



Prior checking opinion on "Empirical analysis of correlations between work system variables and decision-making" notified by the Office for Harmonization in the Internal Market ("OHIM") on 22 July 2010

Brussels, 22 November 2010 (case 2010-0468)

1. Proceedings

On 21 June 2010 OHIM notified the European Data Protection Supervisor ("EDPS") of a data processing operation under the title "Empirical analysis of correlations between work system variables and decision-making" for "ex-post" prior checking. The notification was preceded by a consultation on whether the processing operation is subject to prior checking (case 2008-727). OHIM initiated this consultation on 27 November 2008. EDPS advised OHIM to submit its notification for prior checking on 11 May 2010.

On 22 June 2010, the EDPS requested further information and a telephone conference. The telephone conference took place on 26 July 2010. On 29 July 2010 the EDPS sent OHIM a summary of his understanding of the facts, including remaining requests for clarification. OHIM confirmed the facts and responded to the questions on 30 July 2010. This was complemented with further information on 3 August 2010. On 3 September 2010, the EDPS sent OHIM the draft opinion for comments. OHIM commented on 27 September and 25 October 2010.

2. The facts

2.1. Introduction, purposes of the exercise, and personal data collected. This prior checking covers the data protection aspects of an exercise undertaken by OHIM entitled "Empirical analysis of correlations between work system variables and decision-making". The exercise is conducted by a statistical business analyst ("**analyst**") in OHIM's Quality Management Department ("**QMD**"). It was explained to the EDPS that the analysis could help identify comparable job profiles, and develop best practice of HR management for these profiles.

In addition to bringing practical benefits to OHIM as an organization, the project also serves additional scientific purposes, as the analyst plans to publish his findings (after careful editing to protect the privacy of the participants in the exercise¹) in a PhD thesis.

Indeed, the analyst processes the data for two related purposes, first, to help further improve OHIM's human resources practices, and second, for purposes of his PhD thesis. These dual purposes have been foreseen from the beginning of the exercise and the participants of the survey were informed of both purposes. When acting for the first purpose, the analyst is acting on behalf of OHIM. When acting for the second purpose, he is acting in his own

¹ See Section 2.5 below for more detail.

personal, individual capacity. In fact, as will be shown in part three of this opinion ("Legal aspects and Recommendations"), from the legal point of view, OHIM as an organization and the analyst in his personal capacity act as "co-controllers" of the data collected and further processed in this exercise.

The duality of the purposes and the duality of the capacity in which the analyst acts have significant impact on applicable law, the supervisory powers of the EDPS, the scope of this opinion as well as on the recommendations made by the EDPS as it will be explained in part three.

The processing operation is described in the notification as *"statistical analysis of correlations between work system variables (personal/individual, file, process and environmental variables) with Opposition² decision making performance in terms of quality, quantity, speed and effortlessness"*.

The notification further explained the purposes of the processing operation as follows: *"Various work system variables are suspected to have an impact on the decision making process, which is the central core business of OHIM. In order to scientifically evaluate these variables (classified as being related to a person/individual, file, process or environment), a broad set of very personal information has to be polled (with the possibility to opt-out in each question). The purpose is not to draw any conclusions on the individual level, but rather to conclude on the general influence of these variables on decision making in general"*.

The variables - on each of which detailed personal data are collected in the framework of this exercise - include aspects such as experience, personality, languages, motivation, file difficulty, file bulkiness, file language, work times, seating order, work location, effort, teamwork/ individual work, etc. The analyst also mentioned that thus far he found the impact of the individual variables on performance to be low, but that possibility could not be excluded altogether.

Finally, an ancillary purpose is to provide feedback to each participant, if he or she so requests, to allow the participant to "learn more about himself/herself" (see Section 2.6 below).

2.2. Time-frame and scale of the exercise. The first participants enrolled in the exercise on 15 January 2009, a second wave of participants joined subsequently. Data were collected over a period of several months from each participant. Data collection by the last participants ended in October 2010. A total of eight persons participated in the exercise.

