



## **Prior Checking Opinion**

**"Peer Feedback Questionnaire at OHIM"  
Case 2015-0733**

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**In human resources, there are different ways of evaluating people performance. One way is to organise multi source assessment where feedback comes from members of an employee's immediate work environment. The purpose is to improve the employer's organisational efficiency and teamwork. It involves the processing of employees' personal information and must therefore comply with data protection principles. In particular, if the procedure is voluntary, the employee's consent must be a genuine free choice which covers all stages of the process.**

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Brussels, 24 November 2015

## 1. Proceedings

On 11 September 2015, the European Data Protection Supervisor ("EDPS") received a notification for prior checking from the Data Protection Officer ("DPO") of the Office for Harmonization in the Internal Market (OHIM) on the "Peer Feedback Questionnaire".

According to Article 27(4) of Regulation 45/2001 (the "Regulation") this opinion must be delivered within a period of two months, not counting suspensions for requests for further information<sup>1</sup>, in other words 27 November 2015.

## 2. The facts

The **purpose** of the processing is to offer statutory staff (peers) at OHIM a possibility to perform self-perception assessment and to provide feedback about the peers within their functional team. The processing operation will also contribute to improve OHIM's organisational efficiency and team work. This will be carried out by collecting information about the staffs strengths and weaknesses through a questionnaire completed by the staff themselves. Participation in this exercise is voluntary for the staff. OHIM has stated that there are no negative consequences of choosing not to participate and that the information collected will not be used in any form of evaluation (appraisal) process of the persons involved.

The **personal information processed** are names, email addresses, group of respondents the staff belongs to, department/service/team and replies to the survey in the form of scores given to the different statements according to a defined scale. The feedback reports mentioning strengths and areas for development.

**Information** on how OHIM process the participants' personal information will be provided to the staff before OHIM will launch the peer feedback questionnaire. Staff will also receive information by e-mail with a link to the **privacy statement** which is published on OHIM's webpage.

The notification states that personal information will be **disclosed** to the system administrator and a limited number of authorized staff (internal and external) that administrates the IT systems. Furthermore, persons specifically designated within the Staffing, Development and Recognition Service ('HRD') to organize the peer feedback questionnaire will have access to aggregated data of the feedback reports. Participating employees will only have access to their self-assessment questionnaire and to the feedback provided by their colleagues within their functional team and the reports corresponding to their position. Managers will have access to aggregated data for departments/services/teams and the top management will have access to the aggregated data of each department at OHIM.

The **conservation period** of the individual contributions of the participants will be kept for a period of 12 months after the exercise is completed and when the results of the peer feedback have been completely analysed and the framework report produced. Team reports will be deleted no later than 2 years after the results have been delivered.

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<sup>1</sup> The case was suspended for information from 18 September 2015 to 22 September 2015, from 21 October 2015 to 22 October 2015 and for comments of the DPO from 9 November 2015 to 19 November 2015.

Regarding **security measures**, the information gathered during the process will be highly confidential. Access to the personal information as well as all information collected in the context of the peer feedback survey is only granted through User ID/Password to a defined population of users. The information is stored in Allegro (HRIS) according to the security measures of the OHIM information systems. The information is password protected under a single sign-on system and automatically connected to the user ID.

### **3. Legal analysis**

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

The processing of personal data is performed by an agency of the European Union. Furthermore, the processing is partly done through automatic means. Therefore, the Regulation is applicable.

This processing activity is subject to prior checking since it presents specific risks. In particular, OHIM will carry out an evaluation of the staffs strengths and weaknesses.<sup>2</sup>

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

OHIM has stated that the processing of personal information is based on Article 5(a)<sup>3</sup> and (d)<sup>4</sup> of the Regulation.

The legal basis for the processing operation assessed is Article 24(a) of the Staff Regulations, according to which *"The Union shall facilitate such further training and instruction for officials as is compatible with the proper functioning of the service and is in accordance with its own interests"*. It is also in line with Recital 27 of the Regulation, according to which processing of personal data for the performance of tasks carried out in the public interest *"includes the processing of personal data necessary for the management and functioning of those institutions and bodies"*.

Regarding OHIM's reference to Article 5(d) as a ground for lawfulness, the data subject's consent is defined in Article 2(h) of the Regulation as *"any freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed"*. The EDPS stresses, considering the definition, that consent would only be given in exceptional circumstances in an employment relationship when the employee has a genuine free choice and is subsequently able to withdraw the consent without detriment.<sup>5</sup>

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<sup>2</sup> Article 27 of the Regulation subjects to prior checking by the EDPS processing activities likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes. Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks including under point (b) processing intended to evaluate personal aspects relating to the data subject, including his or her conduct.

<sup>3</sup> Personal data may be processed only if 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 adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body or in a third party to whom the data are disclosed.

<sup>4</sup> Personal data may be processed only if the data subject has unambiguously given his or her consent.

<sup>5</sup> Article 29 Data Protection Working Party Opinion 8/2001 of 13 September 2001 on processing of personal data in the employment context.

Participation in the Peer Feedback Questionnaire is voluntary without negative consequences of choosing not to participate. According to the documents OHIM has provided this will clearly be presented to the staff. In light of this, the processing appears to be lawful in accordance with Article 5(a) and (d) of the Regulation.

Furthermore, consent may be revoked at any time during and after the exercise. This free choice should apply to the whole process. Therefore, the Software Requirements Specification and the privacy statement should clearly define **that consent covers all stages** of the process (including team reports).

### **3.3. Information to individuals**

OHIM mentions that managers and top management will receive a final report comparing the average obtained by each team within his/her department for each statement of the questionnaire. However, in the privacy statement this is only mentioned under paragraph 3 on access and disclosure. As EDPS understands it, the **generation of team reports** is part of the purpose of the processing and therefore this **should be clarified** in the privacy statement (paragraph 1).

With regard to the procedures for data subjects to exercise their rights of access, rectification and others, it is good practice to include information in the privacy statement of any time limits for requests and responses (e.g. 3 months for access request, without delay for rectification, etc.).

### **Conclusion**

The EDPS considers that there is no reason to believe that there is a breach of the provisions of the Regulation provided that the considerations contained in this Opinion are fully taken into account. In particular, OHIM should:

- add information to the Software Requirements Specification and the privacy statement that consent covers all stages of the processing operation;
- clarify in the privacy statement that generation of team reports for the managers are part of the purpose for which the information will be processed.

The EDPS expects OHIM to implement the recommendations accordingly and will therefore **close the case**.

Thank you for your cooperation.

Yours sincerely,

**(signed)**

Wojciech WIEWIÓROWSKI