

(To be filled out in the EDPS' office)

REGISTER NUMBER: 1135

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NOTIFICATION FOR PRIOR CHECKING

DATE OF SUBMISSION: 23/07/2013

CASE NUMBER: 2013-0892

INSTITUTION: EUROPEAN CENTRAL BANK

LEGAL BASIS: ARTICLE 27-5 OF THE REGULATION CE N° 45/2001⁽¹⁾

INFORMATION TO BE GIVEN²

1/ NAME AND ADDRESS OF THE CONTROLLER

European Central Bank
Directorate General Human Resources, Budget & Organisation
Head of Human Resources Policies and Staff Relations Division
Kaiserstrasse 29
60311 Frankfurt am Main, Germany

2/ ORGANISATIONAL PARTS OF THE INSTITUTION OR BODY ENTRUSTED WITH THE PROCESSING OF PERSONAL DATA

Directorate General Human Resources, Budget and Organisation (**DG/H**), Human Resources Policies & Staff Relations Division (**PSR Division**).

3/ NAME OF THE PROCESSING

The data processing operations relate to the handling of personal data during the different stages of the Underperformance Procedure (**UPP**).

4/ PURPOSE OR PURPOSES OF THE PROCESSING

The UPP aims at identifying cases of underperformance and bringing the respective staff members back on track again. This procedure is part of the ECB's working culture of sustained high performance and continuous professional development in line with its values.

The purpose of the processing operation of personal data in the context of the UPP is to implement

¹ OJ L 8, 12.01.2001.

² Please attach all necessary backup documents

the relevant legal and practical provisions and to monitor their concrete implementation. The procedure aims at fostering objectivity, clarity and transparency of modalities, criteria, and timing. Each individual underperformance case will be separately reviewed by DG/H and appropriate and suitable documentation for each case will be needed in order to achieve the right outcome for each individual case.

Against this background, the UPP consists of the following steps as displayed in the UPP process chart (**Annex 4 to the ECB Cover Letter**):

Process step 1: Initiating of Underperformance Procedure

- 1) Establishment through two consecutive appraisals (appraisal process has already been prior checked by the EDPS)
- 2) Written Proposal to initiate UPP
- 3) Initiation of UPP

Process step 2: Establishment of a Performance Improvement Plan (PIP)

- 4) Establishment of Performance Improvement Plan (PIP)
- 5) Establishment of review dates of PIP
- 6) Final assessment of performance based on PIP

Process – Step 3: Underperformance Hearing and Decision

- 7) Appointment of members UP hearing panel
- 8) Underperformance hearing by UP hearing panel
- 9) Decision by UP hearing panel and/or EB

The UPP is spelled out in the **ECB Staff Rules (Annex 3 of the ECB Cover Letter)**, while an anchoring provision is also foreseen in the Conditions of Employment.

5/ DESCRIPTION OF THE CATEGORY OR CATEGORIES OF DATA SUBJECTS

The personal scope of application of the UPP is limited to the category of **ECB staff members** who qualify as members of staff in accordance with the definition given in Article 1 of the Conditions of Employment for Staff of the European Central Bank:

“1. For the purposes of these Conditions of Employment, “member of staff” of the European Central Bank (hereinafter referred to as the ECB) shall mean any person who has countersigned an employment contract appointing him/her for an indefinite period or a definite period of more than one year to a position within the ECB and who has taken up his/her appointment.”

Short-term staff members are not subject to the UPP.

In accordance with Article 8.5.3 of the Staff Rules, the UPP shall not be initiated for the following members of staff:

- a) *For members of staff who have not completed their probationary period;*
- b) *For members of staff who participate in the ECB’s Graduate Programme, unless the graduate programme participant was engaged at the ECB as a member of staff for an indefinite period immediately prior to their participation in the ECB’s Graduate Programme;*
- c) *For members of staff for whom the ECB’s Medical Adviser has established that a medical condition is the main and direct cause of the underperformance;*

d) *For members of staff elected to represent staff interests or nominated representatives of recognised trade unions and their alternates who are dispensed for at least 25% from the work in their business area for most of the relevant performance cycle.”*

6/ DESCRIPTION OF THE DATA OR CATEGORIES OF DATA (including, if applicable, special categories of data (Article 10) and/or origin of data).

