

Request for confidentiality and the right of defence

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Structure of the presentation

1. **General remarks on data protection and confidentiality**
2. **Possible conflict with the right of defence**
3. **Things to bear in mind when making a confidentiality request (some ‘golden rules’)**

General remarks on data protection and confidentiality

- Currently, data protection is in the special focus of the European public due to the imminent enforcement date of the General Data Protection Regulation (Regulation (EU) 2016/679) on 25 May 2018.
- Data protection rules for EU institutions are still established in Regulation 45/2001 which will, however, soon be replaced by a new Regulation; objective: to bring the rules in line with the GDPR.
- It is planned that the new Data Protection Regulation for EU institutions will also apply from 25 May 2018 onwards.
- EUIPO has always taken data protection and confidentiality issues seriously; therefore, under certain conditions it exempts data from publication and file inspection.

For more information on data protection in the EU see: https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/data-protection_en

General remarks on data protection and confidentiality

- EUIPO is required to **protect confidential and sensitive data** of parties and third parties (e.g. witnesses, experts etc.).
- **Such data consists substantially of:**
 - Personal data (→ protected by data protection law; defined e.g. in Art. 4 GDPR 2016/679);
 - Business and trade secrets (→ protected by different legal instruments, inter alia Art. 39 TRIPS and Directive (EU) 2016/943 on the protection of trade secrets).
- **Confidential and sensitive data can be contained in:**
 - Decisions;
 - Files.
- On the other hand: Article 6(1) European Convention of Fundamental Rights (= public character of court proceedings) and Art.113 (1) 1st sentence EUTMR (ex-Art. 87b (1) 1st sentence EUTMR) (= online access to decisions).

General remarks on data protection and confidentiality

➤ **Need to balance conflicting interests:**

Data subject's right to informational self-determination



Public interest of transparency and predictability

➤ **Factors to be taken into account in the balancing:**

- TM and designs are exclusivity rights allowing their holders to prevent the public from using identical or similar signs under specific conditions → such exclusivity rights involve certain obligations for the holders;
- Public needs to know who owns the TM / design and how the owner can be contacted (e.g. request for licence);
- Names and addresses of the parties and their representatives are already published in the EUIPO Register.

General remarks on data protection and confidentiality: Health related personal data

- **Highly sensitive data, but very rarely in EUIPO files;** only possibly present where request for restitutio in integrum was based on health problems;
- **In files:**
 - **Exempted** from online file inspection even **without specific request;**
 - EUIPO examines whether incoming request for restitutio in integrum is based on health reasons and, if that is the case, marks all documents containing health related data as confidential (only future cases).
- **In decisions:**
 - Decision should be drafted in such a way that it contains as little health related data as possible;
 - Any health related data going beyond the statement that the applicant was prevented from observing the time limit due to health reasons is exempted from publication by blackening the relevant parts;
 - Two versions of the decision: Complete version for notification (kept confidential) and censored version for publication.

General remarks on data protection and confidentiality: Business and trade secrets

➤ In files:

- **Exempted** from online file inspection **only upon explicit request** (→ EUIPO needs help of secret owner to identify business and trade secrets);
- Online access is blocked to any document marked as confidential without examining whether this document actually contains any confidential information;
- If a third party requests **access to a document which is not available via the online file inspection**, EUIPO examines that request on an individual basis taking into account **Art. 114 (4) EUTMR** (ex-Art. 88(4) EUTMR).

➤ In decisions:

- In case of a confidentiality request, the evidence is **described in** such a **general manner** that it does not contain any business and trade secrets;
- Should a decision in exceptional cases contain business and trade secrets, that confidential data is blackened before publication and two different versions of the decision are kept (one for notification and one for publication).

Possible conflict with the right of defence / the right to be heard

➤ Right of defence / right to be heard:

- General principle of EU law according to which a person whose interests are appreciably affected by a decision addressed to him or her must be given the opportunity to make his or her point of view known;
- Enshrined also in Article 94 (1) 2nd sentence EUTMR (ex-Article 75(1) EUMTR).

