



**Opinion on a notification for prior checking received from the Data Protection Officer of the European Investment Bank concerning the "annual performance appraisal exercise" dossier**

Brussels, 17 February 2006 (File 2004-300)

**1. Procedure**

On 20 July 2004 the European Data Protection Supervisor (EDPS) sent the Data Protection Officers a letter asking them to help draw up a list of the processing operations that could undergo prior checking as provided for in Article 27 of Regulation (EC) No 45/2001. The EDPS asked to be informed of all the operations subject to prior checking including those begun before the Supervisor was appointed, for which the checking could never be regarded as "prior" but which would undergo "ex-post" checking.

On 13 September 2004 the Data Protection Officer of the European Investment Bank submitted a list of the cases that had to undergo ex-post prior checking, including the "annual performance appraisal exercise" insofar as this contained data concerning the evaluation of personal aspects relating to the data subject, including his or her ability, efficiency and conduct (Article 27(2)(b)).

The European Data Protection Supervisor identified a number of priority issues, namely the processing of data in disciplinary cases, staff evaluation and medical files, which were subject to ex-post prior checking and had to be notified. The "annual performance appraisal exercise" dossier was included among these.

By letter of 12 December 2005 a notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 was made by Mr Jean Philippe MINNAERT, Data Protection Officer of the European Investment Bank, concerning the "annual performance appraisal exercise" dossier. Attached were two Annexes, one concerning a note dated 20 September 2004 from the DPO to the Directors-General, the other concerning the appraisal exercise for 2004.

By e-mail of 4 January 2006 questions were put to the Data Protection Officer of the European Investment Bank. Answers were given the same day. By e-mail of 5 January 2006 questions were put to the DPO and answers given on 9 and 11 January 2006.

**2. The facts**

Every year the European Investment Bank carries out a performance appraisal exercise. Each year it issues a booklet in which the annual performance appraisal exercise is presented (the exercise under consideration is the one for 2004). The booklet contains practical instructions and information for the proper conduct of an appraisal exercise. The "appraisal instructions" made available to the staff are reviewed each year in the light of adjustments requested by the President or simply on the basis of any new developments in terms of procedure, timetable or other matters. Their aim is to help establish objectives, give practical advice on conducting

interviews, and to provide staff with a pre-interview information sheet and managers with a form to assist in identifying strong and weak points.

## **2.1. The objectives**

The appraisal exercise is useful for giving acknowledgment of a staff member's contribution to achieving the aims of his team or department. Thus the appraisal concerns his performance during the past year in the light of the objectives that *were* assigned to him personally. It is also an opportunity to agree on the objectives for the current year and to formalise the dialogue on working relationships, training requirements and professional development programmes.

The appraisal exercise requires that an interview take place between the assessor and the staff member concerned. Failure to hold the interview means that the appraisal exercise has not been concluded and could thus give grounds for appeal.

The form is the central element in the performance appraisal exercise. It is intended to be a means of dialogue, and it should also enable the manager to make sure, as far as possible, that the person is "comfortable" in his job.

The categories of Functions at the EIB are managerial staff, project staff and executive staff. The managerial staff comprise senior managers (Directors-General, Directors and Associate Directors) and C Functions (Heads of Division and Management Advisers). The project staff comprise Functions D, E and F. The executive staff comprise Functions G, H, I and K.

## **2.2. Who is involved?**

### The assessors

As a rule, the assessor is the head of division, although he might also be an immediate superior such as a head of unit, supervisor, team leader in the case of a secretary, etc. The appointment will still be made in agreement with the head of division, who continues to have responsibility.

### The staff involved

The general principle is that the annual appraisal exercise applies to all staff whose external trial period not later than 31 December of year  $n$  and who completed at least nine months' service paid by the Bank during year  $n$ .

For those who do not meet these conditions, i.e. mainly new staff members or staff on leave on personal grounds, the appraisal interview with the assessor will involve the discussion and setting of objectives, and skills and training.

The form for staff on long-term sick leave, maternity or parental leave or leave on personal grounds will be sent to the individuals concerned.