The data concerned are of a personal and confidential nature and relate to the documentation of underperformance during the different stages of the UPP, as shown in the flow chart (**Annex 4 of the ECB Cover Letter**).

The personal data of staff members are related to their performance on the following ECB sections, as incorporated in the appraisals:

Key responsibilities & agreed objectives
Assessment on values & competences
Management competencies (only for ECB Managers)

Specific data concerning UPP procedure:

- Performance Improvement Plan: agreed objectives and review
- UPP Decision: The underperformance hearing panel shall transmit its decision to the member of staff, the Director General Human Resources, Budget and Organisation or their Deputy, and where applicable, to the Executive Board, within 20 working days from the underperformance hearing. A proposal to the Executive Board by the underperformance hearing panel shall be accompanied by the fully documented record of the underperformance procedure.

Health data:

Data related to the health of staff members are not collected or processed but only the reply from the Medical Adviser whether or not the underperformance is based on the staff member's medical condition. This follows from Article 8.5.3 and Article 8.5.4 of the Staff Rules (**Annex 3 of the ECB Cover Letter**):

“8.5.3 The underperformance procedure shall not be initiated:

[...] c) for members of staff for whom the ECB's Medical Adviser has established that a medical condition is the main and direct cause of the underperformance.”

”8.5.4 [...] In particular if, during such a hearing, the Director General Human Resources, Budget and Organisation or their Deputy considers, or if the member of staff invokes, a medical condition as the main and direct cause of the underperformance, the Director General Human Resources, Budget and Organisation or their Deputy shall immediately refer the member of staff to the ECB's Medical Adviser for examination. In this case, a decision whether or not to initiate an underperformance procedure shall be postponed until receipt of the reply from the ECB's Medical Adviser.”

Data belonging to the special categories described in Article 10 of Regulation 45/2001 are not being collected or processed during the appraisal procedure.

7/ INFORMATION TO BE GIVEN TO DATA SUBJECTS

With regard to staff members who are subject to the underperformance procedure, we would like to refer to Article 8.5 of the Staff Rules (**Annex 3 of the ECB Cover Letter**). Here it is outlined which information is exchanged with the staff member at which moment.

Furthermore, data subjects will be informed on the UPP via an intranet page containing a Privacy Notice which refers also to the prior checking notification for further details (the intranet page is currently in the process of being developed).

The Privacy Notice to be incorporated in the intranet page reads as follows:

“Underperformance Procedure (UPP) - Privacy Statement

This privacy statement aims at providing you with the required information on the processing of personal data during the several phases of the underperformance procedure (UPP) to make you aware of the data protection implications. For more detailed information, reference is made to the prior checking notification on the UPP submitted to the EDPS.

Purpose of the personal data processing

The UPP aims at identifying cases of underperformance and bringing the respective staff members back on track. This procedure is geared to encouraging ECB staff members to at least perform satisfactorily and to supporting staff members who underperform in reverting to at least satisfactory performance. The procedure aims at fostering objectivity, clarity and transparency of modalities, criteria, and timing.

The purpose of the processing operation of personal data in the context of the UPP is to implement the relevant legal and practical provisions and to monitor their concrete implementation. Each individual underperformance case will be separately reviewed by DG/H; appropriate and suitable documentation for each case will be needed in order to achieve the right outcome for each individual case.

Legal basis for the personal data processing

The legal basis for this processing is provided in:

- Conditions of Employment for staff of the ECB (CoE), in particular Articles 11 and 41*
- ECB Staff Rules (SR), in particular Article 8.5*

Controller

The designated ‘controller’ for data processing is the Head of the “Human Resources Policies and Staff Relations Division” (PSR) of the Directorate General Human Resources, Budget and Organisation.

