

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Investment Bank (EIB) concerning the processing of data in the context of the EIB's Exclusion Procedures

Brussels, 19 March 2015 (Case 2014-1110)

1. Proceedings

On 1 December 2014, the European Data Protection Supervisor ("EDPS") received from the Data Protection Officer ("DPO") of the European Investment Bank ("EIB") a notification for prior checking concerning the EIB's Exclusion Procedures.

On 1 December 2014, at the request of the EIB, a bilateral meeting was scheduled for 11 December 2014. Additional information was provided by the EIB on 5 January 2015 and on 4 February 2015.

On 2 March 2015 the EDPS sent the draft Opinion to the DPO for comments, which were received on 12 March 2015.

2. Facts

The processing serves the **purpose** of protecting the financial interests and the reputation of the EIB (and consequently, of the EU) in the context of:

- the EIB's decision-making process on exclusion (as well as, alternatively, the negotiation and implementation of a Settlement Agreement) regarding individuals, organisations, firms or other such entities which have been found to be engaged in Prohibited Conduct¹. These are, as a result, declared ineligible for a stated period to be awarded a contract under any EIB project or to enter into any relationship with the Bank;
- The implementation of such a decision by registering any entity concerned in a list / dedicated database operated by the European Commission (Commission) in their Central Exclusion Database (CED)². The EIB foresees transmitting to the CED all EIB exclusion decisions independently of the source of financings (EIB own resources or EU budget).

The **legal basis** for the processing operation is set forth in

- For the EIB's decision-making process on exclusion (i) the EIB's Exclusion Procedures, their Guiding Principles and their implementation guidelines³, (ii)

¹ As defined in Section 2 (1)(i) and Schedule 1 of the EIB's Exclusion Procedures.

² The processing under the Commission's Central Exclusion Database has been analysed by the EDPS in his Opinion in case 2009-0681.

³ Provided as draft document dated 25/11/2014 entitled "*Internal Implementing Guidelines for EIB's Exclusion Procedures - First implementation phase*".

the EIB's Anti-Fraud Policy⁴ and (iii) the EIB's Guide for Procurement⁵. These Regulations are subject to approval by the EIB competent management bodies and have been elaborated under the umbrella of the Bank's Statute⁶, which stipulates in its Article 18 that "*In its financing operations, the Bank shall...ensure that its funds are employed as rationally as possible in the interests of the Union.*" The EIB has also concluded in September 2006 a Joint Statement with the Multilateral Development Banks (MDBs) on a "Uniform Framework for Preventing and Combating Fraud and Corruption between the Multilateral Development Banks". This document provides common definitions of fraudulent practices and common principles and guidelines for investigations in order to facilitate the cooperation of MDBs in cases of jointly financed projects. The Joint Statement makes clear that *nothing in the guidelines should be interpreted as affecting the rights and obligations of each Organisation per its rules, policies and procedures*. The Joint Statement foresees exchanges of relevant information among member institutions (MDBs)⁷.

- The legal basis for transferring information to and blacklisting in the CED (i.e. the implementation of exclusion decisions) is Article 108(3) of the Financial Regulation⁸ (FR) stating that "*...the EIB... shall communicate to the Commission information on candidates and tenderers that are in one of the situations referred to in point (e) of the first subparagraph of Article 106(1), where the conduct of the operators concerned was detrimental to the Union's financial interests*" (emphasis added). Recital 36 FR clarifies that the notion of the Union's financial interests covers the EIB's own resources⁹ by stipulating that "*Given that the use of the ECB and the EIB own resources is of financial interest to the Union, they should be given access to the information contained in the central exclusion database, which was created to protect the Union's financial interests*" (emphasis added).

The **controller** of the processing is the EIB here represented by the Inspector General of the EIB.