Since the exercise primarily involves the evaluation of results achieved during year  $n$ , responsibility for evaluating performance rests with the Directorate to which the staff member is assigned at 1 March of year  $n+1$ . All changes in mobility and restructuring operations recorded at that date have been taken into account.

## Managerial staff

The appraisal form for managerial staff differs from the one mentioned above and will be available on-screen as from the February of year  $n+2$  together with instructions.

The personal data on the form for the managerial staff category are as follows: surname and forename; personnel number; directorate, department, division; function since (...); e-mail address; assessors; dates of the assessment.

The personal data on the form for the D to K categories of staff are as follows: surname and forename of the person assessed, the assessor, the Director, the Director-General; personnel number of the person assessed; year of entry into service of the person assessed; date of interview; directorate, department, division, unit or service; function and step of person assessed.

### **2.3. Conduct of the appraisal/evaluation**

Appraisal forms for Functions D to K will be available on-screen as from 31st January of year  $n+1$ . Simply opening the document "appraisal.doc" will display the form, which will enter personal data automatically.

All staff members will receive the form but only D to K staff will fill it in (see point 2.2).

#### Timeline for the exercise

The assessee submits his form containing his personal identification data to his assessor.

The assessor himself fills in certain headings on the basis of what was established the previous year, indicating any developments during the year. He then enters the objectives set for year  $n$ .

Where appropriate, the assessor may have to consult the other staff members with whom the assessee works in a subordinate position; he then sends the form to the assessee on-screen.

The assessee then fills in the headings assigned to him. He then prints out the form and gives it to the assessor.

The interview may now take place. During the interview, the objectives for the coming year are established definitively and the assessor gives his comments on the section relating to future development, on the post and on training.

The assessor then signs the form and gives the assessee a copy of it as it stands. The assessor then send the signed form to the department director and to the Director-General, with a proposed mark. The Director-General confirms the performance category at a meeting.

The paper version of the form is signed by the Director and Director-General and then returned to the assessee so that he can see the mark he has been given and the comments relating to it. This is an opportunity for the data subject to comment on the assessment made on him. Once it has been signed by the staff member, the form is sent to his department, which will forward all the forms, classified by department, in the May of year  $n+1$  (at the latest).

The mark proposed by the assessor is discussed at a meeting arranged by the directorate and attended by the Director-General, Directors and Heads of Division. The marks range from A (outstanding performance) to D (professional insufficiency); the intermediate categories are B+ (very good performance), B (good performance) and C (performance to be improved).

The directorate will comment on the appraisal in general and, where appropriate, make recommendations as to the level of the bonus.

#### **2.4. Appeals procedure**

If a staff member disagrees with the assessment made on him, he may state his objections in the relevant box in the appraisal form or on an attached sheet. In the case of a serious objection, a second interview takes place with the assessor(s). If the disagreement cannot be resolved during that interview, the staff member must request, in writing or by e-mail, an interview with the Director of his department and/or the Director-General or his equivalent. If the disagreement persists, the staff member may ask for his case to be examined by the Appeals Committee.

The Chairman and members of the Committee may not be members of the staff currently employed at the Bank. They must be appointed from among persons of guaranteed independence. Members of the Committee are required to perform their duties impartially and conscientiously and must not divulge any information they may possess as regards either the procedure or the deliberations.

The Appeals Committee decides on all questions of admissibility. Its conclusions are delivered within five months from when the case was referred to it. If the Committee is unable to reach a conclusion within that time, it relinquishes the case. It notifies the parties of this, setting out the reasons why it failed to reach a conclusion, and indicates, where appropriate, whether this outcome was due to the conduct of one or more of the parties during the procedure.

The Committee reaches its conclusions by a majority. They are signed by all Committee members and sent to all parties to the procedure. The conclusions are binding on all parties and must be implemented immediately by the party or parties upon whom an obligation is imposed, without prejudice to any right of appeal to the European Union Civil Service Tribunal<sup>1</sup>.

#### **2.5. Other information from the notification form**

##### The data

- \* Annual appraisal forms, comprising various categories such as responsibilities, skills, objectives and request for training.
- \* Correspondence between HR and the directorates:  
Merit marks and e-mails, bonuses, promotions and regradings.
- \* Notes concerning the appraisal process before the forms are sent to the personal files.