Data categories

The documentation of the various stages of the UPP (the Initiation of the UPP, the establishment of a Performance Improvement Plan and Underperformance Hearing and Decision) contains personal data in relation to the identified underperformance. The UPP makes also use of a staff member's assessment in the yearly appraisal exercise as defined in the relevant legal provisions of the SR. In the yearly appraisal exercise, staff members are measured against their key responsibilities, agreed

objectives, ECB values, the competences required by the respective job profile and management competencies in case the staff member is an ECB Manager.

Recipients of data

The main individuals involved in the UPP are – depending on the stage of the procedure – the staff member, the line manager, the Area Head of the staff member and the Director General Human Resources, Budget and Organisation (or Deputy). In case an underperformance hearing panel is constituted, this panel will also have access to the information and eventually the Executive Board will have access to the file. Furthermore, the data might be disclosed to members of staff who, for professional reasons need to have access to the information contained in the file and whose access is authorised by the Director General Human Resources, Budget and Organisation or his/her Deputy/Director General. These parties will be subject to the legal obligation of professional secrecy.

Rights of access and rectification

Personal data held in the context of the UPP is accessible by the individual concerned in accordance with EC Regulation 45/2001 and Article 9 of the implementing ECB Decision (ECB/2007/1). This implies that the staff member has the right of access to the documentation related to the UPP and to rectify inaccurate or incomplete data in the file.

Retention period for data

Pursuant to Article 8.5.23 of the Staff Rules, all documents established in conjunction with or as a result of the underperformance procedure shall be stored in the member of staff's personal file and shall be removed

- (a) in case of an underperformance procedure, five years following its closure;*
- (b) in case of a proposed initiation of an underperformance procedure that has not been followed by such procedure, three years following completion of the second annual appraisal establishing underperformance, or at the request of the member of staff at any point in time, after the member of staff was informed of the decision not to initiate an underperformance unless during that period another annual appraisal establishes underperformance or the documents are needed for a possible follow-up, such as judicial proceedings.*

Points of contact - Right to recourse to the EDPS

In case of queries or complaints on the processing of their personal data, such individuals are encouraged to contact the Controller (Head of Human Resources Policies and Staff Relations Division), and/or the ECB Data Protection Officer. They also have the right to have recourse to the European Data Protection Supervisor. “

8/ PROCEDURES TO GRANT RIGHTS OF DATA SUBJECTS (RIGHTS OF ACCESS, TO RECTIFY, TO BLOCK, TO ERASE, TO OBJECT)

Article 9 of the ECB Decision of 17 April 2007 adopting implementing rules concerning data protection at the ECB (ECB/2007/1) applies.

“1. Further to their right to be appropriately informed about any processing of their personal data, data subjects may approach the relevant controller to exercise their rights pursuant to Articles 13 to 19 of Regulation (EC) No 45/2001, as specified below.

(a) These rights may only be exercised by the data subject or their duly authorised representative. Such persons may exercise any of these rights free of charge.

(b) Requests to exercise these rights shall be addressed in writing to the relevant controller. The controller shall only grant the request if the requester's identity and, if relevant, their entitlement to represent the data subject have been appropriately verified. The controller shall without delay inform the data subject in writing of whether or not the request has been accepted. If the request has been rejected, the controller shall include the grounds for the rejection.

(c) The controller shall, at any time within three calendar months of receipt of the request, grant access pursuant to Article 13 of Regulation (EC) No 45/2001 by enabling the data subject to consult these data on-site or to receive a copy thereof, according to the applicant's preference.

(d) Data subjects may contact the DPO in the event that the controller does not respect either of the time limits in paragraphs (b) or (c). In the event of obvious abuse by a data subject in exercising their rights, the controller may refer the data subject to the DPO. If the case is referred to the DPO, the DPO will decide on the merits of the request and the appropriate follow-up. In the event of disagreement between the data subject and the controller, both parties shall have the right to consult the DPO".

In addition, the following specific provisions apply:

Art. 8.5.23 of the Staff Rules: "All documents established in conjunction with or as a result of the underperformance procedure provided for by these Rules, and all documents submitted by the member of staff in the course of such procedure, shall be stored in the personal file of the member of staff. The member of staff may request insertion in their personal file of any decision by the Executive Board not to terminate the employment contract"

Art. 8.5.20 of the Staff Rules: "Prior to the hearing, the underperformance hearing panel or the member of staff may request the recording of the hearing for the purpose of drawing up the minutes".

9/ AUTOMATED / MANUAL PROCESSING OPERATION

Data are processed by both automated and manual means, i.e. appraisal information is manually inserted into the HR SAP application (ISIS) by the appraiser and appraisee. The digital personal file is held electronically in SAP (ISIS). Once an underperformance procedure has been initiated, the documentation for the on-going procedure is stored in the Electronic Documents and Records Management System (EDRMS) of the ECB (DARWIN) in order to allow for collaboration between the parties concerned - accessible only to those concerned.

10/ STORAGE MEDIA OF DATA

All documents established in conjunction with or as a result of the UPP provided for by the respective provisions, and all documents submitted by the member of staff in the course of such procedure, shall be stored in the member of staff's personal file held in SAP (ISIS). For the on-going procedure and due to collaboration purposes, the documentation is stored in the EDRMS.

11/ LEGAL BASIS AND LAWFULNESS OF THE PROCESSING OPERATION

- Article 36 of the Statute of the European System of Central Banks and of the European Central Bank
- Article 21 of the Decision of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank

- Conditions of Employment for staff of the ECB (**CoE**), in particular Articles 11 and 41 (**Annex 2 to the ECB Cover Letter**)

The CoE define all the provisions that govern the employment relationship with the ECB. They are proposed by the Executive Board, and adopted by the Governing Council after information of the General Council.

- ECB Staff Rules (**SR**), in particular Article 8.5 (**Annex 3 to the ECB Cover Letter**)

The SR complement the Conditions of Employment and give more precise information on the provisions that govern the employment relationship with the ECB.

The processing operation is lawful according to Article 5 a Regulation 45/2001 in connection with Recital 27 of the Data Protection Regulation 45/2001.

12/ THE RECIPIENTS OR CATEGORIES OF RECIPIENT TO WHOM THE DATA MIGHT BE DISCLOSED

The main individuals involved in the UPP are the staff member, the line manager, the Area Head of the staff member, the Director General Human Resources, Budget and Organisation or its Deputy; in case an Underperformance Hearing Panel is constituted, it will also have access to the information; eventually the Executive Board will have access to the file.

According to the different stages of the UPP as reflected in the process chart (**Annex 4 of the ECB Cover Letter**), the data might be disclosed to the recipients involved as follows:

Process step 1: Initiating of Underperformance Procedure

- 1) Establishment through two consecutive appraisals – line manager
- 2) Written Proposal to initiate UPP – line manager, Area Head of staff member, Director General Human Resources, Budget and Organisation (or Deputy)
- 3) Initiation of UPP – line manager, Area Head of staff member, Director General Human Resources, Budget and Organisation (or Deputy)

Process step 2: Establishment of a Performance Improvement Plan (PIP)

- 4) Establishment of Performance Improvement Plan (PIP) – line manager, Area Head of staff member
- 5) Establishment of review dates of PIP – line manager
- 6) Final assessment of performance based on PIP – line manager, Area Head of staff member, Director General Human Resources, Budget and Organisation (or Deputy)

Process – Step 3: Underperformance Hearing and Decision

- 7) Appointment of members UP hearing panel – UP hearing panel consists of Director General Human Resources, Budget and Organisation (or Deputy), two Area Heads of other Business Areas (or their Deputies), Staff Committee Representative with non-voting rights
- 8) Underperformance hearing by UP hearing panel – UP hearing panel, line manager, Area Head of staff member, other individuals called during the panel to testify
- 9) Decision by UP hearing panel and/or EB – UP hearing panel, Executive Board, line manager, Area Head of staff member

With regard to the personal data contained in the personal file and in ISIS, according to Article 1.1.4 of the Staff Rules the personal file shall be confidential. Access to it will be granted only to

(a) the member of staff concerned;

(b) members of the Executive Board;

(c) members of staff who, for professional reasons, need to have access to the information contained in the file and whose access is authorised by the Director General Human Resources, Budget and Organisation or his/her Deputy Director General. These parties will be subject to the legal obligation of professional secrecy.

