



Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Central Bank on processing of personal data in the frame of deductions from salary in the event of a strike

Brussels, 28 September 2010 (Case 2009-0514)

1. Proceedings

On 26 June 2009, the European Data Protection Supervisor (EDPS) received a consultation from the Data Protection Officer (DPO) of the European Central Bank (ECB) on the issue of processing of personal data in the frame of deductions from salary in the event of a strike. The EDPS accepted that deductions could be made prior to the notification of the processing to the EDPS for prior checking.

On 29 July 2009, the EDPS received from DPO of the ECB notification for prior checking regarding the data processing operations that take place in the context of procedures related to deductions from the salary in the event of a strike (the Notification) on the basis of Article 27 of Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (Regulation (EC) No 45/2001).

On 9 September 2009 the EDPS sent further questions to the DPO. These were answered on 16 June 2010.

On 27 July 2010, the EDPS sent the draft Opinion to ECB for comments. The ECB responded on 14 September 2010.

2. The facts

According to Article 1.4 of the ECB Staff Rules, staff members at the ECB have a right to strike. Article 1.4.5 provides that "Unless the Executive Board decides otherwise, the total period of the strike shall be deducted from the salary related payments of the member of staff taking part in the strike". Furthermore, "no disciplinary action may be taken against any member of staff participating in a strike unless the member of staff has been nominated to provide the minimum services described above and fails to do so in order to take part in the strike" (Article 1.4.7). The same rule applies as concerns salary deductions for short term employment on the basis of Article 1.4.5 of the Rules for Short Term Employment. On this basis, at its meeting of 26 May 2009, the Executive Board confirmed that following a strike action on 3 June 2009, there would be an equivalent recalculation of salary and salary related payments and deductions (i.e. allowances and deductions calculated on basis of salary).

To be able to deduct from the salary/salary related items, the names of the staff members taking part in the strike and the period of time absent due to the strike are registered in ISIS¹ as "unpaid leave for other reasons" which is used for other purposes as well. The fact that the staff member participated in the strike action will also be made visible in a separate page of the payslip of the person concerned to justify the reduction of salary and related elements.

Any documentation linked to the deductions (namely the file containing the name of those involved in the strike) is kept on DG/H's secured workspace on DARWIN (i.e. the in-house name given to the electronic document and records management system of the ECB). The access rights to those Darwin folders in which payroll relevant information is stored are administered in a very restrictive manner: in essence, only DG/H management and the few colleagues of the DG/H's *Recruitment and Compensation Division* who are in charge of payroll and absence management within DG/H.

According to data retention policy, all payroll data, including deductions for participation in a strike action, will be kept in the ISIS system up to 5 years after data subject has left the ECB (if data subject has no pension rights) or up to 10 years after the last payment to a dependant was made (if the data subject has a right to a differed pension).

Two messages are published to all staff via intranet and email concerning the deduction of salary and related elements. These messages inform staff members of the legal basis for the recalculation of salary and salary related payments and deductions and the registration of data in ISIS as "unpaid leave for other reasons". The information provides that the data will be kept for a period "to be advised by the European Data Protection Supervisor".

Data subjects are provided with the rights granted by Articles 13 to 19 in accordance with Decision ECB/2007/1 of 17 April 2007 adopting implementing rules on data protection at the ECB.

Only competent staff (HR staff and HR management) dealing with the administration of remuneration will have access to data contained in ISIS. Access rights to this information are subject to clear and functional assignment: Only *HR Business Partners* (who are staff members within DG/H and act as preferred contact point for their respective business areas), DG-H management and the colleagues within DG/H's *Recruitment and Compensation Division* have access to the related information. The few colleagues of the DG/H's *Recruitment and Compensation Division* who are in charge of payroll and absence management have read/write access whereas all other colleagues have read only access. Each user has an individual user account and password and defined access rights according to his/her profile, linked to his/her functional role.

3. Legal Aspects

3.1. Prior checking

Applicability of the Regulation. The notified processing, insofar as it concerns the activities of the ECB, falls under the scope of Regulation (EC) 45/2001 ("Regulation") pursuant to its Articles 2 and 3. The processing of personal data by the ECB is supervised by the EDPS (see Regulation, Article 1).

