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Subject: Prior-check Opinion on EUIPO Whistleblowing Procedure - Case 2016-1056

On 16 November 2016, the European Data Protection Supervisor (“EDPS”) received a notification for prior checking relating to the Whistleblowing procedure from the Data Protection Office of the European Union Intellectual Property Office (“EUIPO”) under Article 27 of Regulation (EC) No 45/2001 (the “Regulation”).

According to Article 27(4) of the Regulation, this Opinion must be delivered within a period of two months, not counting suspensions for requests for further information¹. Since the EDPS has issued Guidelines on how to process personal information within a whistleblowing procedure², the description of the facts and of the legal analysis will only mention those aspects which differ from these Guidelines or otherwise need improvement. For aspects not covered in this Opinion, the EDPS has, based on the documentation provided, no comments.

Description and assessment

1. Legal basis and lawfulness

According to the notification, the legal basis for the processing operation is Article 5(a) of the Regulation, Articles 22a, 22b and 22c of the Staff Regulations and Article 11 and 81 of the Conditions of Employment of Other Servants, European Commission’s Guidelines applied by analogy to EUIPO and Communication from the Executive Director to staff for reporting serious irregularities “whistleblowing”.

¹ The case was suspended from 23 November 2016 to 26 January 2017 and for comments from the DPO from 13 March 2017 to 24 March 2017. The EDPS shall thus render his Opinion no later than 3 April 2017.

² Available on the EDPS website on the following link:

https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/16-07-18_Whistleblowing_Guidelines_EN.pdf

In relation to the Commission's Guidelines on Whistleblowing, the EUIPO has explained that they were informed that the Commission was considering modifying their Guidelines but they eventually decided not to proceed with any revision for the time being. As a result, the EUIPO does not consider that they will receive the Commission rules to be able to apply them by analogy in the near future and has therefore decided to publish, as a transitional message, a communication referring to the Guidelines of the Commission. This does not, however, serve as a proper legal basis for the processing activity. Even though the Guidelines of the Commission address certain important issues to be considered, it does not explicitly refer to the reporting channels of EUIPO and other aspects that is specific for EUIPO, as a controller of the processing activity. **The EUIPO should therefore ensure that there is a specific legal basis, i.e. an internal decision regarding EUIPO whistleblowing procedure, adopted by the Executive Director. The notification and privacy statement (which would be more appropriate to designate as a 'data protection statement') should be amended in this regard.**

2. Ensure confidentiality of all persons implicated in a whistleblowing report

The EDPS welcomes the fact that EUIPO will treat the identity of the whistleblower with the outmost confidentiality³. In this regard, the EDPS stresses that preserving the confidentiality of whistleblowers, the accused persons and the third parties are of utmost importance. The reasons why the confidentiality of the accused person should be protected in the same manner as the whistleblower is because of the risk of stigmatisation and victimisation of that person within the organisation to which he/she belongs. The person will be exposed to such risks even before he/she is aware that he/she has been incriminated and the alleged facts have been investigated to determine whether or not they are substantiated. **The EUIPO should therefore include information on the protection of the accused person in the future internal decision on Whistleblowing.**

One way of ensure confidentiality is to limit the access to the reports. In the notification, potential recipients are mentioned as: an experienced staff member appointed to offer guidance and support to the whistleblower, the hierarchical superior concerned, the Director of the HRD, the Executive Director, the Deputy Executive Director, the President of the Boards of Appeal and a limited number of staff members of the Legal Service/HRD/IT Services/Security Services authorized of handling the file, as well as other staff members responsible for the follow-up action that are to be designated by the Executive Director.

Internal access to the information processed must be granted on a strict need-to-know basis. The EDPS points out that it is crucial to keep as few people as possible involved in order to protect the confidentiality of personal information processed within a report. For example, **it should be up to the whistleblower to decide whether he/she would like to share information with the staff member appointed to offer guidance and support.**

In addition, the notification mentions under recipients the person against whom the allegation has been made, the whistleblower, witnesses, third parties and his/her advisers. Since the EUIPO will treat the identity of the whistleblower with the outmost confidentiality except in certain exceptional circumstances (see footnote 3) the person against whom the allegation has been made should not be considered as a recipient of the personal information. The other categories mentioned should neither be considered as recipients on regular basis, in particular not third parties. **EUIPO should therefore remove this part from the notification and clarify the meaning of confidentiality in the future internal decision along the above lines.**

³ Except if the whistleblower authorises such a disclosure, if this is required by any subsequent criminal law proceedings, or if the whistleblower maliciously makes a false statement.

3. Information to data subjects

Articles 11 and 12 of the Regulation impose information obligations on controllers that differs depending on whether the data have been collected directly from the data subject (Article 11) or from another source (Article 12). The EDPS welcomes the fact that EUIPO intend to inform the data subjects in a two-step procedure. The data protection statement will be published on the website and intranet of EUIPO and persons affected by a particular whistleblowing procedure will be provided with the data protection statement as soon as practically possible (unless Article 20(1) of the Regulation applies).

However, the data protection statement does not inform the data subject about the reporting channels as such. It is with other words not clear to the data subject where to turn in case they come across a behavior covered by the scope of the procedure. **The EUIPO should therefore include information about the reporting procedures in the future internal rules on whistleblowing and clarify this in the data protection statement.**

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In this Opinion, the EDPS has made recommendations to ensure compliance with the Regulation. Provided that the recommendations are implemented, the EDPS does not see any reason to believe that there is a breach of the Regulation. The notification should be updated accordingly.

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

1. Ensure that there is a specific legal basis, i.e. an internal EUIPO decision or agreement, adopted by the Executive Director and amend the notification and data protection statement accordingly;
2. Make clear in the internal rules that the identity of the accused person also should be protected;
3. Clarify that it is up to the whistleblower to decide whether he/she would like to share the information with the staff member appointed to offer guidance and support;
4. Remove the accused person from recipients of the information and clarify the meaning of confidentiality in the internal rules;
5. Add information to the internal decision about the reporting procedures and clarify in the data protection statement to whom a report should be sent.

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc: Data Protection Officer