Data subjects are

- Individuals designated as a party (or managing or controlling an entity designated as a party) in an EIB exclusion proceeding following an investigation by the EIB's

⁴ "Policy on preventing and deterring Corruption, Fraud, Collusion, Coercion, Money Laundering and the Financing of Terrorism in European Investment Bank activities", see http://www.eib.org/attachments/strategies/anti_fraud_policy_20130917_en.pdf, which states in its Section II.6 that the "*EIB will not tolerate prohibited practices, money laundering or terrorist financing in its activities or operations.*"

⁵ <http://www.eib.org/infocentre/publications/all/guide-to-procurement.htm>

⁶ See http://www.eib.org/attachments/general/statute/eib_statute_2013_07_01_en.pdf

⁷ Joint Statement by the Heads of the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, European Investment Bank Group, Inter-American Development Bank Group, International Monetary Fund, and World Bank Group, see http://www.eib.org/attachments/general/uniform_framework_en.pdf.

⁸ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:298:0001:0096:EN:PDF>.

⁹ According to the EIB, the resources needed to finance about 90% of its lending activity are borrowed on the capital markets through public bond issues and thus do not come from the EU budget.

Fraud Investigations Division (IG/IN)¹⁰. These individuals and entities belong to the following categories ("EIB interested parties"):

- Promoters, borrowers, contractors, suppliers, consultants, intermediaries, agents, advisers or other interested parties in an EIB-financed project;
- Applicants for EIB financing or tenderers for EIB projects;
- Individuals registered in the Commission's CED.

The **personal data** processed for the EIB's decision making process include:

- Identification data of the data subject (generally provided by EIB projects' promoters, borrowers and other interested parties themselves);
- Allegations, summary of facts and evidence related to the prohibited conduct(s) involving the subject; such information and evidence is collected by the IG/IN¹¹;
- Recommendation of the Exclusion Committee;
- Conditions and terms of a settlement agreement in case of negotiation; and
- Decision of the EIB's Management Committee on exclusion proceeding.

Where an exclusion procedure is launched based on a (prior) registration of the concerned entity in the Commission's CED, the relevant items of processed data are the following:

- Name and address of the excluded entity or individual;
- Ground of exclusion (generic description);
- Date of exclusion decision;
- Period of exclusion (start and end date of the active warning);
- Reference to the authority that requested the warning.

The personal data processed for the implementation of the exclusion decision are:

- Name and address of the excluded entity or individual;
- Ground of exclusion pursuant to Schedule 1 of the EIB's Exclusion Procedures in the light of Article 106(1)(c) and (e) FR;
- End date of the exclusion;
- Person of contact at the EIB.

Regarding **retention periods**, paper and electronic files pertaining to an exclusion proceeding or negotiated settlement will be destroyed / deleted 10 years after the close of an exclusion case, which corresponds to:

- the end of an exclusion period and consequently the compliance of the data subject with the Bank's conditions, if any; or
- the compliance of the individual/entity with the terms and conditions of the agreement in case of negotiated settlement.

The exclusion warnings will be removed from the CED at the end of their duration.

As to **data protection information**, a privacy statement specifically referring to the EIB's Exclusion Procedures will be made accessible online on the website of the EIB informing borrowers, contractors and other interested parties. In accordance with the provisions of the EIB's Exclusion Procedures, the data subject shall be:

¹⁰ See Opinion of 14/10/2010 on procedures related to fraud investigation in the EIB Group (case 2009-0459)

¹¹ See Opinion of 14/10/2010 on procedures related to fraud investigation in the EIB Group (case 2009-0459)

- (i) notified of the beginning of an exclusion proceeding by the EIB;
- (ii) advised that he/she may contest the allegations and/or the recommended exclusion;
- (iii) informed of the procedure by which he/she may respond to the allegation and/or recommended exclusion;
- (iv) invited to a hearing, should the Exclusion Committee decide to hold a hearing;
- (v) provided with copies of all written submissions and evidence, records of any related proceedings and any other materials received or issued by the Exclusion Committee relating to the proceedings;
- (vi) notified of the exclusion decision of the EIB.

