 (the Regulation) is applicable (see its Article 3).

Article 27(1) of the Regulation subjects 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" to prior checking by the EDPS. Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks.

Among these, point (b) refers to "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct". The processing operation notified serves to generate quantitative evidence of the performance of staff, which is then taken into account for their appraisal reports. Article 27(2)(b) therefore applies and the processing operation is subject to prior checking.

As was clarified by the OHIM in reply to a request for further information, the processing is already on-going. It therefore qualifies as an ex-post check, to which the two-month deadline does not apply. This case has been dealt with on a best-effort basis.

3.2. Lawfulness of the processing

Under Article 5 (a), processing that is *"necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof"* is lawful. According to recital 27, this includes processing of personal data that is necessary *"for the management and functioning of those institutions and bodies"*.

The processing operation serves to provide input to staff appraisal. Staff appraisal is based on Articles 34, 43 and 45 of the Staff Regulations of Officials of the European Union (SR) as well as on Articles 14, 84 and 87 of the Conditions of Employment of Other Servants of the European Union (CEOS). The tasks of examiners at OHIM are set out in Article 131 of Council Regulation (EC) 207/2009.

The general rules in the SR and the CEOS will be supplemented by a Decision of the President of OHIM. The Draft Decision was submitted to the EDPS. In order for it to serve as legal basis, it still needs to be adopted. The EDPS considers that this more specific legal basis can contribute to making the processing more transparent for the data subjects and thus ensure

fairness of the processing.² This specific legal basis will set out how the data will be collected and how they will be analysed. Adopting it is a necessary condition for the processing to be lawful under Article 5(a) of the Regulation.

The text of the Draft Decision could be improved by widening the scope of the rules on confidentiality. While Article 14 contains such rules, it is drafted narrowly and with a literal reading does not include persons having access to the "raw data". Widening the scope of Article 14 so that it covers everyone involved in the procedure could help to enforce confidentiality. That being said, the general confidentiality requirement of Article 21 of the Regulation already binds staff handling personal data, so such an additional obligation would basically serve as a reminder.

Recommendation: urgently adopt the draft Decision of the President.

3.3. Data Quality

According to Article 4(1)(c) of the Regulation, data must be "*adequate, relevant and not excessive in relation to the purposes for which collected and/or further processed*". Point (d) of the same paragraph establishes that data must be "accurate and, where necessary, kept up to date".

The data used for generating the summaries seem adequate, relevant and not excessive for the intended purpose. They are extracted from the production databases, which should guarantee a high level of data quality. Additionally, data subjects can access their own data and can rectify inaccurate data, which helps to ensure the quality of the data. See section 3.9 for additional considerations relating to the use of such quantitative tools in evaluation procedures.

3.4. Conservation of data/ Data retention

Personal data must be "*kept in a form which permits identification of data of data subjects for not longer than is necessary for which the data are collected and/or further processed*" (Article 4(1)(e) of the Regulation).

The reports will be stored for two years following the appraisal period. At the end of this period, they will be destroyed.

This period serves to allow the use of the data in the appraisal exercise and for staff members to exercise their rights as provided in the draft Decision and/or under Article 90(2) SR. Its length seems appropriate given the lifecycle of appraisal exercises.³

3.5. Transfers of data

Transfers of personal data within or between Union institutions and bodies may occur when they are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*" (Article 7).

The data are only disclosed to the following internal recipients within the OHIM:

- 1) Database administrators in the IT department (access to tools and raw data, for administration purposes).

² See p. 2-3 of the EDPS staff evaluation guidelines, available on the EDPS website.

³ See case 2010-0869.

- 2) Quality officers/data miners (access to tools, raw data and the summaries, for preparing the summaries).
- 3) The director, head of service and head of sector of the data subject (access to the summaries, for consideration as part of the staff appraisal in their roles as reporting or countersigning officers).

The EDPS considers these actors as integral parts of the procedure, and not as recipients in the sense of Article 7. That being said, the respective access rights appear to be necessary for the legitimate performance of the tasks indicated.

The EDPS would also like to highlight that access by data subjects to their own data under Article 13 of the Regulation is not considered a transfer.

These two points should be clarified in the notification form; the OHIM should submit an updated form to the EDPS.

Recommendation: provide an updated notification form, updated in line with the considerations in this section.