2.3. Legal basis. The notification indicated two different paragraphs of Article 5 of Regulation (EC) No 45/2001 ("**Regulation**") as legal basis of the processing operation. First, Article 5(a), which provides that the *"processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments on the basis thereof"*. Second, Article 5(d), which allows processing if *"the data subject has unambiguously given his or her consent"*.

Indeed, participation is entirely voluntary ("based on mutual trust", as explained by the analyst) and with no adverse consequence on any OHIM employee who refuses to participate.

² Opposition' is a procedure that takes place before OHIM when a third party requests the Office to reject a Community trade mark application (CTMA). For more detail, see <http://oami.europa.eu/ows/rw/pages/CTM/regProcess/opposition.en.do>.

Any refusal to participate in the exercise is kept confidential by the analyst, and not recorded or disclosed to others, such as work colleagues or supervisors. In addition, the participant can also opt out of responding to any specific questions on any of the questionnaires.

2.4. Sources of personal data collected. Personal data are collected from the following six sources:

- a) four questionnaires/tests were completed by the participants on paper forms at the beginning of the exercise:
 - a. a personality questionnaire³;
 - b. an abstract-reasoning test;
 - c. a questionnaire on multi-cultural attitudes and experience ("**acculturation questionnaire**")⁴; and
 - d. a questionnaire on emotional intelligence;⁵
- b) daily questionnaires on paper form: participants keep detailed daily logs, with entries three times a day, comparing their productivity to their "average days";⁶
- c) case questionnaires on paper form: two questionnaires are to be completed with respect to each case handled, one by the case handler and another by the person who carried out the peer review of the document ("**co-signer**") ("**the global file difficulty questionnaire**")⁷;
- d) CVs of participants: these were provided to the analyst directly by the participants; in addition, where necessary, the analyst also asked additional clarifications from the participants, for example, about their language skills, age, or educational background;
- e) time sheets: these are printed out by the participants on a weekly or monthly basis from the OHIM time management system and provided in hardcopy to the analyst; the time sheets indicate how much time each participant spent at the office in a given period, also including any overtime, up to the maximum accountable extra 15 hours per month; the timesheets indicate any absences, including the reasons for such an absence (e.g. whether the absence was for medical leave, flexitime, or vacation); the time sheets do not indicate what files the employee was working on;
- f) data available in OHIM's core on-line business systems. These include, among others, the following:
 - "Euromarc++" (OHIM's case management system for CTM direct filings and Oppositions),
 - "QFman" (scanned documents front-end application),

³ This questionnaire requests the participants to indicate, on a scale of one to five, how accurate each of a number of specific statements is with regard to their personality. The statements include, for example, "panic easily", "feel comfortable around people", "believe that others have good intentions", and "get irritated easily".

⁴ Questions relate to the participant's cultural background, experience in the Alicante area, and his or her approach to living abroad. Scales of one to five are used. Questions include, for example: In which country did you spend your childhood? In which foreign country did you live longest so far? How much of your free time do you spend with newly made friends from the Alicante area? How much of your free time do you spend with people from your own cultural background? Does your partner have a harder time adjusting to Alicante than yourself?

⁵ This questionnaire requests the participants to indicate, on a scale of one to five, how true each of a number of specific statements is with regard to their emotional intelligence. The statements include, for example, "I like helping people", "I prefer others to make decisions for me", "I have not broken a law of any kind".

⁶ Each participant needs to compare - on a scale from minus three to plus three - how his/her day compares with his/her "average" day, in several respects. For example, "compared to an "average afternoon", "I expect my capability for writing English texts this afternoon to be much worse/worse/slightly worse/about average, etc." When the participants see a difference from their average, they are encouraged to describe, using keywords only, what the reasons for this difference were (regardless if these were private or job-related).

⁷ Participants need to indicate, among others, the net time invested in drafting, the net time invested in file screening and strategy definition, and must rate the difficulty of the file (on a scale of one to nine from extremely easy to extremely hard).

