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Subject: Opinion on the procedure for renewal of temporary and contract agent's contracts at EUIPO, your reference: DPN-2017-008

Dear [...],

I refer to the ex-post notification you have sent to the European Data Protection Supervisor (EDPS) on 2 March 2017 for prior checking under Article 27 of Regulation (EC) NO 45/2001¹ ("the Regulation"), regarding the processing operation "*Procedure for renewal of temporary and contract agent's contracts at EUIPO*" from the European Intellectual Property Office (EUIPO).² On 18 May 2017 the EDPS has sent a request for further information to the EUIPO's Data Protection Officer (DPO). EUIPO's DPO answered on 28 June 2017 and on 5 July 2017 the DPO provided further clarifications over the phone.

The EDPS has issued Guidelines concerning the processing of personal data for staff evaluation ("the Guidelines").³ Therefore, this Opinion analyses and highlights only those practices which do not seem to be in conformity with the principles of the Regulation and with the Guidelines. In the light of the accountability principle guiding his work, the EDPS would nonetheless like to highlight that *all* relevant recommendations made in the Guidelines apply to the processing operations put in place for the renewal of temporary and contract agent's contracts at EUIPO.

¹ OJ L 8, 12.1.2001, p. 1.

² Ex-post: As this is an ex-post case, the deadline of two months does not apply. This case has been dealt with on a best-effort basis.

³ EDPS Guidelines concerning the processing of personal data in the area of staff evaluation July 2011, page 2 section 1, available at: https://edps.europa.eu/sites/edp/files/publication/11-07-15_evaluation_guidelines_en.pdf.

1) Facts

The notification is accompanied by the following documents:

- Framework for the Workforce management in OHIM, dated 28/01/2016;
- Guidelines for the renewal of temporary agent contracts at the OHIM, dated 28/01/2016;
- Guidelines for the use and selection of contract agents at EUIPO - QSD-0083, dated 18/05/2016;
- Procedure for first renewal or non-renewal of contracts (Temporary or Contract agents), QSD-0060, dated 20/04/2016;
- Data Protection Privacy Statement;
- Form renewal Non-renewal Contract (applicable for first renewal procedure).

The ground for lawfulness of the data processing operation is Article 5(a) of the Regulation. The processing of personal data is considered as necessary for the Human Resources Department of EUIPO (HRD) to evaluate if the contracts of contract and temporary agents should be renewed. The renewal of the working contract for temporary agents is based on Article 8 of the Conditions of Employment of Other Servants of the European Union (CEOS) and the renewal of the working contracts for contract agents is based on Article 85 of the CEOS. The procedure for dealing with the renewal of working contracts of temporary and contract agents is based on the rules of the CEOS and EUIPO's guidelines.

The processing operation has been notified under Article 27(2)(b) of the Regulation, which refers to *"processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct"*. In order to take decisions on the renewal of working contract for temporary and contract agents within the framework for the workforce management, the HRD of EUIPO evaluates the performances of the temporary and contract agents. The evaluation of performances should be considered as the evaluation of personal aspects in the light of Article 27(2)(b) of the Regulation.

2) Legal Analysis

2.1) Conservation periods

Article 4(1)(e) of the Regulation provides that personal data must 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."*

According to the information provided by EUIPO, all letters and notes exchanged between the Authority Authorized to Conclude Contracts of employment (AACC) and the staff members are kept in the personal file, see point 13 of the notification. According to EUIPO these letters and notes are processed in accordance with "Guidelines for the renewal of temporary agent contracts at the OHIM, dated 28/01/2016", in particular annex 1 and contribute to the final decision.

According to the notification, the EUIPO has established 2 conservation periods: 1) the working documents (e-mails, letters and notes) are kept by the EUIPO for 5 years after the (non-)renewal decision, 2) the renewed contract and all letters and notes exchanged are kept in the personal file for at least 120 years from the staff member's date of birth.

Firstly, regarding the conservation period of 5 years for the working documents after the (non-)renewal decision, **the EDPS has no comments regarding this conservation period since it seems to be reasonable.**

Secondly, concerning the conservation of “all letters and notes exchanged”⁴ in the personal file for a period of at least 120 years after the staff member’s date of birth, the EDPS is not convinced of the necessity of such a lengthy conservation period for these supporting documents. As also mentioned in the EDPS Guidelines (section 4), such a conservation does not correspond to the specific purposes for which the data were collected and/or further processed, i.e. the accomplishment of the (non-)renewal of the contract. Besides, there is a possibility that the storage by EUIPO is of no interest/relevance since it was collected for the purpose of (non-)renewal of the working contract and therefore the processing could be excessive.⁵ Indeed, once the (non-)renewal decision becomes definitive, it is less relevant to keep all the supporting documents including the personal data, since they reflect a situation at a given time. Besides, the EUIPO informed the EDPS that HRB keeps all the letters and notes in case a former employee wants to challenge the decision for non-renewal in court. The EDPS reminds the EUIPO of the fact that the time limits for challenging the renewal decision through a complaint under Article 90 of the Staff Regulations, the Ombudsman or before the EU Courts elapse well before 5 years. **In this respect, the EDPS recommends that EUIPO reduces the data conservation period for “all letters and notes”. For example, EUIPO could apply the same data conservation period of maximum 5 years after the decision of the ACCC on the (non-)renewal of the contract as mentioned for “working documents (see above).**