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<sup>1</sup> Although the Court of First Instance is referred to in the Annex to the staff note RH/Dir/2005-0064 of 22 July 2005, it is necessary to mention the European Union Civil Service Tribunal – established by the Council Decision of 2 November 2004 (2004/752/EC, Euratom), this is the competent body in place of the Court of First Instance. The latter is the appeal body.

## Informing the data subjects

The appraisal manual is published on the EIB's intranet site. The appraisal exercise is initiated by an e-mail to all staff, signed by the HRD.

## Procedures for protecting the rights of the data subjects

1. During the exercise, staff can state their views in specifically-designed sections of the form, as indicated in the appraisal manual.
2. After the appraisal exercise is concluded, there is an appeal procedure set up by HR in cooperation with the staff representatives.
3. After the exercise, the assessments are placed in the personal files.

Personal files are confidential and kept under lock and key. They are accessible only to the head of the development division and his assistant dealing with performance assessment. There is a list of the HR staff who have access to personal files.

Individual forms are accessible only to the data subject and the HR staff as mentioned in the HR manual of procedures. Access to the assessment form is as follows:

- \* staff member, as holder of his assessment
- \* list of authorised HR staff (see point below)
- \* there is also a list of HR contacts which is established and updated annually by the Directors-General.

## Persons to whom the data may be communicated

The staff member concerned by his assessment, his hierarchical superiors, including the President (as the appointing authority), HR (see HR access list), any person authorised by the staff member himself, persons from the legal service where the EIB is being defended, and persons consulted in the course of an appeal.

## Storage of data

Storage by HR:

- forms: in the staff member's personal file, throughout his time at the EIB
- working documents (in locked cupboards in the development division): promotions: five years; merit and bonuses: three years. These are the working documents needed to conduct the exercise efficiently (e.g. e-mails, notes, etc.).

Storage by the directorates: HR contacts (in accordance with the list held by the HR quality controller)

- forms by assessors: current exercise + last two appraisals. In accordance with the DPO's recommendation (HR note to this effect addressed to the Directors-General).

## Deadlines for blocking and deletion of the various categories of data (on a legitimate request from the data subject)

After the simulations of marks, bonuses, regradings and promotions are checked by the DGs, in the simulation system the appraisal data, blocking is automatic. The data subjects still have access to the data on them.

## Security measures

Confidential files under lock and key, accessible only to persons dealing with performance assessment (i.e. according to the list of persons indicated in the HR manual of procedures). Individual forms accessible to the data subjects (the subjects of the appraisal).

### **3. Legal aspects**

#### **3.1 Prior checking**

The notification received on 12 December 2005 constitutes processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)). The processing operation presented is carried out by an institution, in the exercise of activities all or part of which fall within the scope of Community law (Article 3(1)).

The assessment procedure is processed both by automatic means and manually. The appraisal/assessment procedure is processed manually but the content is intended to form part of a filing system. Thus Article 3(2) applies in this case.

Consequently, such processing comes under Regulation (EC) No 45/2001.

Under Article 27 of Regulation (EC) No 45/2001, processing operations that present specific risks to the rights and freedoms of data subjects are subject to prior checking by the European Data

Protection Supervisor. Article 27(2) contains a list of processing operations that are likely to present such risks. Article 27(2)(b) describes as processing operations likely to present such risks "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*".

The assessment procedure for all staff of the EIB Group is a personal data processing operation covered by Article 27(2)(b) and thereby subject to prior checking by the European Data Protection Supervisor.

In principle, the checking carried out by the European Data Protection Supervisor precedes the implementation of the processing operation. In the present case, because the European Data Protection Supervisor was notified after the procedure was initiated, the checking necessarily becomes *ex post*. This in no way detracts from the desirability of implementing the EDPS's recommendations.

Official notification was received by letter of 12 December 2005. An e-mail requesting further information was sent on 4 January 2006 and answered the same day. A request for further information was e-mailed on 5 January 2006. In accordance with Article 27(4), the two-month period within the European Data Protection Supervisor must deliver his opinion was suspended. Answers were given by e-mail on 9 and 11 January 2006. The European Data Protection Supervisor will deliver his opinion by 20 February 2006 (13 February + six days' suspension, i.e. Sunday 19 February, or the following day).