- "COR" (correspondence module),
- "ADM" (user/service administration module),
- OHIM's data warehouse, and
- OHIM's ex-post quality check tool (OHIM confirmed that it uses only its ex-post quality check tool and not its ex-ante quality check tool which was assessed by the EDPS in case nr 2008-437⁸).

All data from the questionnaires, which were completed by hand in paper form, are subsequently entered into an electronic file by the analyst. Thus far, no administrative assistant has been asked to carry out this manual task, but it cannot be excluded that this will be necessary. As for the CVs, these are kept in an excel file by the analyst.

As for the data available in OHIM's core on-line business systems, the analyst explained that these may contain some work-related personal data (for example, which case handler is allocated to handle a specific case). However, they do not contain evaluation data, medical data, recruitment data, or other similarly more confidential types of personal information. With that said, these databases, in particular, OHIM's ex-post quality check tool may also contain fairly "sensitive" information such as what mistakes were made in specific cases. When this information is linked to the case handlers and reviewers of the specific cases, this can be used by the analyst not only to draw conclusions on the difficulties of particular cases but also on the accuracy of the work of the individuals who participated in the survey.

2.5. Analysis of the data, anonymization techniques, and final results of the exercise. The analyst processes the data collected for the purposes described in Section 2.1 above. To help protect the privacy of the participants, the analyst uses different "anonymization techniques" at the different stages of collection, analysis and final dissemination of the data. In essence, these techniques are there to strip personal data of personal identifiers (not just direct ones) in order to eliminate or reduce privacy concerns, while still retaining useful information, as necessary at the different stages of the data processing.

To start with, neither the daily questionnaires nor the case-questionnaires completed by the participants have the participants' names, personnel number or other direct identifiers on them. Instead, each participant is instructed to invent a neutral codeword for himself or herself, use it on the questionnaires, keep it confidential, and share it only with the analyst. The individual is instructed that the code word must be easy to remember but difficult to guess or associate with the individual concerned.

As for the four initial questionnaires, random stickers were used that the participants drew from an envelope. They each put one sticker beside their names, which served as linking information for the individual feedback promised. Thus, again, the questionnaires did not contain direct identifiers.

At a later stage, when the analyst has completed his analysis and has prepared his final report, and thus, there will no longer be a need for him to identify an individual participant (for example, to ask him/her for clarifications on a response), each code-word (and sticker) will be replaced by a randomly generated participant number. After the allocation of random numbers and deletion of all references to the code words and stickers, neither the participant, nor the analyst will be informed which individual's data set will be given which random number.

⁸ See EDPS website at http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Supervision/Priorchecks/Opinions/2008/08-10-22_OHIM_quality_checks_EN.pdf

The analyst also explained that the final report containing the results of the exercise, which will be circulated within OHIM, will be very carefully edited - eliminating unnecessary detail, outliers, and using other "anonymization techniques" as necessary - so as to ensure that no individual who participated in the survey could be identified, directly or indirectly, by anyone within or outside OHIM, including any colleagues participating in the survey, any supervisors, friends or family members who know the participants well or have access to confidential information related to their work. As an example, no information will be published about the specific language skills in a lesser known language of a particular participant, as this may indirectly reveal his/her identity, considering the small number of participants concerned and the possible uniqueness of a particular language skill. The same careful editing will be carried out when any of the results will be published in the analyst's PhD thesis.

During the prior checking procedure, the analyst expressed a wish to keep the "microdata"⁹ obtained in the exercise, after assignment of the random participation number, for a significant, or possibly, indefinite, period of time, and make it available, when requested, to other researchers. The analyst explained that this may be desirable, for example, if they wish to build their own research on the results of this exercise, or if they wish to challenge the findings of the PhD thesis.

2.6. Recipients, data transfers and dissemination of results. The analyst confirmed that only he has access to any of the personal data collected during the exercise. (Please see also Section 10 below on security aspects.) One of the two exceptions to this limited access is that the analyst may decide to use the services of an assistant (an OHIM employee) for data entry when inputting the results of the questionnaires into an electronic form. If this will be the case, this assistant will be specifically reminded and requested to treat all data confidential and not use them for any other purpose or disclose them to anyone. The other exception is that the system administrator will also have access for IT purposes.