➤ Request for confidentiality ↔ Right of defence:

- **(P) Confidentiality request vis-à-vis the other party** of the proceedings
- Possible reasons for such a request:
 - Loss of competitive advantage by revealing the information to the other party;
 - Loss of trade secret protection by public disclosure.
- Conflicting interests:

Efficient protection of trade and business secrets ↔ Deprivation of fair chance to challenge the decision

Possible conflict with the right of defence / the right to be heard

- **(P)** Measures to protect confidentiality tend to be an **all-or-nothing solution**.
- Some Member States have in place ‘in camera proceedings’ to prevent disclosure of trade secrets (especially in patent litigations).
- **No legal basis for in camera proceedings** at EUIPO.
- In case of a request for confidentiality also vis-à-vis the other party, EUIPO acts as follows:
 - If unclear: Asks the requester to clearly identify the document(s) considered to be confidential even towards the other party;
 - Informs that there is no legal basis for an ‘in camera inspection’ and that the Office can only base its decision on information that has been made available to the other party for comments;
 - Requests that the requester within a set time limit either agrees that the respective document(s) can be made available to the other party or withdraws the document(s).

Things to bear in mind when making a confidentiality request

I. Protect your own confidential data by making a confidentiality request

- Remember: EUIPO usually exempts confidential data from publication and file inspection only upon specific request and not ex officio (with some very limited exceptions).

II. Don't request confidentiality vis-à vis the other party

III. Inform us if the other party's writ refers to your confidential data and expressly repeats it

- In proceedings where one party has claimed confidentiality with regard to certain data, EUIPO strives to ensure that documents of the other party expressly repeating that data are also exempted from online file inspection.
- However, often whole documents are marked as confidential without expressly identifying which specific data contained in that document is confidential; moreover, EUIPO receives huge amount of documents daily.

Things to bear in mind when making a confidentiality request

- Therefore, please inform us if you see a legal writ of the other party that is available via the online file inspection although it expressly repeats your confidential data. We will then immediately block the online access.
- Opposite scenario: You want to comment on data that has been marked as confidential by the other side: In this case, please mark the respective part in your writ as confidential if you expressly repeat the confidential data.

IV. Be aware that you need to exactly identify which data you consider to be confidential and you should explain why you consider that data as confidential

- Art. 114(4) EUTMR: *,Where the files are inspected pursuant to paragraph 2 or 3 of this Article, [...] parts of the file which the party concerned showed a special interest in keeping confidential before the request for inspection of the files was made, unless inspection of such parts of the file is justified by overriding, legitimate interests of the party seeking inspection, may be withheld from inspection.*
- ‚Special interest‘: Requires clear identification of the confidential data and explanation why it is regarded as confidential.

Things to bear in mind when making a confidentiality request

- ‚Before the request for inspection‘: not sufficient to state the reasons for confidentiality afterwards.

- V. If you think that a document which is not available via the online file inspection in fact does not contain any confidential data or that you have an overriding interest in seeing it anyway, please request inspection of the paper file / ‚offline inspection‘**
 - Other side of the coin of the principle just explained;
 - Art. 114(4) EUTMR.

- VI. Be aware that Art. 113(1) 2nd sentence EUTMR in the vast majority of the cases only allows you to request the removal of your name and contact details from the decision and not of the trade mark / trade mark number itself**
 - New provision giving the right to request the removal of personal data included in decisions;

Things to bear in mind when making a confidentiality request

- **(P) Concept of ,personal data‘** within the meaning of Art. 4(1) General Data Protection Regulation 2016/679 is very broad:
 - Covers also TM/design number and TM/design itself as together with the info in the Register this data allows the identification of a natural person;
 - Contradiction with information and consultation function of the publication of decisions -> legal reasoning becomes incomprehensible if TM/design and any description thereof is removed from the decision.
- **Generally, only the name and the contact details** of the concerned data subject are **removed** (teleological interpretation, taking into account in particular the aim and purpose underlying Art. 113(1) 1st sentence EUTMR).
- An **explicit request to remove also the TM/design number and the TM/design** itself is **only upheld if** the concerned data subject can prove an **overriding legitimate interest**.
- If such an overriding legitimate interest is established, the decision is not published at all (due to technical issues with regard to eSearch Plus).

Things to bear in mind when making a confidentiality request

VII. Be aware that you yourself might be subject to obligations under data protection law

- The General Data Protection Regulation (Regulation (EU) 2016/679) and national law of the Member States contain rules for companies processing personal data.
- When you submit statements/affidavits of your employee's in order to prove certain facts, you process personal data since the statements/ affidavits contain the name of your employee as well as information on their job position.



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Thank you

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