#### **3.2. Legal basis and lawfulness of the processing operation**

The legal basis for the data processing operation in question is to be found in Article 22 of the Staff Regulations: "*An annual performance appraisal shall be made of and communicated to each staff*"

*member. The procedure to be followed for this appraisal shall be determined by an internal decision. For members of staff in Functions C to K, incremental advancement shall be based on professional merit as expressed in the overall mark awarded in the annual appraisal.*" The legal basis is sufficiently clear and raises no particular questions.

As well as its legal basis, the operation's lawfulness also needs to be considered. Article 5(a) of Regulation (EC) No 45/2001 provides that *"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 in the legitimate exercise of official authority vested in the Community institution"*.

Assessment procedures involving the collecting and processing of personal data on officials or other staff come within the legitimate exercise of official authority vested in the Community institution. The fact that the legal basis is to be found in the Staff Regulations of the EIB supports the lawfulness of the processing operation.

### **3.3. Data quality**

Data must be *"adequate, relevant and not excessive"* (Article 4(1)(c) of Regulation (EC) No 45/2001). The processed data described at the beginning of this opinion should be regarded as satisfying these conditions as regards processing. The data required are administrative in nature and necessary to appraise the work of officials. The EDPS considers that Article 4(1)(c) of Regulation (EC) No 45/2001 has been fulfilled in this respect.

The data must also be processed *"fairly and lawfully"* (Article 4(1)(a) of Regulation (EC) No 45/2001). The lawfulness of the processing has already been discussed (see point 2 above). As regards fairness, this relates to the information given to the data subjects. See point 3.9 below on this point.

Under Article 4(1)(d) of the Regulation, *"data must be accurate and, where necessary, kept up to date"*. The system ensures that they are accurate and kept up to date insofar as the appraisal form is available electronically and incorporates personal data automatically. The data subject has the right to access and the right to rectify data, so that the file can be as comprehensive as possible. This also makes it possible to ensure the quality of data. See point 8 below on the dual rights of access and rectification.

### **3.4. Data retention**

Article 4(1)(e) of Regulation (EC) No 45/2001 establishes the principle 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 are collected or for which they are further processed"*.

Data relating to the appraisal of a EIB Group staff member are kept by the Human Resources Directorate in the data subject's personal file as regards the completed forms; working documents (correspondence, e-mails, notes) are kept for five years as regards promotions and three years as regards merit and bonuses.

The human resources contacts for each directorate keep (under lock and key) the appraisal forms relating to the last two completed exercises and the current exercise; for all other exercise they must be destroyed, in accordance with the note from Human Resources Director-General to all Directors-General.

The EDPS welcomes the fact that such a system for storing personal data has been put in place. He would simply point out that keeping data in a personal file involves a process of long-term storage which, as such, must be accompanied by appropriate safeguards. The stored data are personal. The fact that they are archived for long-term storage does not mean that they cease to be personal data. Thus, even in the context of long-term storage of personal files, such data must be subject to suitable transmission and storage measures like any item of personal data.

According to the notification, there is no possibility of the data being stored for statistical, historical or scientific purposes.

### **3.5 Change of purpose/Compatible use**

Data are retrieved from or entered into the staff databases. The processing operation under review involves no general change to the stated purpose of staff databases, of which appraisal is only one aspect. Accordingly, Article 6(1) of Regulation (EC) No 45/2001 does not apply in this instance and the conditions of Article 4(1)(b) are fulfilled.

### **3.6 Transfer of data**

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is the transfer of personal data within or to other Community institutions or bodies *"if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

What we have here is a transfer within the same institution (Human Resources, HR contacts in the Directorates-General, Legal Service, Appeals Committee).

Although this is not mentioned, appraisal reports may be communicated to other institutions or agencies in the case of transfers or applications to another institution. The European Union Civil Service Tribunal may be sent these files, upon request, in the context of proceedings before it <sup>2</sup>.