As discussed in Section 2.5 above, a report containing the findings of the exercise will be circulated within OHIM, and further details may also be publicly disclosed in a PhD thesis. This will be done after use of the anonymization techniques described above as well as further careful editing, to ensure full anonymity of the data subjects.

The analyst also expressed a need to accommodate data requests from researchers for "microdata"¹⁰ that support his findings and that he used in his research (this, in his capacity as the author of the research and PhD thesis).

Finally, each participant, if he or she so requests, can also receive an overview of the findings of the analyst with respect to his or her own individual situation. The purpose of this feedback is to allow the participants to "learn more about themselves".

⁹ Microdata are "sets of records containing information on individual respondents or on economic entities. In other words, microdata are the basic information collected within surveys..." (Source: Eurostat, at http://epp.eurostat.ec.europa.eu/portal/page/portal/research_methodology/statistical_confidentiality/confidential_data/introduction#microdata).

See also Wikipedia definition: at [http://en.wikipedia.org/wiki/Microdata_\(statistics\)](http://en.wikipedia.org/wiki/Microdata_(statistics)): "In the study of survey and census data, microdata is information at the level of individual respondents. For instance, a national census might collect age, home address, educational level, employment status, and many other variables, recorded separately for every person who responds; this is microdata."

¹⁰ For further discussion of microdata that may be subject to such requests, please see Section 2.9 below.

2.7. Information to data subjects. The analyst explained that before the participants enrolled in the exercise, he met with them and explained the purpose of the exercise, how it was to be carried out and what data protections safeguards were taken to ensure that the personal data provided by the participants are safe. A slide-show was used as a presentation aid, and a copy of it was submitted to the EDPS. This information, although not specifically designed as a "data protection notice", already contained several items required under Article 11 and 12 of the Regulation, as well as an explanation of some of the "anonymization techniques" to be used.

2.8. Access rights (including rectification, erasure and blocking). The analyst explained that he provides data subjects with the right to access, rectify, block, erase or object to the use of personal data upon simple request to the analyst.

2.9. Conservation period. The notification provides that "individual data" would be deleted at the latest by the end of 2011, that is, little over one year as of the end of the data acquisition period. The analyst clarified during the prior checking procedure that this means that by the end of 2011, the following will be accomplished:

- a) all code names (as well as any links between the "stickers" used in the four initial questionnaires and the names of the participants) would be removed from any and all files and documents kept by the analyst, and replaced by the random identifier as described in Section 2.5 above;
- b) any information about who were the participants (such as a list of participants to the survey with their names or other personal identifiers) would be securely destroyed;
- c) any documents, notes, final reports containing individual feedback to participants would be securely destroyed or returned to the participants concerned;
- d) questionnaires on multi-cultural experience would be securely destroyed or returned to the participants concerned, whether or not having any code names or other personal identifiers on them;
- e) all CVs collected would be securely destroyed or returned to the participants concerned, whether or not having the names of the persons or other personal identifiers on them;
- f) any indication for the reasons of absence would be blackened out in all time-sheets collected including any medical leave data.

The rest of the data ("microdata" as well as the final report to OHIM and the final text of the PhD thesis) are proposed by the analyst to be kept indefinitely.

2.10. Security measures. As explained in Section 2.6 above, it is only the analyst who has access to any of the personal data processed except for (i) possibly, access by an assistant to the questionnaires for data input, and (ii) access by the system administrator.

All data and information, which are kept in an electronic form, are kept in a dedicated folder on OHIM's server, with access only by the analyst. All hardcopies of documents such as the questionnaires and the timesheets are held in a closed filing cabinet in the office of the analyst. The electronic files are backed up on a regular basis using a central back-up procedure carried out by OHIM's IT department.