Regarding the **rights of the data subjects**,

- for the EIB's decision making process, the data subject involved in an exclusion proceeding has access to their own data, and the right to have it rectified, blocked or erased and will have the possibility to submit to the Exclusion Committee written responses and material evidence to contest the allegations and recommended exclusion decision, in accordance with the relevant provisions of the Exclusion Procedures and the Implementation Guidelines;
- for the implementation of the exclusion decision, the notification refers to access rights being granted "...in accordance with the rules applicable to the Central Exclusion Database (notification 2009-681)".
- For both steps of the processing operation, the notification states that "*Restrictions on these rights shall respect article 20 of Regulation 45/2001: the application of articles 13 to 17 can be restricted provided some conditions are met and information to data subject can be deferred as long as it would deprive the restriction of its effect.*"

The **data recipients** at different stages of the procedure are:

- *During an exclusion proceeding*
 - The members and secretariat of the Exclusion Committee: The Exclusion Committee consists of five members (two of which are external) appointed by the President of the Bank for a period of not more than 4 years (renewable once), who make recommendations to the EIB's Management Committee in respect of the subject's culpability and, where culpability is established, exclusion decisions. Confidentiality provisions will be included in the letters of appointment of the external members.
 - the Inspector General and the staff of the IG/IN;
 - the members and secretariat of the Management Committee (the Bank's permanent collegiate executive body); and
 - on a "need-to-know" basis, senior management and officers whose project(s) are concerned by an exclusion proceeding or decision.
- *Following an EIB exclusion decision:*
 - Authorised EIB staff, who need access to the data for the proper exercise of their task will be granted access to the CED. In such cases, access to data will be restricted to the information available in the CED i.e. name and address of the data subject, the ground of exclusion and end date the exclusion period.
 - The European Commission as operator of the CED.

- EU/International transfers: The Anti-Fraud Policy stipulates that the EIB may refer a case to (i) the appropriate national¹² and/or EU authorities for further investigation and/or criminal prosecution where criminal conduct is suspected, (ii) an agency of a State, or (iii) another concerned international or multinational organisation or body, including another development bank who may have an interest in the project¹³.

As concerns **security measures**, ...

3. Legal aspects

3.1. Prior checking

Applicability of Regulation (EC) No 45/2001 ("the Regulation"): The processing of data by the EIB in the context of exclusion procedures constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2(a) of the Regulation). The data processing is performed by an EU institution in the exercise of activities which fall within the scope of EU law (Article 3(1) of the Regulation, in the light of the Lisbon Treaty). The processing is both manual and by automated means¹⁴; in the latter case, such processing forms part of a filing system, Article 3(2) of the Regulation. Therefore, Regulation (EC) No 45/2001 is applicable.

Grounds for prior checking: In accordance with Article 27(1) of the Regulation, "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purpose shall be subject to prior checking by the European Data Protection Supervisor*". Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks.

- Article 27(2)(a) of the Regulation subjects to prior checking "*processing of data relating to (...) suspected offences, offences, criminal convictions*". The EIB exclusion procedures may involve the processing of these types of data.
- Under Article 27(2)(b) of the Regulation, "*processing intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" requires prior checking. To take an exclusion decision, the EIB evaluates in particular the financial conduct of a person.

¹² EU national authorities acting under national law implementing Directive 95/46/EC, e.g. national enforcement authorities based in EU or national development agencies based in EU subject to national law (the EIB works in close cooperation with some national development agencies based in EU, i.e. Agence française de Développement in France and KfW Bankengruppe in Germany).

¹³ According to the EIB, the relevant Multilateral Development Banks (International Financial Institutions) are the World Bank (HQ: Washington), the African Development Bank (HQ: Abidjan), the Asian Development Bank (HQ: Manila), the Inter-American Development Bank (HQ: Washington) and the European Bank for Reconstruction and Development (HQ: London).

¹⁴ The information and data relevant for an exclusion proceeding are processed on the basis of standard forms, i.e. Notice of Early Temporary Suspension, Notice of Exclusion Proceedings, Notice of Recommendation of the Exclusion Committee, as the case may be. These documents are stored electronically in the case management system in a secured section with access limited to members of IN/IG and the Exclusion Committee.