Thirdly, concerning the conservation period of the (non-)renewed contract itself, EUIPO keeps this document in the personal file for at least 120 years after the staff member’s data of birth. In light of Article 4(1)(e) of the Regulation, the EDPS has always considered the conservation period of at least 120 years from the staff member’s date of birth as excessive and unnecessary to the purpose for which personal data are collected and further processed. The EDPS considers in the Guidelines that the contract should be kept for maximum up to ten years after the termination of the employment (or the last pension payment).⁶ The EDPS acknowledges that the issue of the conservation period of personal files, which are determined by the European Commission’s Retention List⁷, is a pending issue subject to on-going discussions between the EDPS and the EU institutions. In the light of this, **the EDPS invites EUIPO to provide justifications for this conservation period (to be taken into account in these discussions) or to set up a maximum conservation period of 10 years after the termination of the employment.**

The EDPS recommends that EUIPO:

- 1. Reduces the data conservation period for “all letters and notes”. For instance, the conservation period can be reduced in line with the conservation period of 5 years concerning the working documents.**
- 2. Provides justifications for this conservation period (to be taken into account in the general discussions) or reduces the conservation period for the renewed contract to a conservation period up to a maximum of 10 years after the termination of the employment.**

2.2) Information provided to the data subjects

Firstly, the EDPS notes that all information required under Articles 11 and 12 of the Regulation is provided in the Privacy statement. The EDPS welcomes the fact that the Privacy statement

⁴ As foreseen by Annex 1 to “Guidelines for the renewal of temporary agent contracts at the OHIM, dated 28/01/2016”.

⁵ EDPS Guidelines concerning the processing of personal data in the area of staff evaluation, p. 5, available at: https://edps.europa.eu/sites/edp/files/publication/11-07-15_evaluation_guidelines_en.pdf.

⁶ EDPS Guidelines concerning the processing of personal data in the area of staff evaluation, p. 4, available at: https://edps.europa.eu/sites/edp/files/publication/11-07-15_evaluation_guidelines_en.pdf.

⁷ Common Commission level retention list, SEC 2012(713).

from the notified processing activity is available via the relevant HRD Intranet page, see point 7 of the notification. However, in the light of Article 11 of the Regulation, the EDPS recommends providing the privacy statement individually to staff members concerned before further personal data are collected.⁸ For example, EUIPO should annex a copy or include link to the letter launching the exercise (i.e. the letter asking for the interest of the staff member in contract renewal before they declare their interest). At least a link could also be included in all other notes/exchanges with the staff member on this subject.

Secondly, with regard to the procedures for staff members to exercise their rights of access, rectification and others, **the EDPS suggests (as a good practice) including information on in which time limit data subjects can expect a reaction from the controller** (e.g. 3 months for access request, without delay for rectification, etc.).⁹ This information should be provided in the Privacy statement.

The EDPS recommends that EUIPO:

3. Provides the privacy statement individually to staff members, for example as an annex or link to the letter asking for the staff member's interest in renewal.

4. Includes information on in which time limit a reaction can be expected in the Privacy statement under point 5.

5. Updates the privacy statement concerning the revised conservation periods (see above) in order to provide all the relevant information to the data subjects.

2.3) Data recipients

The notification and the privacy statement both mention a number of possible recipients of personal data on a need-to-know basis, such as the European Anti-Fraud Office. For your information, with regard to Article 2(g) of the Regulation, authorities which would only receive data in the context of specific targeted inquiries are not considered "recipients" and do not *need* to be mentioned in the privacy statement.¹⁰

In this Opinion, the EDPS has made several recommendations to ensure compliance with the Regulation, as well as several suggestions for improvement.

The EDPS recommends that EUIPO:

1. Reduces the data conservation period for "all letters and notes". For instance, the conservation period can be reduced in line with the conservation period of 5 years concerning the working documents.

2. Provides justifications for this conservation period (to be taken into account in the general discussions) or reduces the conservation period for the renewed contract to a conservation period up to a maximum of 10 years after the termination of the employment.

⁸ EDPS Guidelines concerning the processing of personal data in the area of staff evaluation July 2011, page 8 section 8, available at: https://edps.europa.eu/sites/edp/files/publication/11-07-15_evaluation_guidelines_en.pdf.

⁹ EDPS opinion of 12 June 2014 concerning "The processing operations related to renewal of contracts for temporary and contract agents in the Innovation and Networks Executive Agency", case 2013-1288, page 2, available at: https://edps.europa.eu/sites/edp/files/publication/14-06-12_letter_contract_agents_inea_en.pdf.

¹⁰ This is an exception to the information obligations in Article 11 and 12, but not to the rules on transfers in Articles 7 to 9. In practice, this means that authorities such as the OLAF, the European Ombudsman or the EDPS do not need to be mentioned in the privacy statement (unless the processing operation in question involves transfers to these organisations as part of the procedure); however, the applicable rules on transfers will always need to be respected.

3. Provides the privacy statement individually to staff members, for example as an annex or link to the letter asking for the staff member's interest in renewal.

4. Includes information on in which time limit a reaction can be expected in the Privacy statement under point 5 As a good practice, the EDPS suggests.

5. Updates the privacy statement concerning the revised conservation periods (see above) in order to provide all the relevant information to the data subjects.

The EDPS expects **implementation** of the recommendations made in this Opinion **and documentary evidence** thereof within **three months** of the date of this Opinion.

Kind regards,

Wojciech Rafał WIEWIÓROWSKI

Cc: [...], Data Protection Officer EUIPO