3. Legal aspects and Recommendations

3.1. Applicability of the Regulation, scope of the supervisory authority of the EDPS and scope of this opinion. As anticipated in Section 2.1 above, from the legal point of view,

OHIM as an organization and the analyst in his personal capacity act as "co-controllers" of the data collected and further processed in this exercise.¹¹ The joint controllership and the duality of the purposes and the capacity in which the analyst acts have significant impact on applicable law, the supervisory powers of the EDPS (competent to monitor EU institutions and bodies), the scope of this opinion as well as on the recommendations made by the EDPS.

First, the notified processing, insofar as it concerns the activities of OHIM (which also includes the activities of the analyst when acting on behalf of OHIM) falls under the scope of Regulation (EC) 45/2001 ("**Regulation**") pursuant to its Articles 2 and 3.

On the other hand, for the analyst, when acting in his capacity as the author of the PhD thesis, the applicable law is his own national data protection law transposing Directive 95/46/EC (including any sectoral legislations or potential exceptions such laws may provide). The processing of personal data by him is supervised by his national or sub-national data protection authority.

Second, the scope of this opinion will be limited to the processing of data for OHIM's purposes when the analyst is acting on behalf of OHIM. It will not cover the processing of data for purposes of the analyst's PhD thesis in his individual capacity. With regard to these latter issues we recommend that the analyst contacts his own national or sub-national data protection authority and/or makes his own assessment as regards the safeguards that he needs to follow. With that said, to facilitate the analyst's compliance efforts in his personal capacity, we also use this occasion to briefly refer to some of the safeguards that he may wish to consider. These are provided as examples of best practice and should by no means be considered comprehensive or prejudice any legal obligation the analyst might have under applicable law or any further advice from his national or sub-national data protection authority.

Further, as regards the concept of "personal data", the EDPS emphasizes that despite the use of anonymization techniques data will continue to be considered as "personal data", and thus, subject to the Regulation, so long as the individuals can be identified, even if such identification can only be done indirectly. The mere fact that "anonymization techniques have been used", does not mean that the data are considered as "anonymized" in the meaning of recital 8 of the Regulation.¹²

Importantly, on the facts of this case and despite the anonymization techniques used, the microdata that the analyst plans to retain and possibly make available to others for research purposes may lead to identification of the participants (at least in some circumstances and in the hands of some people), and thus, constitutes personal data. Therefore, as discussed in this opinion, safeguards continue to be necessary so long as such microdata are not securely destroyed or fully anonymized.

3.2. Grounds for prior checking. The processing is subject to prior checking pursuant to Article 27(2)(a) of the Regulation which requires prior checking by the EDPS, among others, in case of "*(b) processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". The case involves a processing operation intended to evaluate certain personal aspects of the data subject, and therefore it is subject to prior checking.

¹¹ On the concept of "joint controllership", see Opinion 1/2010 of the 16 February 2010 of the Article 29 Data Protection Working Party on the concepts of "controller" and "processor" (ref: WP 169).

¹² Recital 8, see notably: "*To determine whether a person is identifiable, account should be taken of all the means likely to be reasonably used either by the controller or by any other person to identify the said person*".

3.3. Deadlines for notification and for issue of the EDPS opinion. The exercise was launched after the EDPS was consulted on the need for prior checking but before a formal prior checking submission was made. Therefore, this prior checking procedure is now carried out and the EDPS recommendations need to be implemented ex post. For the future, the EDPS calls OHIM's attention to the fact that the opinion of the EDPS should, as a rule, be *requested and given* prior to the start of any processing of personal data.

Pursuant to Article 27(4) of the Regulation, this opinion must be delivered within two months, discounting any periods of suspension allowed for receipt of additional information requested by the EDPS. The procedure was suspended for 89 days as well as for the month of August 2010. The opinion must therefore be provided no later than 20 December 2010.

3.4. Lawfulness of the processing (Article 5(a) and (d) of the Regulation). The notification suggests that the processing is based on the dual legal basis described in Section 2.3 above.