¹ ISIS is the Enterprise Resource Planning solution at the ECB.

Grounds for Prior Checking. Article 27(2) of the Regulation contains a list of processing operations that are likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes such risks. This list includes, under paragraph (d), the "processing operations for the purpose of excluding individuals from a right, benefit or contract". To the extent that the participation to a strike automatically entails a deduction from salary and other allowances in accordance with Article 1.4.5 of the ECB Staff Rules, the processing of personal data related to that deduction is subject to prior checking by the EDPS.

Prior Checking. Since prior checking is designed to address situations that are likely to present certain risks, the Opinion of the EDPS should be given prior to the start of the processing operation. Following a consultation by the DPO of the ECB on 26 June 2009 relating to the deduction from salary for a strike action which took place in June 2009, the EDPS accepted to receive the notification for prior checking on an "ex post" basis, providing that any recommendations made by the EDPS can be taken on board and that adequate information relating to the processing of personal data is provided to data subjects in accordance with Articles 11 and 12 of the Regulation.

The present prior check covers processing of personal data in the frame of deductions from salary not only resulting from the strike action of 3 June 2009, but from any other further strike action in the future.

Notification and Due Date for the EDPS Opinion. The Notification was received on 29 July 2009. The period within which the EDPS must deliver an opinion was suspended for a total of 363 days to allow for replies to questions of the EDPS and to comments on the draft EDPS Opinion. The Opinion must therefore be adopted no later than 28 September 2010.

3.2. Lawfulness of the Processing

Personal data may only be processed if legal grounds can be found in Article 5 of the Regulation. The grounds that justify the processing operation are based on Article 5(a), pursuant to which data may be processed if the processing is "*necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof*". The recitals (§27) to the Regulation further provide that "*processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies*".

In order to determine whether the processing operations comply with Article 5(a), two elements must be taken into account: first, whether either the Treaty or another legal instrument adopted on the basis thereof foresee a public task in this context, and second, whether the processing operations carried out by the data controllers are indeed necessary for the performance of that task.

Article 1.4 of the ECB Staff Rules, staff members at the ECB gave a right to strike. Article 1.4.5 provides that "Unless the Executive Board decides otherwise, the total period of the strike shall be deducted from the salary related payments of the member of staff taking part in the strike". The same rule applies as concerns salary deductions for short term employment on the basis of Article 1.4.5 of the Rules for Short Term Employment. The ECB Staff Rules therefore foresee a right to strike and the deduction from salary related payments. The processing of personal data thus resulting from any strike action is therefore to be considered

as necessary for the performance of this task also in the light of §27 of the recitals to the Regulation.

The EDPS therefore takes the approach that the processing by the ECB of personal data in the context of deductions from salary related payments in the event of a strike action can be considered as lawful in accordance with Article 5 of Regulation (EC) 45/2001.

3.3. Processing of Special Categories of Data

Article 10.1 of the Regulation establishes that "*the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and of data concerning health or sex life, are prohibited*". The prohibition is lifted if grounds can be found in Articles 10(2) and 10(3) of the Regulation notably when the processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorized by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof.

In the event of a strike organised by a specific trade union, the trade union membership could be revealed by participation to the strike. The processing of such data will however be permitted on the basis of the ECB Staff Rules referred to above.

3.4. Data Quality

Adequacy, Relevance and Proportionality. According to Article 4(1)(c) of the Regulation "*personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*".

According to the notification received from the ECB, only the names of staff members taking part in the strike and the period of time absent due to the strike are processed by the Human Resources Budget and Organisation department in the context of strike related deductions. The EDPS is satisfied that the adequacy, relevance and proportionality principle as defined in Article 4(1)(c) is respected.

Article 4(1)(d) provides that personal data must be "*accurate and, where necessary, kept up to date*". The ISIS system must therefore ensure that data are accurate and kept up to date. The rights of access and rectification granted to the data subjects also serve to guarantee the respect of this principle (see below point 3.7).

Fairness and Lawfulness. Article 4(1)(a) of the Regulation requires that data must be processed fairly and lawfully. The issue of lawfulness was analyzed above (see Section 3.2). The issue of fairness is closely related to what information is provided to data subjects which is further addressed in Section 3.8.