- The processing is intended to exclude individual from a contract, granting of an award or refusal of funds and falls therefore within Article 27(2)(d) of the Regulation.

The processing is therefore subject to prior checking.

Deadlines: The notification of the DPO was received on 1 December 2014. In accordance with Article 27(4) of the Regulation, the EDPS Opinion must be delivered within a period of two months. The procedure was suspended for a total of 35 days. Consequently, the present Opinion must be provided no later than 9 March 2015.

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 the 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*". 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 (Section 3.2.1.), and
- second, whether the processing operations carried out by the controllers are indeed necessary for the performance of that task (Section 3.2.2.).

3.2.1. Legal basis foreseeing a public task

a) For the **EIB's decision-making process** on exclusion the legal basis is further set forth in (i) the EIB's Exclusion Procedures¹⁵, their Guiding Principles and their Implementation Guidelines, (ii) the EIB's Anti-Fraud Policy¹⁶ and (iii) the EIB's Guide to Procurement. Under Article 18 of the EIB Statute, "*...the Bank shall...ensure that its funds are employed as rationally as possible in the interests of the Union*" (emphasis added). To comply with Article 5 of the Regulation, these instruments should be considered as "*legal instruments adopted on the basis of the Treaty or other legal act adopted on the basis thereof*". Regarding cases where exclusion proceedings are launched based on the conclusions by another Multilateral Development Bank, the EDPS notes that the Joint Statement on combatting fraud and corruption includes a clause which allows the EIB to receive information from another MDBs in case of jointly financed projects.

b) Insofar as the EIB foresees **transmitting all EIB exclusion decisions to the CED** for the purpose of blacklisting independently of the source of financings (EIB own resources or EU budget), Article 108(3) FR states that the EIB shall communicate to the Commission information on candidates and tenderers that are in one of the

¹⁵ Including the exclusion criterion not listed in the Financial Regulation under Schedule 1, Section A (1)(c) of the EIB's Exclusion Procedures (the launch of an exclusion proceeding following the conclusion of another MDB that an entity or individual has engaged in Prohibited Conduct).

¹⁶ "Policy on preventing and deterring Corruption, Fraud, Collusion, Coercion, Money Laundering and the Financing of Terrorism in European Investment Bank activities", which states in its Section II.6 that the "*EIB will not tolerate prohibited practices, money laundering or terrorist financing in its activities or operations.*"

situations referred to in Article 106(1)(e) FR, where the conduct of the operators concerned was detrimental to the Union's financial interests.

The notification states that "*...the Commission has agreed in a written exchange with EIB that Arts 106 and 108 of the Financial Regulation provide a minimum standard and that EIB can feed the CED with all its exclusion decisions. This would expand the range of cases using EU funds to all EIB cases, including cases involving EIB own resources. As such, it fully complies with the spirit and the stated objective of the Financial Regulation and Regulation No 1302/2008 on the Central Exclusion Database, to ensure sound and effective protection of the Union's financial interests which also include EIB's own resources (cf. recital 36 of the FR). In particular, as regards Article 106(1)(c), non-inclusion of all EIB exclusions into the CED could undermine the efficient application of this provision which requires the exclusion of candidates and tenderers on grounds of grave professional misconduct, proven i.a. on the basis of decisions of the EIB.*"

In the light of recital 36 FR, the Union's financial interests include EIB own resources. Article 108(3) FR can thus be considered a "*legal instruments adopted on the basis of the Treaty or other legal act adopted on the basis thereof*" in the sense of Article 5 of the Regulation which covers transmitting *all* EIB exclusion decisions to the CED.

3.2.2. Necessity of the processing for the performance of that task

a) The purpose of the **EIB's decision-making process on exclusion** seems to be twofold:

- *Sanction function*: Prevent for a stated period that entities which have been found to be engaged in Prohibited Conduct be awarded a contract under any EIB project or to enter into any relationship with the Bank;
- *Deterrence function*: Deter other "EIB interested parties" from getting involved in Prohibited Conduct.