With respect to Article 5(a), the EDPS does not question that the "empirical analysis" exercise may be useful for the performance of the tasks of OHIM. With that said, during the prior checking exercise it was not demonstrated that this exercise would be, strictly speaking, "necessary" for the performance of the tasks of OHIM. Therefore, the EDPS welcomes that participation in the exercise is entirely voluntary with no adverse consequence on any OHIM employee who refuses to participate. The EDPS particularly welcomes that any refusal to participate in the exercise is kept confidential by the analyst, and not recorded or disclosed to others, such as work colleagues or supervisors. Considering these circumstances, and subject to recommendations and safeguards noted elsewhere in this opinion, the EDPS takes note that the consent is "freely given", "specific" and "informed" in the meaning of Article 2(h) of the Regulation. The EDPS therefore finds consent as sufficient legal basis in the present case, without further justification on the necessity of the exercise.

With that said, for any possible similar exercises in the future, the EDPS draws the attention of OHIM to the position of the Article 29 Working Party with regard to consent in the employment context¹³. The Article 29 Working Party takes the view that where consent is required from an employee, and there is a real or potential relevant prejudice that arises from not consenting, then the consent cannot be considered to be freely given and therefore, it cannot be considered valid.

3.6. Data quality (adequacy, relevance, proportionality, fairness, lawfulness, purpose limitation, accuracy: Articles 4(1)(a),(b)(c) and (d)).

Considering the strictly voluntary nature of participation, and the possibility to opt out of responding to any of the questions, the EDPS does not find the amount of the data collected excessive. More generally, the EDPS is also satisfied with the design of the exercise for purposes of data quality, and has not detected any compliance problems that should be investigated further.

As to purpose limitation, the EDPS emphasises that neither the analyst nor any other potential recipients should use any of the personal data for any purposes not specified at the time when requesting consent from the participants. In particular, the personal data should not be used in any way so as to individually affect the participants.

¹³Opinion 8/2001 of 13 September 2001 on the processing of personal data in the employment context, Article 29 Data Protection Working Party (ref: WP48).

3.7. Retention of data (Article (4)(1)(e)). With regard to retention, the EDPS welcomes the measures described in Section 2.9 which are to be taken prior to the end of 2011. These measures, first, allocate random code numbers and delete all direct identifiers. Second, the analyst also plans to delete some categories of detailed microdata where it is possible to do so while still retaining the information necessary for the research purposes.

The measures described in Section 2.9 will minimize the retention and disclosure of sensitive information and significantly reduce any risk of prejudice to data subjects for the case of a security breach or misuse (for example, by a third-party researcher to whom the data may be transferred). However, these measures do not entirely eliminate these risks and do not lead to full anonymization.

Therefore, and considering also that OHIM expressed no specific need to retain the microdata, the EDPS recommends that once the analyst finalized the report he prepares for OHIM with his findings (in a fully anonymized format, as discussed above), OHIM should no longer hold any personal data regarding the exercise. This may be accomplished, for example, by ensuring that all personal data will be deleted from OHIM servers and transferred (in a secure manner) to the analyst who will hold them from that time on uniquely in his capacity as the author of the PhD research and for purposes of his PhD thesis. Hardcopies should be similarly securely destroyed or transferred.

As part of this exercise, any and all microdata that the analyst plans to retain after application of the anonymization techniques and measures described in Section 2.9 above under paragraphs (a) to (f) should be removed from OHIM's servers (and file cabinets). This includes, in particular,

- a) any hard-copies or electronic entries of the individual data noted on the personality questionnaires, abstract reasoning tests, emotional intelligence questionnaires, daily questionnaires, and case questionnaires;
- b) any other personal data collected from the various information sources such as time sheet data and data available from OHIM's core business systems; as well as
- c) any remaining personal data from "acculturation questionnaires" or CVs.

As noted in Section 3.1 above, the EDPS recommends that the analyst, in his individual capacity (rather than as acting on behalf of OHIM) should also consider further, under the national law applicable to it, and possibly, by contacting his national or sub-national data protection authority, what other measures he should take to ensure that the microdata he plans to retain himself once OHIM has deleted all data from its servers are kept to what is strictly necessary for the research purposes foreseen (including his own research and any third party research). Such measures should further reduce, to the extent possible, the risk that sensitive data may be disclosed about the participants.

