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Subject: Procedure on Access to the professional/personal data, physical or electronic, of staff members in the event of absence, leaving the Bank or death.

Dear [...],

On 28 June 2013, the Data Protection Officer (DPO) of the EIB has notified the EIB's procedure on "Access to the professional/personal data, physical or electronic, of staff members in the event of absence, leaving the Bank or death" to the EDPS for prior checking under Article 27 of Regulation (EC) 45/2001 ("the Regulation")¹.

As this was an ex-post case (i.e. the processing was already in place at the time of notification), the deadline of Article 27(4) of the Regulation does not apply. Given that the EDPS was in the process of developing Guidelines on eCommunications ("the Guidelines"), which also cover questions of access to (former) staff members' mailboxes in their absence, the EDPS decided to suspend all pending ex-post cases on this issue until the adoption of the Guidelines. Following adoption of the Guidelines on 16 December 2015², the case was unsuspending again.

The analysis below will only cover those aspects of the procedure where the EIB is not compliant with the Guidelines or which otherwise merit comments.

¹ OJ L 8/1, 12/01/2001

² https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/15-12-16_eCommunications_EN.pdf

The Facts

The EIB's procedure on "Access to the professional/personal data, physical or electronic, of staff members in the event of absence, leaving the Bank or death" is based on Article 3.7, second subparagraph of the Code of Conduct for its staff, as further elaborated in Note to Staff No. 626.

Information on the procedure is provided in Note to Staff No. 626. In case the procedure is used, the (former) staff member will be contacted where possible, explaining the reasons and purposes for the request and requesting her/his consent. If consent is not given, the matter will be referred to HR and the DPO will be consulted. Upon request of HR and in line with the instructions given by it, IT-Sec will retrieve the information requested in line with relevant legal provisions.

This procedure only covers access to e-mails for business continuity purposes; the rules on accessing e-mails in administrative inquiries and disciplinary proceedings are covered elsewhere³.

Legal Analysis

The procedure notified covers accessing staff members' mailboxes for purposes of business continuity. It therefore does not aim at evaluating staff members' conduct (Article 27(2)(b) of the Regulation); neither does it trigger any of the other criteria requiring prior checking under Article 27.⁴ The notified processing operations are therefore **not subject to prior checking**.

That being said, the EDPS still has some observations to make against the background of the Guidelines.

Article 3.7, second subparagraph of the Code of Conduct authorises limited private use of EIB equipment by staff. It does not refer in any detail to the procedures for the EIB to access personal data of staff members in the event of absence, leaving the Bank or death. All available information and documentation of procedures appears to be included in Note to Staff No. 626. The EIB should **clarify the status of Note to Staff No. 626, notably whether it only serves as an information instrument, or whether it also serves as a legal basis for the procedure in itself. In the former case, the EIB should adopt a specific internal legal basis.**

Moreover, the (former) staff member's consent is not the appropriate ground for lawfulness in this situation (see also point 66 of the Guidelines). The reason for accessing an e-mail account is for business continuity and because it has been deemed necessary and proportionate for this purpose as part of the EIB's performance of its tasks in the public interest. The fact that, should the staff member refuse consent, the EIB may still go on to access the data indicates that this would not be valid consent.⁵ The EDPS recommends the EIB to **amend the procedure and the information provided to staff accordingly. The information to staff should also include information on the right to object under Article 18 of the Regulation.**

Under Articles 11 and/or 12 (as applicable) of the Regulation, persons concerned have to be informed about the processing of their personal data (see also recommendations 17 and 18 in the Guidelines). These Articles provide a list of information items to be provided. Controllers

³ see EDPS case 2009-0459

⁴ In some cases, the EIB may access staff members' mailboxes for purposes of evaluating their conduct in the framework of internal investigations. However, such uses are covered by the EIB's notification on anti-fraud investigations, which has already been the object of a prior checking notification to the EDPS (EDPS case 2009-0459). Staff members are also instructed to flag private or confidential messages accordingly, reducing the risk that such messages will be accidentally accessed.

⁵ See Article 29 Working Party Opinion 15/2001, p. 13 and Article 29 Working Party Opinion 08/2001, p. 3 for more information. To summarise, given the power imbalance between staff and employer, consent should only be used when there is a genuinely free choice for the staff member to make. This is not the case here.

have a certain leeway in how they provide this information, but usually a privacy statement is the best way to do so. In the case at hand, there is no specific privacy statement, but users are informed about some aspects of the processing in Note 626, which is made available to all staff. However, the information provided should be improved: The controller is currently only mentioned implicitly (mandatory item under Article 11(1)(a) / Article 12(1)(a)); there is no mention of the right to access⁶ for data stored electronically (Article 11(1)(e) / Article 12(1)(e)); the right to recourse to the EDPS is not mentioned (Article 11(1)(f)(iii) / Articles 12(1)(f)(iii)). The EDPS recommends the EIB to **also provide the missing information to staff**, either in Note 626, a separate privacy statement, or when contacting (former) staff members about the impending access.

Conclusion

Please inform the EDPS about the implementation of the three recommendations highlighted in bold above **within three months** from the date of this Opinion.

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc: [...], DPO, EIB

⁶ the section entitled "access to personal data" of Note to Staff No. 626 is about the *EIB's* access to personal data of staff members, not about staff members' access to their *own* personal data.