

## **Opinion on the notification for Prior Checking from the Data Protection Officer of the European Investment Bank (EIB) concerning processing of personal data by the Ethics and Compliance Committee of the EIB**

Brussels, 11 April 2012 (case 2011-1141)

### **1. Proceedings**

On 9 December 2011, the European Data Protection Supervisor (EDPS) received a notification for prior checking from the Data Protection Officer (DPO) of the European Investment Bank (EIB) relating to the processing of personal data by the Ethics and Compliance Committee (ECC) with accompanying documents<sup>1</sup>.

Questions were raised on 11 January 2012 to which the DPO replied on 5 March 2012. The draft Opinion was sent to the DPO for comments on 27 March 2012. The EDPS received a reply on 4 April 2012.

### **2. The facts**

The **purpose of the processing operations** is to manage the decision-making process of the ECC in particular with regard to a request for a decision/opinion by the ECC. The ECC shall rule on any potential conflict of interest of a member or former member of the Board of Directors or the Management Committee. Furthermore, an ECC opinion can be requested by members of the Audit Committee under Section 4 of the Code of Conduct of the Audit Committee in cases of potential conflicts of interests for members of the Audit Committee. The ECC is established within the EIB Board of Directors of the EIB, and is composed of the three longest-serving directors plus the Chairman of the Audit Committee under Article 11.4 of the EIB Rules of Procedures<sup>2</sup>. The Secretary General of the Bank, in accordance with Article 30 of the Rules of Procedure of the EIB, provides secretarial service for the ECC<sup>3</sup>.

Cases submitted to the ECC can be the following:

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<sup>1</sup> ECC Privacy Notice; Rules of Procedure of the EIB; Operating Rules of the ECC; Code of Conduct for the Members of the Board of Directors; Management Committee Code of Conduct; Code of Conduct for the Members of the Audit Committee of the EIB.

<sup>2</sup> The Board of Directors of the EIB consists of 28 Directors, with one Director nominated by each member State and one by the European Commission. The Board of the Directors is non-resident. The Management Committee is the Bank's permanent collegiate executive body. It has nine members. The President is also chairman of the Board of Directors. The Audit Committee is non-resident, composed of six members, appointed by the Board of Governors.

<sup>3</sup> cf Section 5 of the ECC Operating Rules.

- i) Potential conflicts of interest for members or former members of the Management Committee and of the Board of Directors (*Art. 11.4 of Rules of Procedure/Art. 1.7 and Art. 1.8. of the Code of Conduct of the Management Committee, Section 3 of the Code of Conduct of the Board of Directors*);
- ii) Authorization of external activities (activities not connected to EIB's work) for incumbent members of the Management Committee (*Section 3 of Code of Conduct of the Management Committee*);
- iii) Authorization of post-mandate activities of former members of the Management Committee within the twelve months cooling-off period (*Section 4 of Code of Conduct of the Management Committee*);
- iv) Requests for ECC opinions by members of the Audit Committee (*Section 4 of Code of Conduct of the Audit Committee*);
- v) Notification of a Decoration, prize or honour awarded to members of the Management Committee (*Art. 1.14 of Code of Conduct of the Management Committee*).

Cases i) involving potential conflicts of interest can be introduced directly by an individual member of the EIB governing bodies. In addition, they can be submitted by the EIB Secretary General, EIB Chief Compliance Officer and by other members of the EIB governing bodies (Section 3 of the ECC Operating Rules). Cases ii) and iii) are requests for decisions introduced directly by the individual members of the EIB Management Committee. Cases iv) are requests for guidance i.e. opinions, while cases v) are notifications without any request for an ECC decision or opinion.

All requests shall be submitted to the ECC by addressing a request in writing to the ECC Secretariat. Requests for a decision have to explicitly set out the details of the case. The Chairman may request the Secretary General or the Chief Compliance Officer to provide internally available information for matters within their remit or knowledge. This additional information might be submitted to the ECC in writing including in the form of a report. Personal data from a person other than the data subject would only be collected if required by the case, for instance if a potential conflict of interest of a data subject involves a third person/party. ECC proceedings are minuted.

The EIB has the primary **responsibility for the data processing** as controller. Since the ECC has been established by the EIB and the composition of the ECC is regulated in the EIB Rules of procedure, the EIB Board of Governors determines what the ECC does and how they do it. Other than the ECC members, the EIB Secretary General provides in line with the Operating Rules of the ECC secretarial services to the ECC and is therefore considered as organisational part of the ECC entrusted with the administrative and clerical work.

**Data subjects** are:

- members and former members of the EIB Board of Directors;
- members and former members of the EIB Management Committee;
- members of the EIB Audit Committee who can request the opinion of the ECC.

The following **categories of data** are processed:

- identification data (name and governing body of the EIB to which they belong);
- other personal data (address, phone number, e-mail address);
- data contained in the request for an ECC decision/opinion.

Personal data are processed both manually and automatically. The data processed in the ECC proceedings are on the basis of requests for an ECC decision/opinion submitted in writing to

the ECC Secretariat. The ECC Secretariat creates a new file for each request in a password protected electronic Forum (hereafter 'ECC Forum') and uses this ECC Forum to provide the request as well as supporting documentation to the ECC members. The electronic ECC Forum is for the exclusive use of the ECC members, as well as the EIB Chief Compliance Officer. Paper files pertaining to the ECC. Proceedings are kept by the ECC Secretariat and ECC members.

The following **retention policy** applies.

Access to any information stored in the ECC Forum which the EIB no longer needs for the accomplishment of its tasks, but which has to be retained for purposes of proof (in particular with regards to the review of ECC decisions foreseen in Section 9 of the ECC Operating Rules), will be restricted in the electronic ECC Forum by technical means. As a result, access to information/data in the electronic files in the ECC Forum will be closed for ECC Members and the EIB Group Chief Compliance Officer after the implementation of the final ECC decision/opinion, or after the closure of a possible appeal against the final ECC decision before the EIB Board of Directors, or the challenge of the appeal decision before the Court of Justice of the EU, or immediately after termination of the statutory mandate of an ECC Member.

Electronic files archived in the ECC Forum for the purpose of compiling general conclusions for future ECC decision or for drawing up annual reports to the Board of Governors as foreseen in the Operating rules of the ECC will only be accessible to the incumbent Secretary General or duly authorised person under his/her direct responsibility for a period of two years. After two years, any personal data will be removed from the electronic files.

Paper files pertaining to the ECC proceedings shall be destroyed by the ECC Secretariat and ECC members at the latest two months after the implementation of a final decision by the ECC, or the closure of the appeal of the final ECC decision, or the challenge of the appeal decision before the Court of Justice of the EU, or immediately after termination of the statutory mandate of an ECC member.

The data subjects are granted **rights of access to and rectification of data processed** at any stage during the ECC proceedings upon written request by post or by e-mail. Personal data processed in the electronic ECC Forum will be erased/blocked/immediately by technical means upon justified, legitimate requests from the data subjects.

As far as the **right of information** is concerned, members or former members of the Board of Directors or the Management Committee shall be promptly notified by the ECC when they are directly and individually concerned by a case examined by the ECC, including when extraordinary circumstances cause a postponement of the ECC decision<sup>4</sup>. They shall also be promptly notified about the ECC decision and have the right to ask the ECC for the rationale of its final decision and to be informed about the consequences thereof. Moreover, they are provided with the opportunity to present their observations within 30 days after the ECC notice<sup>5</sup>. Their observations can be presented to the ECC either in writing or orally during an ECC meeting.

A privacy statement is included in the ECC notification or confirmation of receipt of a request for an ECC decision/opinion.

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<sup>4</sup> cf. Section 8 of the ECC Operating Rules.

<sup>5</sup> cf. Section 8 of the Operating Rules of the ECC.

**Recipients of data:** Other than the ECC members and the restricted number of EIB staff under the direct responsibility and control of the Secretary General (who constitutes the ECC Secretariat), only the EIB Group chief Compliance Officer will have access to the information/data.

[...]

### **3. Legal aspects**

#### **3.1. Prior checking**

The processing of personal data for the purpose of managing the decision-making process of the ECC falls within the scope of Regulation (EC) 45/2001 (hereinafter the Regulation) and is subject to prior checking by the EDPS pursuant to its Article 27(2) (b). Data is collected and processed with the purpose to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct.

In principle, prior checks by the EDPS should be carried out before the processing operation is implemented. Since the relevant data processing operations have already been established, the check has to be carried out *ex post*. In any case all recommendations made by the EDPS should be fully taken into account and the processing operations should be adjusted accordingly.