For example, once an individual's personality, emotional intelligence or abstract reasoning skills are assessed via the questionnaires, there should be no reason why that individual's answers to particular questions on the questionnaire should need to be retained (e.g. "*I get irritated easily*" or "*It is not at all true that I have not broken a law of any kind*"). When taken together, these answers disclose very personal details, and as long as anonymization cannot be fully guaranteed at this level of detail (considering also the small number of participants), there is a risk that this data, if falls into the wrong hands, can be misused. Therefore, the analyst should assess whether in addition to the acculturation questionnaire, the personality

questionnaire, the abstract reasoning test, and the emotional intelligence questionnaire should also be securely destroyed by the end of 2011.

If the analyst wishes to keep copies of the questionnaires as proof that the research has actually been carried out, it is possible that this may be acceptable under applicable law for a limited period of time (for example, until the analyst's PhD thesis is finally accepted and his title granted). After this period the questionnaires should be securely destroyed. The destruction should include not only the paper forms themselves but also any detailed data entered from them in an electronic form.

The analyst should also consider whether applicable law limits retention of conclusions on an individual's personality, emotional intelligence or abstract reasoning skills. For example, a data protection authority may find that these could only be retained for a longer period of time in a summary form and in relevant part only, rather than preserving a detailed psychological profile of the participants indefinitely.

As best practice, the analyst should also assess the possibilities to use further anonymization techniques with respect to the part of the microdata which may be preserved for a longer period. For example, the age of participants should not be referred to by birth dates or by exact years of birth, rather by age ranges (e.g. 35 to 40).

It is for the analyst to verify whether applicable national law allows retaining the remaining data for a longer period of time for additional research purposes. Factors that are also likely to be relevant under national law in this regard include

- a) whether adequate "anonymization techniques" are used to limit the risks of identification of the participants and whether
- b) access to the data remains limited and secure.

3.8. Recipients and data transfers. The EDPS welcomes the fact that the scope of the recipients of the data is limited to those identified in Section 2.

The data were collected based on the "*freely given*", "*specific*" and fully "*informed*" consent of the participants (assuming that OHIM follows the recommendations set forth in this opinion). The dual purposes of the exercise and the use of the data for purposes of the analyst's PhD thesis have been (and will be further) explained to the participants.¹⁴

With regard to potential transfers of any microdata to other researchers for research purposes, the EDPS first emphasises that OHIM should no longer retain any microdata that might be of use to researchers after the end of 2011, as recommended in Section 3.7 above. Therefore, the issue of potential transfers to researchers should only be relevant to the analyst, acting in his individual capacity and subject to his national law, upon advice, as necessary, from his own national or sub-national data protection authority.

Under his national data protection law, the analyst should find an appropriate legal ground for the transfer of the data to third party researchers. As best practice, transfers to third party researchers should take place subject to the "freely given", "specific" and "informed" consent of the participants of the survey. This entails that the information provided to the data subjects (see Section 3.10 below) should clearly specify the potential transfers by the analyst of micro-

¹⁴ The analyst also confirmed to the EDPS that the participants may, if they do desire, withdraw their consent in light of the further clarifications, even if they have previously agreed to participate in the exercise.

data to researchers and the conditions thereof (including data protection safeguards applied or required) and the participants should specifically agree to this possibility.

Further safeguards should be in place to ensure that the data disclosed remain confidential and will only be used for genuine research purposes. These safeguards are necessary to ensure the privacy of the data subjects concerned so long as the data disclosed to third parties are not fully "anonymous" and there is a risk that the participants might be indirectly identified.

Transfers should be made (unless otherwise agreed) for genuine non-commercial research purposes only. The researchers should safeguard the confidentiality of the data and not publish the microdata or other further processed data that may still lead to identification of the participants. They should also only use the data for the specified research purposes and not, for example, to make any attempt to identify the individuals who participated in the exercise or to take any measures concerning them as individuals.