(d) a member of staff may authorise the Directorate General Human Resources, Budget and Organisation - subject to the approval of the Executive Board - to make his/her personal file available to third parties.

Following Article 7 of Regulation 45/2001, the data might be disclosed to the European Ombudsman, the European Data Protection Supervisor or the European Court of Justice in case of complaints, disputes or legal proceedings falling within their legitimate competence.

13/ RETENTION POLICY OF (CATEGORIES OF) PERSONAL DATA

In accordance with Article 8.5.23 of the Staff Rules, all documents established in conjunction with or as a result of the UPP, and all documents submitted by the member of staff in the course of such procedure, shall be stored in the member of staff's personal file.

With the exception of appraisals, and where applicable, the decision by the Executive Board to demote the member of staff or to terminate the employment contract, these documents shall be removed from the personal file:

- in case of an UPP, five years following its closure;

- in case of a proposed initiation of an underperformance procedure that has not been followed by an underperformance procedure, three years following completion of the second annual appraisal establishing underperformance, or at the request of the member of staff at any point in time, after the member of staff was informed of the decision not to initiate an underperformance procedure, unless during that period another annual appraisal establishes underperformance or the documents are needed for a possible follow-up, such as judicial proceedings.

Pursuant to Article 8.5.20 of the Staff Rules, any recordings of panel hearings as regards underperformance procedures shall be destroyed within six months from the final decision by the Executive Board or the closure of the underperformance procedure, unless they are needed for a possible follow-up such as judicial proceedings.

The case folder in the EDRMS serves for internal collaboration purposes only and shall be deleted within six months after closure of the underperformance procedure.

13 A/ TIME LIMIT TO BLOCK/ERASE ON JUSTIFIED LEGITIMATE REQUEST FROM THE DATA SUBJECTS

No specific time limits apply to the blocking or erasure of data on justified legitimate requests from the data subjects. In case the staff member is being informed of the decision not to initiate an underperformance procedure, the staff member may request at any point in time to remove the documentation from the personal file, unless during that period another annual appraisal establishes underperformance or the documents are needed for a possible follow-up, such as judicial proceedings.

14/ HISTORICAL, STATISTICAL OR SCIENTIFIC PURPOSES

If you store data for longer periods than mentioned above, please specify, if applicable, why the data must be kept under a form which permits identification.

Not applicable

Further processing for historical, statistical or scientific purposes is not envisaged at this stage. Should the retention of data be decided at a later stage in order to gain statistical figures on the underperformance procedure, the data will be anonymised.

15/ PROPOSED TRANSFERS OF DATA TO THIRD COUNTRIES OR INTERNATIONAL ORGANISATIONS

Not applicable

16/ THE PROCESSING OPERATION PRESENTS SPECIFIC RISK WHICH JUSTIFIES PRIOR CHECKING (*Please describe*):

Article 27.2. (a); Processing of data relating to health and to suspected offences, offences, criminal convictions or security measures.³

Article 27.2. (b); Processing operations intended to evaluate personal aspects relating to the data subject, here assessment of the performance of professional duties.

Article 27.2. (d); Processing operations for the purpose of excluding individuals from a right, benefit or contract.

17/ COMMENTS

n/a

PLACE AND DATE:

DATA PROTECTION OFFICER:

INSTITUTION OR BODY:

³ As stated above in section 6) on the data categories, no data relating to health are processed but only the reply from the Medical Adviser whether or not the underperformance is based on the staff member's medical conditions.