3.5. Conservation of Data

Pursuant to Article 4(1)(e) of the Regulation, personal data may be kept in a form which permits identification of data subjects for no longer than necessary for the purposes for which the data are collected and/or further processed.

According to data retention policy, all payroll data, including deductions for participation in a strike action, will be kept in the ISIS system up to 5 years after data subject has left the ECB (if data subject has no pension rights) or up to 10 years after the last payment to a dependant

was made (if the data subject has a right to a differed pension). This is justified by the ECB on the grounds that the ECB must be in a position to prove that a certain salary calculation was correct. Such data are also considered as necessary for pension calculations which are to be calculated on the basis of salary payments and which must therefore take into account precise salary calculations. The EDPS therefore takes note of the justification provided that the conservation of such data is necessary for the purposes for which the data were collected and for which they are further processed in compliance with Article 4(1)(e) and reminds the ECB that any documentation stored in DARWIN linked to salary deductions should be destroyed after a fixed period of time.

3.6. Transfers of Data

Article 7 of the Regulation sets forth the rules applicable to transfers within an EU institution (based on Article 7). Article 7.1 establishes that data shall only be transferred if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient.

The EDPS considers that the transfers of information to the recipients described in the Notification for the purposes stated seem to comply with the Article 7.1. Indeed, all the recipients are supposed to have the competences to perform the task for which the data is provided. As to the necessity of the data being transferred, provided the principle of data quality is respected (see above 3.4), this condition is respected.

Article 7(3) states that "*The recipient shall process the personal data only for the purposes for which they are transmitted*". The EDPS underlines that this must be reminded to all persons receiving such data in the process under analysis.

3.7. Right of Access and Rectification

According to Article 13 of the Regulation, the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source.

The Notification refers to the general rights of the data subjects according to Articles 13 to 19 of Decision ECB/2007/1 of 17 April 2007 adopting implementing rules on data protection at the ECB. The EDPS considers that the right of access and rectification are therefore recognized.

3.8. Information to the Data Subject

Pursuant to Articles 11 and 12 of the Regulation, those who collect personal data are required to inform individuals that their data are being collected and processed unless the data subject already has this information. Individuals are further entitled to be informed of, inter alia, the purposes of the processing, the recipients of the data and the specific rights that individuals, as data subjects, are entitled to.

As mentioned in the facts, two messages are published to all staff via intranet and email concerning the deduction of salary and related elements in the context of the strike which took place on 3 June 2009. As concerns the processing of personal data, these messages inform staff members of the legal basis for the recalculation of salary and salary related payments and

deductions and the registration of data in ISIS as "unpaid leave for other reasons". The information provides that the data will be kept for a period "to be advised by the European Data Protection Supervisor".

The EDPS notes that the information provided the data subjects relating to the processing of their personal data in the context of the deductions from salary for strike related actions is not fully in compliance with Articles 11 and 12 of the Regulation. For example, no information is provided to the data subjects concerning the time limits for storing the data, the categories of data concerned and the right to have recourse to the EDPS. The EDPS insists that further information should be provided to staff members in general at a minimum on the intranet site in accordance with Articles 11 and 12 of the Regulation. Furthermore individual information should be provided to all staff members directly concerned with a strike action.

3.9. Security measures

According to Articles 22 and 23 of the Regulation, the controller and the processor must implement the appropriate technical and organizational 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. These security measures must in particular prevent any unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing.

On the basis of the available information, the EDPS does not see any indication to believe that the ECB has not applied the security measures required in Article 22 of the Regulation.

4. Conclusion

There is no reason to believe that there is a breach of the provisions of the Regulation provided that the considerations in this Opinion are fully taken into account. In particular, the ECB must:

- set a time limit for the conservation of any documentation stored in DARWIN linked to salary deductions;
- remind all recipients that they should only process the personal data for the purposes for which they are transmitted;
- provide further information to data subjects in accordance with Articles 11 and 12 of Regulation (EC) 45/2001 in accordance with point 3.8 of this opinion.

Done at Brussels, 28 September 2010

(signed)

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