The applicant third party should specify a research purpose, the identity and the credentials of the researcher should be checked (e.g. whether he or she is affiliated with a research institute), and the applicant should sign a confidentiality undertaking. This should limit use to the research purposes specified, limit further disclosure and specifically prohibit publication of any data which is not fully-anonymized. The security of the data should also be ensured (e.g. by encrypting data which are provided on a media support). It should also be noted that researchers will be subject to their own national law for any processing taking place after transfer, including any provisions on supervision, liability and enforcement.

In addition, the EDPS reminds the analyst that any international data transfers may only take place subject to informed consent or other strict conditions under national law.

3.9. Right of access and rectification (Article 13). Considering the small number of participants, and the fact that OHIM's data protection implementing rules (OHIM President's Decision No ADM-08-40) already provide basic safeguards, the EDPS finds it adequate that access is granted upon simple request and there are no specific procedures set forth for this purpose.

3.10. Information to the data subject (Articles 11 and 12). Articles 11 and 12 of the Regulation require that certain information be given to data subjects in order to ensure the transparency of the processing of personal data.

The EDPS welcomes that the presentation to the participants mentioned in Section 2.7 provided information on data protection in a clear and user-friendly way. In terms of content, the EDPS welcomes that information was provided regarding the use of code-words, random participant numbers, confidentiality, and the voluntary nature of the exercise (including the opportunity to stop participating in it and the possibility to opt out of individual questions). The EDPS also welcomes that the analyst informed the participants verbally at the time that the EDPS was also consulted and a proceeding before him is pending.

The EDPS recommends that the information provided to the participants would be complemented with the following:

- further clarifications about the (dual) purposes of the exercise and the fact that the analysts acts both on behalf of OHIM and in his personal capacity;
- disclosure of the fact (if this has not yet been done) that the findings of the exercise will be made public in a PhD thesis;

- disclosure that the services of an assistant might be used for data entry from the questionnaires;
- information that the EDPS has issued this opinion and that the participants have, at any time, right of recourse to the EDPS with respect to any aspect of the processing when the analyst acts on behalf of OHIM (similar information may be required under national law to refer to national or sub-national data protection authorities);
- information about the conservation period, including the fact that microdata that might potentially indirectly lead to the identification of the participants (despite the anonymization techniques used) may be retained by the analyst for a longer period (and information about the deletion of all personal data from OHIM servers before the end of 2011);
- information about potential transfers by the analyst of microdata to researchers and the conditions thereof (including data protection safeguards applied or required);
- information about the right of access to the data and the right of rectification.

Considering the limited number of participants, a simple email sent to all participants discussing these items, or circulation of an updated version of the initial slide presentation on "data protection and data usage" may be sufficient. We recommend that a link to this opinion on our website should also be provided for further information.

3.11. Security measures (Article 22). The EDPS has two specific further recommendations on security aspects: First, access by OHIM's IT administrator should be prevented by encrypting the dedicated folder on OHIM's server where the data related to the exercise is kept. Second, when transferring the data to the analyst in his personal capacity, specific attention should be made to security aspects: any data on OHIM servers should be securely and irrevocably destroyed and any transfer to the analyst should be made in a secure way (for example, on an encrypted media support).

Conclusion

The EDPS finds no reason to believe that there is a breach of the provisions of the Regulation provided that the recommendations in Section 3 are implemented, namely:

- **Retention of data**

All personal data from OHIM's servers should be deleted by the end of the conservation period which was foreseen for the end of 2011. As for data retention by the analyst, further efforts may be necessary under national law to ensure that the microdata retained for a longer period of time for potential future research purposes should be limited to what is strictly necessary for such purposes.

- **Transfers to third parties**

Considering deletion of all data from OHIM servers by the end of 2011 and the fact that OHIM has no plans to further transfer the data, this issue is limited to potential transfers of any microdata by the analyst for research purposes. In this respect the EDPS calls the attention of the analyst to assess, under applicable law, what safeguards should be in place to ensure that the data disclosed remains confidential and will only be used for genuine research purposes.

- **Information to data subjects**

Additional information should be provided on some remaining items to the participants.

Done in Brussels, on 22 November 2010

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor