



EUIPO
Ex-ante product quality audits (trademarks and designs)
Prior Checking Opinion
Case 2016-0477

Organisations such as EUIPO ensure the quality of their output in different ways. One such way is checking the quality of decisions before it leaves the organization (*ex-ante*), recording the error rate and trends in the type and category of errors - and using a database to record this monitoring process.

As staff members remain identifiable in the process and are given feedback at individual level on the basis of this processing operation, this might lead to implications for their performance evaluation (on such processing operations, see EDPS Guidelines in the area of staff evaluation¹). This is why the organization needs to comprehensively inform those concerned, grant all data subjects' rights and ensure the accuracy of the data processed.

Brussels, 15 February 2017

¹ https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/11-07-15_Evaluation_Guidelines_EN.pdf

1) The Facts

The processing operation aims at checking the quality of decisions, communications or tasks produced by examiners in EUIPO's Operations Department² before they are finalized (i.e. ex-ante). Quality checkers examine the products in the light of the same quality criteria as for ex-post checks (case 2010-0869³).

The quality checkers inform the examiners about the results and of any immediate correction or improvement needed before finalizing the product. In addition, when required, global measures to improve quality/error rates will be taken, for example conducting general training in certain problematic areas or clarifying instructions. General anonymised results (error rates) per area are published on the Operations Department's Quality page (EUIPO intranet) every other week.

According to EUIPO, "the purpose of the ex-ante checks is not to evaluate the work of individual examiners" and EUIPO "does not intend to use this information in the context of individuals evaluation/appraisal exercise". However, the quality checker will give feedback to the examiner whenever an error was detected, in order to prevent repetition of the same error in the future and to prevent any erroneous decisions, letters and related actions in individual cases.

Basic information about all the ex-ante checks, such as the file number, area checked, date of entering status checked, quality level, type and category of errors made or good quality examples is introduced into an "Access database". The examiner's name will not be recorded, but, as noted in the cover letter accompanying the notification, through the file number and the type of decision, letter or task checked, it is indirectly possible to identify the examiner involved.

According to a draft data protection notice, this information will be kept for 15 months (whereas the notification refers to a retention period of two years), allowing to compare the results of the ex-ante checks with the ex-post quality check. Data deletion at the end of the conservation period is done manually by the data miners.

(...)

² The different areas where ex-ante checks take place are Cancellation Decisions, Opposition Decisions, Invalidation design decisions, EUTM Classification refusals, IR Classification refusals and RCD refusals.

³ See EDPS Opinion of 9 June 2011:

https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Priorchecks/Opinions/2011/11-06-09_OHIM_EN.pdf

2) Legal analysis

This prior checking Opinion⁴ under Article 27 of Regulation (EC) 45/2001⁵ (the Regulation) will focus on those aspects which raise issues of compliance with the Regulation or otherwise merit further analysis. For aspects not covered in this Opinion, the EDPS has, based on the documentation provided, no comments.

a) *Need for prior-checking*

aa) *Not a purely manual processing operation*

Under Article 3(2) of the Regulation, the Regulation “*shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system*”. Although EUIPO in the notification (section 9) qualifies this processing operation as “Manual processing operation”, the EUIPO clarified in a letter dated 8 November 2016 that “*All the entered data are manually keyed in by the Quality Checkers in the Access database, which according to us, constitutes a “Manual processing operation”. Once these data are stored in that database the further processing and in particular, the extraction of data is automated, at least partially, following a technical request completed by the Data Miners. In case of any specific request, the information is to be extracted and analysed manually.*” The processing at hand is thus not purely manual.

bb) *Processing operation intended to evaluate personal aspects relating to the data subject*

This processing operation, which has been operational since 18 January 2016, requires ex-post prior-checking under Article 27(2)(b) of Regulation (EC) 45/2001 (the Regulation), which subjects to prior-checking “*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*”⁶.

Although EUIPO stated in the notification that it does not *intend* to use this information in the context of individuals evaluation/appraisal exercise, the quality checker will give feedback to the individual examiner on the quality of his/her decision. As EUIPO has explicitly clarified in a letter dated 8 November 2016, “*The results of the ex-ante audits processing operation are provided to each and every examiner (data subject) from each and every ex-ante checker (processor) immediately at the end of the each and every check (processing operation)*”.

In order to give such direct and immediate feedback, quality checkers will inevitably need to *evaluate* the work of individual examiners. This evaluation regards the ability and efficiency of each individual examiner to deal with an individual case, thus personal aspects relating to the data subject.

It consequently qualifies this processing operation for prior-checking under Article 27(2)(b) of the Regulation, irrespective of whether the ex-ante evaluation is used in the context of annual

⁴ As this is an ex-post case, the deadline of two months for the EDPS to issues his Opinion does not apply. The notification was received on 25 May 2016. This case has been dealt with on a best-effort basis.

⁵ OJ L 8, 12.1.2001, p. 1.

⁶ In the introduction (p.1) of the EDPS Guidelines in the area of staff evaluation, see https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/11-07-15_Evaluation_Guidelines_EN.pdf define the scope of the Guidelines (“They address the following procedures”). They do not (and could not) restrict the scope of Article 27(2)(b) of the Regulation.

appraisals and independent of the overall purpose and intention stated by the EUIPO in this respect.

cc) Not a mere update of the notification in case 2008-0437

The notification of this processing operation is not a mere update of the notification in case 2008-0437 (“100% Ex-Ante Quality Checks”), as the EDPS had been informed during an inspection conducted in 2012 at the EUIPO (then OHIM) that these previously notified ex-ante checks were abandoned in July 2009 and the database had “recently” disappeared. According to the additional information provided by EUIPO on 8 November 2016, *“this processing was initiated and applied on 18 January 2016, without a notification to the EDPS.”*

There is consequently no continuity between the processing operation at hand and the processing operation notified in case 2008-0437. Also, as pointed out in the cover letter to the notification, unlike the predecessor system of ex-ante quality checks notified in case 2008-0437, in the context of the present processing operation, *“the kept information will never be used for individuals evaluation exercise”*. However, many similarities between both systems of ex-ante quality checks exist. Where applicable, this Opinion will therefore refer to the Opinion issued on the predecessor system of ex-ante quality checks (case 2008-0437)⁷.

As already noted in the EDPS Opinion in case 2008-0437, the EDPS emphasizes that *“since prior checking is designed to address situations that are likely to present risks, the opinion of the EDPS should be requested and given prior to the start of the processing operation, which also means, prior to the start of any pilot periods. Therefore, notifications should be submitted at the planning stage, in such time that considering the time available for the EDPS to issue his Opinion, as well as the eventual time needed for OHIM to fulfil any requests for information, the case could be brought to an end before the processing operations begin. Timely notifications may also help prevent controllers investing efforts and resources in setting up processing operations which will subsequently need to be significantly modified to comply with data protection rules”*.

b) Information to data subjects

Article 12 of the Regulation provides that when the data are not obtained from the data subject, certain elements of information must be given at the time of recording the data, or at the latest, no later than the time when the data are first disclosed.

As already highlighted in the Opinion in case 2008-0437, *“Considering that (i) none of the Article 12 exceptions apply to the facts of the case and that (ii) all items listed in Article 12 (including the legal basis of processing, time-limits for storing the data, and the right of recourse to the EDPS) are necessary to guarantee fair processing, the EDPS is of the opinion that all items listed under Article 12 must be provided in the data protection notice.”*

Whilst the notification did not contain any data protection notice, EUIPO provided a draft data protection notice on 8 December 2016 with a commitment to publish it on the EUIPO intranet.

⁷ This Opinion, dated 22 October 2008, is available at: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Priorchecks/Opinions/2008/08-10-22_OHIM_quality_checks_EN.pdf

The EDPS **strongly recommends** informing the data subjects by means of a comprehensive data protection notice. The EDPS expects to receive documentary evidence of implementation. Next to publication on the EUIPO intranet, the EDPS suggests the inclusion of this data protection notice in the text of the management decision on the processing.

c) Limited data subject rights

Articles 14 to 16 of the Regulation stipulate the rights of the data subject to rectification, blocking and erasure of his/her personal data under certain circumstances. Although the examiner's name will not be recorded in the Access database, as noted in the cover letter accompanying the notification, through the file number and the type of decision, letter or task checked, it is indirectly possible to identify the examiner involved.

According to the notification (section 8), the rights of the data subject to rectification, blocking and erasure are "not applicable" in the context of this processing operation. As EUIPO has clarified in a letter dated 8 November 2016, "*the DPO does not perceive the necessity of any "blocking", "rectification" and/or "erasure" of the data recorded in the Access database*". The following explanation is provided in this context: "*The personal data included in the database does not become final until it is properly communicated by the ex-ante checker to the examiner and "accessed" by him/her first.*"

As noted in the Guidelines on the Rights of Individuals with regard to the Processing of Personal Data⁸ (p. 19), a distinction has to be made between objective/hard data and subjective/soft data when granting the right to rectification. Whilst inaccurate "hard data" should be rectified following Article 14 of the Regulation, inaccurate "soft data" can only relate to the fact that specific statements have been made by the data subject (which then again is a *factual* statement which can be rectified). Additionally, in the case of soft data, to ensure the completeness of a file, data subjects may also ask to add their opinion to it. Regarding subjective data, the requirement of accuracy cannot appertain to the accuracy of a particular statement (*subjective* data, i.e. not accurate or inaccurate as such), but merely to the fact that a particular statement has been made.

The communication by the ex-ante checker to the examiner, however, has no influence on the *existence* of the data subject's rights under Articles 14 to 16 of the Regulation⁹. Article 20 of the Regulation foresees a restriction of such data subjects' rights only in specific circumstances, which have not been invoked by EUIPO.

On 8 December 2016, EUIPO provided a draft data protection notice with a commitment to publish it on the EUIPO intranet, which refers to the rights of the data subject to rectification, blocking and erasure of his/her personal data under Articles 14 to 16 of the Regulation.

⁸ https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/14-02-25_GL_DS_rights_EN.pdf

⁹ See Guidelines on the Rights of Individuals with regard to the Processing of Personal Data, p. 9, available under https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/14-02-25_GL_DS_rights_EN.pdf: In a case (2010-0869) regarding a database containing evaluation results, the EDPS noted that in order to ensure the accuracy and completeness of the data, an informal process by which data subjects could contest assessments made was insufficient and recommended that the EU institution clearly inform the data subjects of their rights to contest the accuracy of the data, and to rectify them.

The EDPS **strongly recommends** effectively guaranteeing the rights of the data subject to rectification, blocking and erasure stipulated Articles 14 to 16 of the Regulation in the context of this processing operation and to inform the data subjects respectively by means of a comprehensive data protection notice. The EDPS expects to receive documentary evidence of implementation.

d) Conservation of data

The general principle in Regulation is that personal data may 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 (Article (4)(1)(e) of the Regulation).

According to a draft data protection notice, this information will be kept for 15 months (whereas the notification refers to a retention period of two years), allowing to compare the results of the ex-ante checks with the ex-post quality check.

For the predecessor system of ex-ante quality checks notified in case 2008-0437, information was kept for a period of 15 months in the MS Access Database - Ex-ante Quality Check Tool. EUIPO (OHIM at the time) explained that the length of the conservation period is linked to the appraisal system, with data “*designed to be kept in the database as long as necessary to allow (i) management to use the data during the annual appraisals, and (ii) staff to eventually use the data to launch appeals against the appraisal decisions*”. The EDPS found this 15 months conservation period adequate and welcomed that the data will not be deleted until after the deadline for appeals against the appraisal decisions has passed.

According to EUIPO, the purpose of the present ex-ante checks “is not to evaluate the work of individual examiners” and EUIPO “does not intend to use this information in the context of individuals evaluation/appraisal exercise”. According to the notification of the processing at hand, the retention period is two years so as to allow for comparison between the results of the ex-ante checks with the ex-post quality checks.

On 8 December 2016, EUIPO provided a draft data protection notice with a commitment to publish it on the EUIPO intranet, which refers to a retention period of 15 months.

The EDPS **recommends** the implementation of a 15 months retention period as foreseen in the draft data protection notice.

In addition, the EDPS **suggests, as an improvement**, moving from manual data deletion by the data miners at the end of the conservation period to automated deletion as applied for the predecessor scheme in case 2008-0437.

e) Communication in an intelligible form of the data undergoing the processing

According to Article 13(c) of Regulation 45/2001, the data subjects have the right to obtain from the controller, without constraint, communication in an intelligible form of the data undergoing the processing and any available information as to their source.

The notification (section 13) stipulates a time limit of three months for providing access under Article 13 of the Regulation. As already noted in the Opinion in case 2008-0437, “*...as regards the time limits for providing access, the EDPS finds the current three-months period excessive,*

considering...the ease with which data can be provided (push of a button should be sufficient to generate the necessary individual reports)”.

The EDPS **recommends** shortening the time limit of three months for providing access under Article 13 of the Regulation to two weeks and suggests referring to this shortened time limit in the data protection notice.

3) Recommendations and suggestions for improvement

In this Opinion, the EDPS has made several recommendations to ensure compliance with the Regulation, as well as several suggestions for improvement. Provided that both major and minor recommendations are implemented, the EDPS sees no reason to believe that there is a breach of the Regulation.

For the following **major recommendations**, the EDPS expects **implementation and documentary evidence** thereof within **three months** of the date of this Opinion:

1. Ensure that data subjects are informed by means of a comprehensive data protection notice; next to publication on the EUIPO intranet, the EDPS suggests the inclusion of this data protection notice in the text of the management decision on the processing;
2. Effectively guarantee the rights of the data subject to rectification, blocking and erasure stipulated Articles 14 to 16 of the Regulation and inform the data subjects respectively by means of a comprehensive data protection notice.

For the following **minor recommendations**, the EDPS expects **implementation**, but does not require documentary evidence:

3. Implement a 15 months retention period as foreseen in the draft data protection notice and revise the notification accordingly;
4. Shorten the time limit of three months for providing access under Article 13 of the Regulation to two weeks and refer to this shortened time limit in the data protection notice. Additionally, the EDPS suggests moving from manual data deletion by the data miners at the end of the conservation period to automated deletion as applied for the predecessor scheme in case 2008-0437.

Done at Brussels, 15 February 2017

(signed)

Wojciech WIEWIOROWSKI