The notification of the DPO was received on 9 December 2011. According to Article 27(4) of the Regulation, the EDPS Opinion must be delivered within a period of two months. Taking into account that the procedure was suspended for a total of 53 days to request complementary information and to allow for comments on the draft Opinion, the present Opinion must be delivered no later than 12 April 2012.

#### **3.2. Lawfulness of the processing**

The legal basis of the processing of personal data within the decision-making process can be found in the following internal rules and procedures of the EIB:

- Article 11.4 of the Rules of Procedure of the EIB;
- Operating Rules of the ECC;
- Codes of Conduct for the Members of the Board of Director;
- Management Committee Code of Conduct;
- Code of Conduct for the Members of the Audit Committee of the EIB.

Processing of personal data in the context of requests for an ECC decision and opinion is necessary for the management and functioning of the EIB and can be considered as necessary for the performance of tasks carried out in the public interest on the basis of the above mentioned rules. Thus, processing of personal data in the case at hand is lawful within the meaning of Article 5(a) of Regulation (EC) 45/2001, read together with its recital 27.

#### **3.3. Data Quality**

According to Article 4(1)(c) of the Regulation "*personal data must be adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*". The EDPS is of the opinion that the data listed in the notification and collected from the data subject for the decision-making process of the ECC comply with the criteria set

out in Article 4(1)(c). There is no evidence that the data processed in this context are not adequate, relevant or excessive in relation to the purpose for which they are collected and further processed.

Article 4(1)(d) provides that personal data must be "*accurate and, where necessary, kept up to date*". A member or former member of the Board of Directors of the Management Committee who is directly or individually concerned by a case examined by the ECC shall be promptly notified by the ECC and provided with all related documentation and with the opportunity to present his/her observations within 30 days. Thus, accuracy is assured. The rights of access and rectification contribute further to ensure that the data processed are accurate and up to date (cf. point 3.6 below).

As regards request by a member himself/herself, data are provided by the respective data subjects; hence the procedure itself helps to guarantee accuracy of data being processed.

Article 4(1)(a) also provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (see point 3.2). That of fairness has to be assessed in the context of information provided to data subjects (see point 3.8).

### **3.4. Data retention**

Article 4(e) of the Regulation states 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*".

The EDPS notes that keeping electronic files for a period of two years corresponds to the maximum time period for which personal data is necessary for the purpose of compiling general conclusions for future ECC decisions or for drawing up annual reports. The assessment has taken account of the fact that after the implementation of the final ECC decision electronic files will only be accessible to the incumbent Secretary General or duly authorised person or not to the ECC anymore.

The storage period for paper files pertaining to the ECC proceedings at the latest two months after the implementation of a final decision or immediately after termination of the statutory mandate of an ECC member can be considered appropriate.

### **3.5. Transfer of data**

The internal data transfers mentioned above are subject to Article 7(1) of the Regulation that provides that "*Personal data shall only be transferred 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*".

The intra-institutional transfers of personal data within the ECC proceedings seem to be necessary for the legitimate performance of tasks covered by the competence of the recipient. Other than the ECC members and the EIB Chief Compliance Officer, only staff of the Secretary General, who constitutes the ECC secretariat, has access to the personal data. Article 7(1) of the Regulation is thus respected. However, to ensure full compliance with the Regulation, the EDPS recommends that all data recipients are explicitly reminded of their obligation not to use personal data for any other purpose than the one for which they are transmitted.

### **3.6. Right of access, rectification, blocking and erasure**

The EDPS considers that the measures provided by the EIB to guarantee the rights of access, rectification, blocking and erasure seem to be in accordance with Articles 13-16 of the Regulation. These rights can be exercised at any stage during the ECC proceedings.

### **3.7. Information to the data subject**

Articles 11 and 12 of the Regulation provide that data subjects must be informed of the processing of data relating to them and list a range of general and additional items.

The EDPS notes that the ECE privacy notice provides for the essential information required in Articles 11 and 12. However, he invites the ECC to revise the privacy statement in order to also reflect the categories of data concerned and the time-limits for storing the data. Moreover, he suggests that the privacy notice should make a reference to the Rules of Procedure of the EIB and the Operating Rules of the ECC for further information on the procedure.

[...]

## **4. Conclusion**

The processing under review does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001, provided that:

- all data recipients are explicitly reminded of the purpose limitation principle;
- information in the privacy statement is revised as outlined in section 3.7.

Done at Brussels, on 11 April 2012

**(signed)**

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor