



Brussels, 3 June 2016

EDPS Decision pursuant to Article 9(7) of Regulation (EC) No 45/2001 concerning the transfers of personal data carried out by the ECB for its supervisory activities

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to Regulation (EC) No 45/2001 of the European Parliament and 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 data¹ (the “Regulation”), and in particular Article 9(7) thereof,

Whereas:

- (1) Transfers of personal data from the European Central Bank (ECB) to third countries not recognised as ensuring an adequate level of protection of personal data within the meaning of paragraphs 1 and 2 of Article 9 of Regulation (EC) No 45/2001 for the purposes of the ECB's authorisation division's procedures necessitate an authorisation from the European Data Protection Supervisor (EDPS) pursuant to Article 9(7) of the Regulation.
- (2) The ECB intends to establish cooperation arrangements with third-country (banking) supervisory authorities for more efficient supervision of internationally active financial groups. Some of the information exchanged may be personal data.
- (3) With a view to guaranteeing protection of personal data transferred to its partners, the ECB intends to annex a set of data protection clauses to these arrangements and has submitted draft clauses to the EDPS.
- (4) On 16 September 2014, the ECB notified the planned procedures of its Authorisation Division (licensing, qualifying holdings, fit and proper, right of establishment by significant supervised entities, withdrawals of authorisation) for prior checking under Article 27 of the Regulation. On 3 November 2014, the EDPS issued a Prior Check Opinion on this notification. Concerning transfers under Article 9 of the Regulation, the ECB explained that it had the intention of negotiating cooperation arrangements with third-country authorities in the future. The EDPS stressed that any such arrangements and transfers would have to comply with Article 9. The Opinion contained a number of other recommendations as well.
- (5) The follow-up of the Prior Check Opinion was closed on 13 July 2015. Concerning transfers under Article 9, the ECB committed to submitting draft data protection clauses for consultation when it intends to negotiate arrangement with third-country authorities.
- (6) The EDPS considers that the ECB and its partners should enter into a specific cooperation agreement setting out the main elements of the processing and the main data protection and security principles and safeguards. This should include, among others, a binding reference to the clauses' provisions and mandatory confidentiality undertakings for the

¹ OJ L 8, 12.01.2001, p. 1.

persons authorised to process the data. It should provide for binding mediation or arbitration mechanisms in case of complaints from data subjects.

- (7) It is necessary to specify the exceptional circumstances in which the suspension or termination of data flows may be justified.

HAS ADOPTED THIS DECISION:

Article 1

For the purposes of the present Decision:

- (a) **EDPS** shall mean the European Data Protection Supervisor;
- (b) **ECB** shall mean the European Central Bank;
- (c) **Partner** shall mean the third-country (banking) supervisory authority with which the ECB enters into a MoU;
- (d) **MoU** shall mean the Memorandum of Understanding entered into by the ECB and a third-country (banking) supervisory authority;
- (e) **MoU Data Protection Clauses** shall mean the Annex to the MoU containing specific provisions and clauses concerning the rules to be observed when transferring or otherwise processing personal data in the framework of the MoU, as annexed to the present Decision.

Article 2

1. Subject to the conditions laid down in Articles 3, 4, 5 and 6 below, the EDPS takes note that the ECB has provided sufficient safeguards in respect of transfers of personal data carried out to (banking) supervisory authorities in third countries not ensuring an adequate level of protection of personal data within the meaning of Article 9, paragraphs 1 and 2 of Regulation (EC) No 45/2001 in the framework of the ECB's supervisory activities.

2. Transfers of personal data from the ECB to its partners within the meaning of paragraph 1 are therefore authorised.

Article 3

The ECB shall enter into a MoU with each partner containing:

- (a) a definition of the scope of the cooperation;
- (b) confidentiality obligations, as applicable to the ECB and the partner, respectively;
- (c) a statement that all transfers of personal data held by the ECB to the partner and the processing of personal data received from the partner are subject to the requirements of Regulation (EC) 45/2001;
- (d) a commitment to data protection rules, as explained in the MoU Data Protection Clauses, annexed to the MoU.

Article 4

1. The ECB shall issue detailed instructions setting out the specific implementation rules concerning the transfers subject of this Decision, with particular regard to the safeguards aimed at ensuring respect for the principles of necessity, proportionality and data quality in

the processing of personal data, including a prohibition of automated individual decisions pursuant to Article 19 of Regulation (EC) No 45/2001.

Article 5

The EDPS may exercise the existing powers conferred under Article 47 of Regulation (EC) No 45/2001, and in particular the power to impose a temporary or definitive ban on the transfers that are the subject of this Decision. Such powers may be exercised in particular where:

- (a) the EDPS or another competent data protection authority or court has determined that the ECB or the recipient is in breach of the applicable standards of protection; or
- (b) there is a substantial likelihood that the standards of protection are being infringed; or
- (c) there are reasonable grounds to believe that one or more of the conditions set out by the present Decision are not complied with.

Article 6

1. The ECB shall provide the EDPS with the complete list of MoU signed containing the MoU Data Protection Clauses and notify the identity of new partners as soon as a new MoU is signed. The ECB shall also publish this list.
2. The ECB shall report to the EDPS on the implementation of the present Decision on a regular basis, at least once a year.

Article 7

The ECB shall take all the measures to comply with this Decision and submit the first report to the EDPS in this regard within three months of the adoption of this Decision.

Article 8

This Decision is addressed to the ECB.

Done at Brussels, 3 June 2016

[signed]

Wojciech Rafał WIEWIÓROWSKI

Assistant European Data Protection Supervisor

Annex: Model text for MoU data protection clauses: "data protection contractual clauses related to the memorandum of understanding between the ECB and [insert name of the authority]"

Annex:

DATA PROTECTION CONTRACTUAL CLAUSES RELATED TO THE MEMORANDUM OF UNDERSTANDING BETWEEN THE ECB AND [INSERT NAME OF THE AUTHORITY]

The European Central Bank (ECB), hereinafter: the “data exporter”

and

[insert name of the Authority], hereinafter “data importer”

each a “party”; together “the parties”,

acting in good faith, warrant and undertake that they will meet all obligations specified in the clauses that follow, and that they have the legal authority to do so.

1. DEFINITIONS

For the purposes of these clauses:

1.1. “personal data”, “special categories of data”, “processing of personal data”, “controller”, “processor”, “data subject”, and “adequate protection” shall have the same meaning as in Regulation (EC) 45/2001¹.

1.2. “ECB personal data” shall mean personal data which are transferred by the ECB to [insert name of the Authority] in the context of this Memorandum of Understanding.

1.3. “[insert name of the Authority] personal data” shall mean personal data which are transferred by [insert name of the Authority] to the ECB in the context of this Memorandum of Understanding.

1.4. “data importer” shall mean the controller who agrees to receive from the data exporter personal data for further processing in accordance with the terms of these clauses and who is not subject to a third country’s system ensuring adequate protection;

1.5. “data exporter” shall mean the controller who transfers the personal data;

1.6. “clauses” shall mean these contractual clauses.

2. JOINT OBLIGATIONS

2.1. The data importer shall process personal data of the data exporter only for purposes described in Article 1 of the Memorandum of Understanding.

2.2. The data importer has in place appropriate technical and organisational measures to protect the data exporter’s personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, and which provide a level of security appropriate to the risk represented by the processing and the nature of the data to be protected. The data importer shall process all data received from the data exporter on its own premises, and will not process the data by means of services provided by external service providers.

2.3. The data importer has in place procedures to ensure that any third party which it has authorised to have access to the data exporter’s personal data, including processors, shall respect and maintain the confidentiality and security of such data. Any person acting under the authority of the data importer, including a data processor, will be required to process the personal data only on instructions from the data importer and only on the premises of the data importer.

2.4. The data importer will disclose personal data provided by the data exporter to government authorities, including non-EU government authorities, only with the express agreement of the data

¹ OJ L 8/1, 12/01/2001

exporter. Such agreement must be obtained from the data exporter on each occasion of a proposed disclosure, before the disclosure is made.

(i) Such government authorities shall be obliged by the express terms of disclosure to:

(1) use the personal data only for the purpose of prudential supervision,

(2) ensure the orderly disposal of any personal data received, consistent with such authority's record retention procedures, and

(3) obtain the data exporter's express permission for any further dissemination.

(ii) Failure to respect the conditions for transfer will make such government authority ineligible to receive subsequent transfers from the data importer of the data exporter's personal data.

2.5. Upon request, each of the parties shall provide either the other party, or an independent/impartial inspection agent or auditor, which the inspecting party selects and which is not reasonably objected to by the inspected party, or the competent court, as the case may be, with sufficient evidence of compliance, and shall demonstrate the effectiveness of measures taken.

3. OBLIGATIONS OF THE ECB The ECB warrants and undertakes that:

3.1. [insert name of the Authority] personal data shall be processed and further transferred by the ECB in accordance with the law applicable to the ECB, in particular Articles 7 and 8 EU Charter of Fundamental Rights and Regulation (EC) No. 45/2001.

3.2. ECB personal data have been collected, processed and transferred in accordance with the law applicable to the ECB, and in particular in accordance with Article 9 of Regulation (EC) 45/2001.

3.3. The ECB has used reasonable efforts to determine that [insert name of the Authority] is able to satisfy its legal obligations under these clauses.

3.4. The ECB has provided [insert name of the Authority] with a copy of Regulation (EC) 45/2001 and will provide it, when so requested, with copies of any other relevant data protection laws or references to them of the EU, and will keep it informed of any changes to such laws relevant to the ECB's obligations concerning this Memorandum of Understanding.

3.5 The ECB shall implement appropriate and effective measures to ensure that the principles and obligations set out in Regulation 45/2001 are satisfied, and shall demonstrate compliance to the EDPS on its request.

3.6. The ECB shall respond to enquiries from data subjects and the European Data Protection Supervisor (EDPS) concerning the processing of ECB personal data by [insert name of the Authority], unless both parties have agreed in a particular case that [insert name of the Authority] will send the response. In that event the ECB will respond to the extent reasonably possible and with the information reasonably available to it if [insert name of the Authority] is unwilling or unable to respond. Responses will be made within three months.

3.7. The ECB shall make available to data subjects, upon request, a copy of this Memorandum of Understanding and its Annex.

3.8. The ECB shall record each transfer or series of transfers of ECB personal data, and each of the ECB's onward transfers of [insert name of the Authority] personal data to a third party. It will also record each request from [Authority] for an onward transfer of ECB personal data, and the ECB's reply. The records will specify the data subjects and categories of data subjects, the purpose of the transfer, and categories of data transferred, the recipient, whether special categories of data are concerned, and any other relevant and necessary information.

4. OBLIGATIONS OF [INSERT NAME OF THE AUTHORITY]

4.1. To enable the ECB to meet its obligation to adduce adequate safeguards for the protection of the personal data which it exports to a recipient not subject to the EU data protection regime, [insert name of the Authority] warrants and undertakes that it will process ECB personal data in accordance with the Data Protection Principles set forth in the Appendix to these clauses.

4.2. [insert name of the Authority] warrants and undertakes that it has no reason to believe, at the time of entering into these clauses, in the existence of any laws to which it is subject that would have a substantial adverse effect on the guarantees provided for under these clauses, and it will inform the ECB if it becomes aware of any such laws.

5. INTERPRETATION OF THE CLAUSES

These clauses shall be construed in accordance with the ECB's obligations under applicable EU law, as interpreted by the courts of the EU.

6. RESOLUTION OF DISPUTES WITH DATA SUBJECTS OR THE EDPS

6.1. In the event of a dispute or claim brought by a data subject or the European Data Protection Supervisor (EDPS) concerning the processing of the personal data against either or both of the parties, the parties will inform each other, and will cooperate with a view to an amicable settlement in a timely fashion.

6.2. The parties agree to respond to any generally available non-binding mediation procedure initiated by a data subject or by the EDPS. If they participate in the proceedings, the parties may elect to do so remotely (such as by telephone or other electronic means). The parties also agree to consider participating in any other non-binding arbitration, mediation or other dispute resolution proceedings developed for data protection disputes.

6.3. In the event that all efforts on dispute resolution as set out under points 6.1 and 6.2 fail, the ECB must bear responsibility in accordance with Article 32 of Regulation (EC) 45/2001 for any damage suffered by the data subject as a result of a violation of these clauses. Such responsibility covers damages resulting from violations committed by [insert name of the Authority] in cases where the data subject was not able reasonably to obtain redress from [insert name of the Authority].

7. SUSPENSION AND TERMINATION

7.1. In the event that either party fails to respect its undertakings under these clauses, the other party may temporarily suspend the transfer of its personal data until the breach is repaired or the Administrative Cooperation Arrangement is terminated.

7.2. In the event that the transfer of personal data is suspended by either party, or that the Administrative Cooperation Arrangement is terminated pursuant to Point 6 therein, the EDPS shall be so informed. Such suspension or termination does not exempt the parties from the obligations and/or conditions under the clauses as regards the processing of the personal data already transferred.

[insert name of the Authority] competent signatory

European Central Bank (ECB)

Date:

APPENDIX

DATA PROCESSING PRINCIPLES

1. Purpose limitation: Personal data may be processed and subsequently used or further communicated only for purposes described in Point 1 of the Administrative Cooperation Arrangement or subsequently authorised by the data subject.
2. Data quality and proportionality: Personal data must be accurate and, where necessary, kept up to date. The personal data must be adequate, relevant and not excessive in relation to the purposes for which they are transferred and further processed. The data should 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 further processed.
3. Transparency: The controller must provide data subjects with specified information in accordance with Articles 11 and 12 of Regulation 45/2001. The provision of such information may be deferred in accordance with Article 20.
4. Security and confidentiality: Technical and organisational security measures must be taken by the data controller that are appropriate to the risks, such as against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, presented by the processing. Any person acting under the authority of the data controller, including a processor, must not process the data except on instructions from the data controller.
5. Rights of access, rectification, deletion and objection: Data subjects must have access to their personal data and must be able to have the personal data about them rectified, blocked or erased in accordance with Articles 13-16 of the Regulation. Notification of any rectification, blocking or erasure to third parties to whom the data have been disclosed need not be made when this involves a disproportionate effort. Data subjects must also be able to object to the processing of the personal data relating to them if there are compelling legitimate grounds relating to their particular situation. The burden of proof for any refusal rests on the data importer, and the data subject may always challenge a refusal before the EDPS.
6. Special categories of data: The controller shall take such additional measures (e.g. relating to security) as are necessary to protect such special categories of data in accordance with its obligations under clause 2.2.