The EIB's Statute stipulates in Article 18 that "*In its financing operations, the Bank shall...ensure that its funds are employed as rationally as possible in the interests of the Union.*" The processing operations carried out by the EIB would indeed seem necessary for the performance of that task.

b) Regarding the **transmission of EIB exclusion decisions to the CED** for the purpose of blacklisting independently of the source of financings (EIB own resources or EU budget), it should be noted that the FR aims at ensuring the sound and effective protection of the Union's financial interests. As noted above, in the light of recital 36 FR, the Union's financial interests include EIB own resources. The transmission of EIB exclusion decisions to the CED for the purpose of blacklisting independently of the source of financings (EIB own resources or EU budget) would thus seem necessary for the performance of the task pursued.

3.3. Processing of special categories of data

Pursuant to Article 10(5) of the Regulation, "*the processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards*". The data which are processed are included in the scope of Article 10(5) of Regulation (EC) 45/2001, in particular

- Where an exclusion procedure is launched based on a (prior) registration of the concerned entity in the Commission's CED, data registered under the field "ground of exclusion" can include grounds for exclusion related to *res judicata* criminal judgments mentioned in Article 106(1)(e) FR. The processing of such data is authorized by a legal instrument adopted on the basis of the Treaties establishing the European Communities (the FR and its implementing rules) and therefore complies with Article 10(5) of the Regulation¹⁷.
- Where an exclusion procedure is launched based on evidence collected by the IG/IN, processing of special categories of data, if any, is authorised by the EIB's Anti Fraud Policy and the "Procedures for the Conduct of Investigations by the Inspectorate General of the EIB Group" adopted on 8 April 2008¹⁸.

The requirements stipulated in Article 10(5) of the Regulation for processing of special categories of data (where applicable in the case at hand) are thus met.

3.4. Data Quality

3.4.1. Adequacy, relevance and proportionality

In accordance with 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*". On the basis of the information available, the personal data processed appear, *prima facie*, to meet those requirements. The EDPS would, however, like to emphasise that where the source of the exclusion procedure is personal data from another MDBs, the data quality principle must also be applied.

3.4.2. Accuracy

Article 4(1)(d) of the Regulation provides that personal data must be "*accurate and, where necessary, kept up to date*" and that "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified*".

Section 9 of the Exclusion Procedures stipulates that "*The Notice of Exclusion Proceedings shall be served by the Inspector General simultaneously to the Respondent*" (the latter defined as party accused of wrongdoing in Section 1 (2) of the Exclusion Procedures). Under Section 10(iv) of the Exclusion Procedures, the Notice of Exclusion Proceedings shall "*advise the Respondent that if, following issuance of the proposed Notice by the Inspector General, the Respondent desires to contest the allegations and / or the recommended exclusion in the proposed Notice, the Respondent must so notify the Exclusion Committee in the manner described in Section 16*" of the Exclusion Procedures.

The data subject thus in principle has the right to access and the right to rectify data, so that the file can be as complete as possible. This also contributes to ensuring the quality of the data (see section 3.7).

It must, however, be noted that Section 16(1) stipulates that the response by the Respondent to the allegations and recommended exclusion decision contained in the Notice needs to be in writing and Section 16(5) of the Exclusion Procedures stipulates for such written submissions that "*All written materials submitted to the Exclusion Committee shall be submitted in English and French...*" The EDPS recommends

¹⁷ See EDPS Opinion in case 2009-0681.

¹⁸ See EDPS Opinion in case 2009-0459.

examining the possibility of allowing for the submission of written materials in any EU language so as to ensure a truly effective exercise by the data subjects of their right to access and rectification.

Regarding the accuracy of data received by "occasional transfers" from Multilateral Development Banks (International Financial Institutions) the EDPS recommends the EIB to establish safeguards ensuring that these data are accurate and, where necessary, kept up to date and to take every reasonable step to ensure that data which are inaccurate or incomplete are erased or rectified.

3.4.3. Fairness and lawfulness

Article 4(1)(a) of the Regulation also provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (see section 3.2) and fairness will be dealt with in relation to information provided to data subjects (see section 3.8).

3.5. Data retention

Article 4(1)(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 underlines the need to fully assess the necessity to keep data relating to exclusion procedure for up to 10 years and, in line with his recommendations in case 2009-0459 (Opinion of 14/10/2010 on procedures related to fraud investigation in the EIB Group), invites the EIB to align itself to the results of the evaluation regarding the retention period applicable to OLAF once conducted by OLAF¹⁹.

3.6. Transfer of data

Personal data collected in the context of the processing operations under examination are transferred

- within or between Community institutions and bodies (Article 7 of the Regulation). Under Article 7(1) of the Regulation, data may be transferred within or between Community institutions only if they are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*". This will be further examined below as regards
 - transfers to external members of the Exclusion Committee (see Section 3.6.1) as well as
 - the transfer of all EIB exclusion decisions to the CED operated by the Commission (see Section 3.6.2);
- to recipients in the EU other than Community institutions and bodies (Article 8 of the Regulation) (see Section 3.6.3), and
- to recipients outside the EU (Article 9 of the Regulation) (see Section 3.6.4).

3.6.1. Transfers to external members of the Exclusion Committee

¹⁹ In the context of the comparable retention period proposed in case 2009-0459, the EDPS explicitly stressed that "*...the evaluation regarding the retention period applicable to OLAF has not yet been conducted by OLAF. When this evaluation will be conducted, the EDPS invites the Bank to align itself to the results of his decision.*"

Data are transferred to external members of the Exclusion Committee, a fully independent ad hoc body of three members appointed among EIB staff and two external members. The role of the Exclusion Committee is limited to the Exclusion proceedings as described in the Exclusion Procedures and it will not be involved in other EIB activities. Under such circumstances, the EDPS considers that these transfers comply with Article 7 of the Regulation as they are necessary for the legitimate performance of the tasks of these recipients. 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 at all stages of the procedure, the external members to whom the data are transferred must be reminded that they can only process the data for the purpose of the Exclusion proceedings as described in the Exclusion Procedures.

3.6.2. Transfer of all EIB exclusion decisions to the CED

The EIB foresees transmitting all EIB exclusion decisions to the CED for the purpose of blacklisting independently of the source of financings (EIB own resources or EU budget). As outlined in section 3.2 above, this transmission would seem necessary for ensuring the sound and effective protection of the Union's financial interests, which, in the light of recital 36 FR, include EIB own resources and thus for the legitimate performance of tasks covered by the competence of the Commission under the FR.

3.6.3. Transfers to recipients in the EU other than Community institutions, subject to Directive 95/46/EC

Article 8 of the Regulation foresees that "*Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC (a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority (...)*".

The Anti-Fraud Policy stipulates that the EIB may refer a case to (i) the appropriate national authorities for further investigation and/or criminal prosecution where criminal conduct is suspected, (ii) an agency of a State, or (iii) another concerned international or multinational organisation or body, including another development bank, which may have an interest in the project. In this context, the EIB has clarified that

- such national authorities are bodies acting under national law implementing Directive 95/46/EC, e.g. national enforcement authorities based in EU;
- that the reference to "an agency of a State" is to national development agencies based in the EU subject to national law implementing Directive 95/46/EC.

The EDPS recommends that the EIB ensure on a case-by-case basis that the recipient establishes that the data to be transferred are indeed necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority.

For those countries that have not extended their implementation of Directive 95/46/EC to judicial authorities, consideration to Article 9 of the Regulation has to be given. In those cases, Council of Europe Convention 108 is in any case applicable to judicial authorities.

3.6.4. Transfers to third country recipients and/or international organisations

Article 9(1) of the Regulation provides that data may be transferred only to a recipient if an adequate level of protection is ensured in the country of the recipient or within the recipient international organisation and the data are transferred solely to allow tasks covered by the competence of the controller. By way of derogation from Article 9(1), Article 9(6) allows the transfer of data to countries which do not provide for adequate protection if *"the transfer is necessary or legally required on important public interest grounds"*.

As concerns compliance with Article 9 in the case of data transfers to third parties, the EIB informed the EDPS that the EIB will not transfer personal data from the CED to third parties until a practical system has been agreed by the Commission with the EDPS to ensure that they achieve an adequate level of compliance with the data protection principles. The EDPS notes that such transfer from the CED can at any rate only be envisaged within the limits of where it can be considered necessary for the EIB to access the CED in the first place (see above Section 3.4.1.).

Concerning the transfer of data available pursuant to an EIB exclusion procedure, the EIB informed that compliance with Article 9 of the Regulation will be ensured as follows:

- verification that the recipient provides an adequate level of protection;
- if not, enter into adequate safeguards with the recipient to allow for a regular exchange of information;
- for occasional transfers, rely on the derogation of Article 9(6)(d) of the Regulation. In these cases, standard letters with data protection safeguards will be prepared.

On the basis of Article 9(6) of the Regulation, the EIB may only transfer personal data relating to exclusion procedures to international organisations, such as financial institutions in a third country, if this transfer is deemed necessary on important public grounds. These transfers may not be done on a systematic basis and a case by case examination will need to be carried out before the transfer takes place in order to assess the interests at stake and the necessity of the transfer.

Furthermore, according to Article 9(7) of the Regulation, *"[w]ithout prejudice to paragraph 6, the European Data Protection Supervisor may authorise a transfer or a set of transfers of personal data to a third country or international organisation which does not ensure an adequate level of protection within the meaning of paragraphs 1 and 2, where the controller adduces adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may result from appropriate contractual clauses"*.

The application of this rule would result only in the authorisation by the EDPS of the stream for a specific case on the basis of what has been adduced by the data controller. Thus, the controller has to present sufficient evidence supporting the adoption of adequate safeguards in the specific case, even if the country of destination is not adequate as such. The "adequate safeguards" are then created ad hoc.

The EDPS therefore recommends that the EIB ensure compliance with Article 9 of the Regulation in line with the above-mentioned limitations and the EDPS Position

Paper on the transfer of personal data to third countries and international organisations by EU institutions and bodies²⁰.

3.7. Rights of Access and Rectification

Articles 13 to 19 of the Regulation establish a number of rights for data subjects. These notably include the right to access data upon request by the data subject and the right to rectify, erase or block personal data.

The EDPS welcomes that Section 9 of the Exclusion Procedures goes beyond right to access data upon request and stipulates that the person concerned should be informed *ex officio*²¹: "*The Notice of Exclusion Proceedings shall be served by the Inspector General simultaneously to the Respondent*".

Under Section 10(iv) of the Exclusion Procedures, the Notice of Exclusion Proceedings shall "*advise the Respondent that if, following issuance of the proposed Notice by the Inspector General, the Respondent desires to contest the allegations and / or the recommended exclusion in the proposed Notice, the Respondent must so notify the Exclusion Committee in the manner described in Section 16*" of the Exclusion Procedures. Section 15(1) establishes in that regard that "*The Exclusion Committee may, at all moments during the procedure, and based on new elements that were brought to its attention, withdraw the Notice...*" These provisions would seem to adequately guarantee the data subject's right to rectify, erase or block personal data.

The EDPS welcomes that Section 13 of the Exclusion Procedures offers a possibility for review²²: "*If the Respondent informs the Exclusion Committee pursuant to Section 16(1) below that it desires to contest the allegations and / or the exclusion recommended by the Inspector General in the Notice, the Exclusion Committee shall notify the Inspector General thereof, and the matter shall be returned to the Exclusion Committee for its review and recommendations.*" For a recommendation regarding the language requirement stipulated in Section 16 of the Exclusion Procedures, however, see Section 3.4.