It is therefore necessary to make sure that the conditions laid down in Article 7(1) are complied with, which is in fact the case, since the data collected are needed to carry out the processing operation and, furthermore, they are *"necessary for the legitimate performance of tasks covered by the competence of the recipient"*. In the present case, this task is covered by the competence of the various institutions concerned and Article 7(1) has indeed been complied with.

### **3.7 Processing including a personnel number or identifying number**

The European Investment Bank uses personnel numbers in staff reports. The use of the personnel number may have the consequence of allowing interconnection of data processed in different contexts. This is not the place to determine the conditions under which the European Investment Bank may process a personnel number (Article 10(6) of the Regulation), but it is appropriate here to emphasise the attention that must be paid to this aspect of the Regulation. In the case in point, the EIB's use of the personnel number is reasonable as it is used for the purposes of identifying the person and keeping track of the file. The EDPS considers that this

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<sup>2</sup> See footnote 1 on page 5.



number may be used in the context of the appraisal report.

### **3.8. Rights of access and rectification**

Article 13 of Regulation (EC) No 45/2001 establishes a right of access – and the arrangements for exercising it – upon request by the data subject. In the case in point, data subjects have access to their appraisal files so that they can complete all the sections required for the procedure to take its course.

After the appraisal exercise has ended, the appraisals are placed in the personal file and may be accessed by the data subject, the authorised persons on the Human Resources staff list, and the HR contacts specified on a list established and updated annually by the Directors-General.

Article 14 of Regulation (EC) No 45/2001 provides the data subject with a right of rectification. In the same way that the data subject has a right of access, he or she may also directly change factual personal data or have them changed, if necessary. Similarly, the right of rectification allows the data subject to give his or her own opinion on the actual assessment.

These arrangements, taken as a whole, fulfill all the conditions of Articles 13 and 14 of Regulation (EC) No 45/2001.

### **3.9. Information to be given to the data subject**

Regulation (EC) No 45/2001 provides that the data subject must be informed where his or her personal data are processed and lists a series of specific items of information that must be provided. In the present case, some of the data are collected directly from the data subject and others from other persons.

Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be given to the data subject applies in this case. Inasmuch as the official or staff member personally fills in the data required of him or her, the data subject provides the data himself or herself.

Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also applies in this case, since the information is collected from the different participants in the process (reporting officers, countersigning officer, committees etc.).

In this case, the data subject is informed by the publication of the appraisal manual and the Human Resources Director-General's note on the EIB's intranet site. The appraisal exercise is launched by an e-mail to all staff each year.

The data subject must be notified of the information specified in Article 11(a) (identity of the controller), (b) (purposes of the processing operation) and (c) (recipients or categories of recipients of the data).

However, point (d) (whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply) is not explicitly mentioned, nor is point (e) (existence of the right of access to, and the right to rectify, the data concerning him or her).

The data subject is notified of the information specified in Article 12(a) (identity of the

controller), (b) (purposes of the processing operation), (c) (categories of data concerned) and (d) (recipients or categories of recipients).

Here, too, there is no explicit mention of point (e) (existence of the right of access to, and the right to rectify, the data concerning him or her).

Lastly, to guarantee that processing is carried out completely fairly, it is desirable that point (f) (*legal basis of the processing operation, time-limits for storing the data, the right to have recourse at any time to the European Data Protection Supervisor*), which appears in both Article 11 and Article 12, should be added.

The European Data Protection Supervisor recommends that this point be included in the various documents providing information on the appraisal procedure.

### **3.10. Security**

Under Article 22 of Regulation (EC) No 45/2001, concerning the security of processing, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected"*.

Other organisational and technical measures are taken to ensure maximum security of data processing.

In the light of all these measures, the European Data Protection Supervisor considers that they can be considered as appropriate within the meaning of Article 22 of Regulation (EC) No 45/2001.

### **Conclusion**

The proposed processing operation does not seem to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. This means in particular that the European Investment Bank should:

- with regard to the storage of personal files, take appropriate transmission and storage measures for data in long-term storage;
- make explicit reference to Article 11(d), (e) and (f) of the Regulation in the various documents providing information on the appraisal procedure;
- make explicit reference to Article 12(e) and (f) of the Regulation in the various documents providing information on the appraisal procedure.

Done at Brussels, 17 February 2006

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