

(To be filled out in the EDPS' office)
REGISTER NUMBER: 1147

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NOTIFICATION FOR PRIOR CHECKING

DATE OF SUBMISSION: 05/08/2013

CASE NUMBER: 2013-0930

INSTITUTION: ESMA

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

INFORMATION TO BE GIVEN²

1/ NAME AND ADDRESS OF THE CONTROLLER
Verena Ross, Executive Director
European Securities and Markets Authority (ESMA)
103 rue de Grenelle
75007 Paris, France

2/ ORGANISATIONAL PARTS OF THE INSTITUTION OR BODY ENTRUSTED WITH THE PROCESSING OF PERSONAL DATA
ESMA Operations Division/HR Team

3/ NAME OF THE PROCESSING
Evaluation of staff through:
- probationary reports and managerial probationary reports;
- annual performance appraisal exercise/staff performance assessment
- reclassification/promotion.

4/ PURPOSE OR PURPOSES OF THE PROCESSING
Management, collection, monitoring of the use and processing of staff' data in relation to their performance in areas of ability, efficiency and conduct in service.

¹ OJ L 8, 12.01.2001.

² **Please attach all necessary backup documents**

5/ DESCRIPTION OF THE CATEGORY OR CATEGORIES OF DATA SUBJECTS

Staff members (Temporary and Contract Agents).

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

1. Identification data:

- Administrative data (name, surname, details concerning previous education and career, contact details of reporting officer(s)).

The Authority does not use the automated IT application and the evaluation is done via hard copies.

2. Special (sensitive) categories of data:

Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life, are prohibited unless an exception can be found in Articles 10 (2)-10 (5) of Regulation 45/2001.

Within the framework of the evaluation certain data belonging to the "special categories of data" might be collected, including:

- Evaluation data: Assessment of staffs' performance with regards ability, efficiency and conduct in service;
- data related to health - in particular in case of probationary period extension due to a maternity or/and sick leave as in line with Article 34(1) of the Staff Regulations. The reason for the extension is provided in a separate note and no information about actual diagnosis is processed within the probation procedure.

As in line with the Regulation, the data subject by providing freely this kind of personal data, is giving his/her consent for data processing.

7/ INFORMATION TO BE GIVEN TO DATA SUBJECTS

In order to ensure transparency and fairness of the processing, the following information listed in Articles 11 and/or 12 of Regulation 45/2001 is provided to data subjects:

- identity of the controller,
- purpose of the processing,
- data categories,
- whether replies to the questions are obligatory or voluntary, as well as possible consequences of failure to reply,
- possible data recipients,
- existence of rights of access, rectification and recourse to the EDPS,
- legal basis of the processing,
- applicable data retention periods.

Due to the fact that this information should be provided either at the collection of data or before their first disclosure to a third party, the following communication means were considered as appropriate for the particular procedure:

- data protection clause in the respective report form, application form or messages sent to data subjects, and
- specific privacy statement made available on the Intranet.

A data protection note will be published on the Authority website, explaining all the information and rights of data subjects (see attached document).

8/ PROCEDURES TO GRANT RIGHTS OF DATA SUBJECTS (Rights of access, to rectify, to block, to erase, to object)

ESMA's Implementing Rules on Data Protection relating to the Regulation (EC) No 45/2001 with regards to the processing of personal data lay down the detailed rules pursuant to which a data subject may exercise his/her rights, the procedure for notifying a processing operation and the procedure for obtaining access to the register of processing operations kept by the Data Protection Officer.

The data processed must be accurate, and where necessary, kept up to date. The data subject have a right to contact HR and access or rectify or erase their own personal data, in case of inaccurate or incomplete data.

Administrative data:

The accuracy of these data is checked and verified by the data subjects themselves, by filling the self-assessment part of both reports.

Evaluation data:

The accuracy of these kinds of data is difficult to establish due to their subjective nature. The evaluation of staff performance done by hierarchical superiors is subjective, and data subjects have a possibility to add their comments directly in this report.

9/ AUTOMATED / MANUAL PROCESSING OPERATION

Manual processing operation for:

- Probationary period reports
- Performance appraisals
- Promotions/reclassifications

The Authority does not use, for the time being, an automated IT application and the evaluation is done via hard copies.

- The initiation of the process is done by HR by sending the necessary pre-filled forms to the managers for the evaluation and data subjects for their self-assessment;
- The data subjects are provided with a copy of their reports and are invited to make comments on them, as foreseen in Article 34 and 43 of the Staff Regulations, as well as Article 14 and 83 CEOS. They can also obtain access to all the documents in their personal file even after leaving the service – Art. 26 of the Staff Regulations, and Art. 11(1) and 81 of the CEOS.
- The evaluation data can be rectified within appeal procedure and this report should also be added to the personal file of concerned data subject.

10/ STORAGE MEDIA OF DATA

The evaluation reports are stored on paper (hard copies) in personal files in line with Article 26 of the Staff Regulations, locked in a special cabinet with restricted access rights.

11/ LEGAL BASIS AND LAWFULNESS OF THE PROCESSING OPERATION

As in line with the Article 5(A) of the Regulation, the personal data may be processed if “processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties... or other legal instrument adopted”.

- Probationary reports – Art. 34 of the Staff Regulations and Art. 14 and 83 of CEOS
- Managerial probationary reports – Art. 44-46 of the Staff Regulations
- Performance appraisals – Art. 43 of the Staff Regulations and Art.15(2) of the CEOS
- Reclassification/promotions – Art. 10(3) and 15 CEOS.

In addition, the corresponding implementing rules, adopted By ESMA on the basis of Article 110 of the Staff Regulations.

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

The access rights to the personal data of data subject are restricted to HR staff.

Recipients within Authority:

- HR staff dealing with the corresponding processes
- Head of Operations Division
- Executive Director (for the purpose of reporting and confirming the contract)
- Respective Head of Unit/Division
- Data subjects themselves, for the data that concerns them individually.

Recipients outside Authority, if requested (European Union institutional bodies):

- Internal Audit Service of the Commission and the Court of Auditors (for audit purposes)
- OLAF
- Court of Justice of the European Union
- European Ombudsman.

13/ RETENTION POLICY OF (CATEGORIES OF) PERSONAL DATA

Article 4(1)(e) of Regulation 45/2001 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 evaluation reports are stored on paper (hard copies) in personal files in line with Article 26 of the Staff Regulations, locked in a special cabinet with restricted access rights, for the same duration as the retention period of the personal file itself: up to ten years after the termination of employment of the concerned staff member.

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

(Please, specify the time limits for every category, if applicable)

According to ESMA's Implementing Rules, Article 12: If the ground for the request of blocking data is the inaccuracy of the data, as referred in paragraph 41, a), the Data Controller shall immediately block the data for the period necessary for verifying the accuracy and completeness of the data. A data subject who has requested and obtained the blocking of data shall be informed thereof by the Data Controller. He or she shall also be informed of the fact that data are to be unblocked at least 15 working days before they are unblocked. The Data Controller shall take a decision as soon as possible and at the latest within 15 working days of receiving a request for data to be blocked. If the request is accepted, it shall be acted upon within 30 working days and the data subject notified thereof. Should the request for blocking be rejected, the Data Controller shall have 15 working days within which to inform the data subject by means of a letter stating the grounds for the rejection. In automated filing systems, blocking shall be ensured by technical means. The fact that personal data are blocked shall be indicated in the system in such a way as to make it clear that the data may not be used. Personal data blocked pursuant to this Article shall, with the exception of their storage, only be processed for purposes of proof, or with the consent of the data subject or for the purpose of protecting the rights of third parties.

According to ESMA's Implementing Rules, Article 13: The data subject shall have the right to obtain from the Data Controller the erasure of data if the processing thereof is unlawful. If the request is accepted, it shall be acted upon immediately. If the Data Controller deems the request unjustified, he or she shall have 15 working days within which to inform the data subject by means of a letter stating the grounds for the decision.

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.

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*):

The evaluation procedure is a processing operation that:

- intends to evaluate personal aspects relating to the data subject, and, therefore falls under Article 27.2.(b) of the Regulation;
- processes data Processing operations for the purpose of excluding individuals from a right, benefit or contract, and, therefore falls under Article 27.2.(d) of the Regulation.

17/ COMMENTS

PLACE AND DATE:
Paris, 17 June 2013

DATA PROTECTION OFFICER:
Stephan Karas

INSTITUTION OR BODY:
ESMA