3.8. Information to the data subject

Articles 11 and 12 of the Regulation provide for information to be given to data subjects in order to ensure the transparency of the processing of personal data. Article 11 provides that when the data is obtained from the data subject, the information must be given at the time of collection. When the data has not been obtained from the data subject, the information must be given when the data is first recorded or disclosed, unless the data subject already has it (Article 12).

Next to EIB's Exclusion Procedures and their Implementation Guidelines, the EIB's Anti-Fraud Policy and the EIB's Guide to Procurement, which are all published on the EIB's website, the data subjects who are "EIB interested parties" (see Section 2)

²⁰ https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Papers/14-07-14_transfer_third_countries_EN.pdf

²¹ See the EDPS Opinions in Cases 2005-0120, 2006-0397 and 2007-147 or the draft recommendation of 16/12/2012 by the European Ombudsman in case OI/3/2008/FOR against the European Commission for a suggested similar rule as regards an inclusion in the CED (there in particular §134).

²² See the draft recommendation of 16/12/2012 by the European Ombudsman in case OI/3/2008/FOR against the European Commission, §134, for a similar suggestion regarding the CED.

receive a "Privacy Statement for the EIB's Exclusion Procedures" containing all relevant information.

Where an exclusion procedure is launched based on an "occasional transfer" by a Multilateral Development Banks (International Financial Institutions)²³, the data has not been obtained from the data subject and it cannot be assumed that the data subject is necessarily aware of the registration. However, the data subject would nevertheless fall within the category of "EIB interested parties" (see Section 2) and will as such have been informed adequately of the processing undertaken by *the EIB* by means of the "Privacy Statement for the EIB's Exclusion Procedures", thus meeting the requirements of Article 12 of the Regulation.

3.9. Security measures

...

4. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation (EC) No 45/2001 provided the above considerations are fully taken into account. In particular, the EIB should:

- ensure that processing based on "occasional transfers" of data from Multilateral Development Banks (International Financial Institutions) to the EIB is limited to the instances identified in Section 3.4.1. and ensure that personal data obtained that way are accurate and, where necessary, kept up to date and to take every reasonable step to ensure that data which are inaccurate or incomplete are erased or rectified (Section 3.4.2.);
- examine the possibility of allowing for the submission of written materials under Section 16 of the Exclusion Procedures in any EU language so as to ensure a truly effective exercise by the data subjects of their right to access and rectification (Section 3.4.2.);
- assess the necessity to keep data relating to exclusion procedure for up to 10 years and align itself to the results of the evaluation regarding the retention period applicable to OLAF once conducted by OLAF in line with the recommendations by the EDPS in case 2009-0459 (Section 3.5.);
- ensure that, at all stages of the procedure, the external members of the Exclusion Committee to whom data are transferred are reminded that they can only process this data for the purpose of the Exclusion proceedings as described in the Exclusion Procedures (Section 3.6.1.);
- as regards transfers to recipients subject to the national law adopted for the implementation of Directive 95/46/EC, ensure on a case-by-case basis that the recipient establishes that the data to be transferred are indeed necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority (Section 3.6.3.);

²³ Where an exclusion procedure is launched based on a (prior) registration of the concerned entity in the Commission's CED, the EIB can only have access to the CED (level 5) in accordance with the provisions of the Financial Regulation, and cannot have access to the full EU early warning system (levels 1 to 4). In this context, concerned data subjects will be aware of their registration in the CED.

- ensure compliance with Article 9 of the Regulation (Section 3.6.4.), in particular by (i) envisaging any transfer from the CED only where it can be considered necessary for the EIB to access the CED in the first place and (ii) transferring personal data relating to exclusion procedures to international organisations, such as financial institutions in a third country, only if this transfer is deemed necessary on important public grounds. These transfers may not be done on a systematic basis and a case by case examination will need to be carried out before the transfer takes place in order to assess the interests at stake and the necessity of the transfer;
- ...

Done at Brussels, on 19 March 2015

(signed)

Giovanni BUTTARELLI