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.

Data subjects can request access to the data, which will be granted within three months of the request. Additionally, the summaries will be made available to the data subject during and at the end of each appraisal exercise (see Article 7 of the Draft Decision). Given the high volume of actions logged⁴, receiving an extract once per appraisal exercise would likely result in very long document detailing very small tasks. Such extract might not be very useful for the persons concerned. The EDPS recommends providing extracts on a more regular (for example quarterly) basis, so that each output becomes more manageable for the data subjects.⁵

Requests for rectification are to be addressed in writing to the line manager of the data subject and will, where justified, be implemented within one month. Data subjects can obtain the blocking of inaccurate data (see also Articles 9 to 11 of the Draft Decision). This should also include a right for data subjects to comment and to justify certain figures, so that performance calculation can be adjusted in an accurate manner prior to the evaluation exercise.⁶

Requests for erasure are to be addressed in writing to the Director of the department concerned. There is no specific time limit mentioned.

Recommendations:

- provide extracts of the productivity monitoring to data subjects on a more regular basis (e.g. quarterly);
- ensure that data subject can comment and justify figures.

⁴ The example targets provided by the OHIM for different case handler profiles show that these targets amount to several thousand actions/tasks in the systems.

⁵ See also EDPS case 2012-0971

⁶ See EDPS cases 2012-0971 and 2013-0017

3.7. Information to the data subject

Under Articles 11 and 12 of the Regulation, data subjects have to be informed about the processing of their personal data. These Articles set out a catalogue of information elements that need to be supplied.

Article 11 concerns situations in which data are collected directly from the data subject, where the data subject is actively and knowingly supplying the data and is necessarily aware of the categories of data (such as application forms or questionnaires). Article 12, on the other hand, concerns situations in which data are collected from other sources.

Here, Article 12 applies. The data are not actively supplied by the data subject; they are a by-product of using OHIM's IT tools; additionally, the purpose of this original collection and the purpose of the notified processing operation are different (see **Error! Reference source not found.**).

Article 6 of the Draft Decision repeats most⁷ of the information obligations of Article 12 of the Regulation, noting that this information shall be supplied to data subjects before the collection of production data for evaluation purposes starts.

This information includes targets for several ideal-typical roles for examiners, listing expected production numbers and timelines. As staff members usually combine several of these profiles and also have additional duties not reflected in them, the target numbers are individually adjusted.

The OHIM has also supplied a privacy statement⁷ which contains all necessary items.

In conclusion, the right of information seems to be respected.

3.8. Automated individual decisions

Article 19 of the Regulation establishes 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".

Article 5 of the Draft Decision clearly states that the summaries generated are (emphasis added) "one of the elements to be taken into consideration for the appraisal report" of affected staff, making it clear that other factors should be duly taken into account.⁸ The document sent to the data subject for the appraisal period 2013 (annexed to the list of decisions and tasks measured in the Operations Department) states that (emphasis added) "fulfilling the 5 objectives in a harmonized way (that is, not merely fulfilling the volume targets) will imply getting a score of 'meet requirements', whereas surpassing them by 15% will deserve considering the scoring of 'above the level required', surpassing 30% will deserve considering the scoring of 'significantly above the level required' and dropping by more than 20% will result in considering the scoring of 'improvement required'". The EDPS stresses that carrying out appraisals based solely on the numbers would constitute an automated individual decision in the sense of Article 19 of the Regulation, which is subject to specific rules. In any case, staff concerned should have a right comment and justify their figures (see also 3.7 above).

⁷ All except "identity of the controller" and "purposes of the processing", both of which are obvious from the text of the Draft Decision.

⁸ E.g. lower production numbers explained by the fact that a staff member dealt with especially complex cases or was attributed additional tasks not tracked in the system.

3.9. Security measures

[...]

4. Conclusion:

There is no reason to believe that there is a breach of the provisions of the Regulation providing the recommendations contained in this Opinion are fully taken into account. To reiterate, the EDPS recommends to:

- urgently adopt the Draft Decision;
- provide extracts of the productivity monitoring to data subjects on a more regular basis (e.g. quarterly);
- ensure that data subject can comment and justify figures; provide an updated notification form to the EDPS, updated in line with the considerations in section 3.5.

Done at Brussels, 18 March 2014

(signed)

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