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Subject: updated prior checking notification concerning staff evaluation procedures

Dear Ms. Ross,

I refer to the updated notification on performance appraisal, probation, management probation, reclassification and contract renewals submitted to the European Data Protection Supervisor (EDPS) on 17 December 2015 by the acting Data Protection Officer (DPO) of the European Securities and Market Authority (ESMA). We note that the updated notification is meant to replace the previous notification of 5 August 2013 due to the deployment of the HR electronic database Allegro as well as the 2013 revision of the Staff Regulations.

We observe that all these procedures are in most aspects in compliance with Regulation (EC) 45/2001¹ (the Regulation) as outlined in the Staff Evaluation Guidelines² and will therefore only address the existing practices which do not seem to be fully compliant in this respect.

1. Data conservation: According to the information provided in the notification as well as in the related privacy statement, performance appraisal reports are currently stored in the Allegro database for an unlimited period of time.

¹ Regulation (EC) No 45/2001 of the European Parliament and of the Council 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

² EDPS Guidelines on the processing of personal data in the area of staff evaluation of 15 July 2011 (EDPS 2011-0042)

Furthermore, we note that the following time limits should be "*recommended*" for the conservation of all evaluation related data in the personal files at the ESMA:

- up to the last pension payments for staff members who have acquired EU pension rights,
- up to ten years after the termination of employment for staff members who have not acquired these rights.

We appreciate that the maximum time conservation time limits will be established by the ESMA. At the same time, we would like to recall that according to Article 4(1)(e) of the Regulation, personal data may be kept in a form permitting identification of data subjects for no longer than necessary for the purposes of which they were collected or further processed.

As indicated in the notification, the processing of personal data within probation procedure is carried out for the purpose of the preparation of the first evaluation report and the follow up on individual training. The processing of personal data within performance appraisal procedures is carried out also for the purpose of the subsequent career development, such as reclassification or contract renewal but also blocking of the advancement in step, downgrading or dismissal.

In this respect, the conservation of probation reports, all performance appraisal reports, as well as reclassification and contract renewals decision for up to the last pension payment or for up to ten years after the end of employment does not seem to be necessary. Therefore, we invite the ESMA to reconsider the "*recommended*" time limits and establish shorter ones in relation to the actual purposes of the particular processing operation.

2. Information to data subjects: The information to data subject is provided in the form of the privacy statement made available on the ESMA Intranet. The existing privacy statement provides for most information listed in Articles 11 and 12 of the Regulation. At the same time, the information about recipients, rights of data subjects as well as legal basis for certain processing operations seems to be either misleading or incomplete.

In particular, the responsible/authorised HR staff is mentioned as the only recipient of the evaluation data in point 6., whereas the direct manager and/or countersigning officer (Executive Director or Chair) are only mentioned in point 8. as the people "*who can access the performance appraisal report*". As to the information about rights of access and rectification, point 9. only mentions that the data subject can make use of them in accordance with Articles 10 and 11 of the ESMA Implementing Rules on data protection³. Furthermore, the limitation of the right of rectification to the factual data processed in this context is not mentioned at all and the legal basis of the further processing on unsatisfactory performance appraisal reports for downgrading and dismissal in terms of Article 51(1) of Staff Regulations as revised in 2013 is missing.

³ Decision of the Management Board of 11 April 2011 on the Implementing Rules relating to Regulation EC 45/2001 of the European Parliament and of the Council 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 (ESMA/2011/MB/57 as amended)

In order to ensure full compliance with Articles 11 and 12 of the Regulation, the EDPS recommends that:

- the information about recipients of personal data processed within all related staff evaluation procedures is clarified in point 6. of the existing privacy statement;
- the information about the impossibility to rectify the by nature subjective evaluation data is added to the point 9., together with the information about the related right of appeal;
- the information about the modalities of the exercise of the rights of access and rectification provided in Article 9 of the ESMA Implementing rules on data protection is added to the point 9. so that the data subject are made aware that the requests should be addressed to the internal data controller;
- the information about the legal basis for the further use of unsatisfactory appraisal reports for downgrading and dismissal, i.e. the reference to the implementing rules to Article 51 of the Staff Regulations is added to the point 5.

Finally, the typographical error in point 5. should be corrected so that it refers to European Commission's decision (C) 2013/8985 of 16/12/2013 "laying down general provisions for implementing Article 43 of the Staff Regulations".

In conclusion, the EDPS considers that there is no reason to believe that there is a breach of Regulation 45/2001 provided that the considerations contained in this Opinion are fully taken into account. In particular, the ESMA should establish shorter conservation time limits in relation to the actual purposes of the processing operations as well as revise the existing privacy statement in a way outlined above.

The EDPS expects that the ESMA implements these recommendations accordingly and will therefore close the case.

Yours sincerely,

Wojciech Rafał WIEWIÓROWSKI
(signed)

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