

Opinion on the notification for prior checking received from the Data Protection Officer of the European Central Bank concerning the ECB's Underperformance Procedure

Brussels, 30 August 2013 (Case 2013-0892)

1. Proceedings

On 23 July 2013, the European Data Protection Supervisor ("EDPS") received from the Data Protection Officer ("DPO") of the European Central Bank ("ECB") a notification for prior checking concerning the ECB's Underperformance Procedure ("UPP").

On 30 July 2013, the EDPS sent a request for additional information to the DPO, who responded on 1 August 2013. The draft Opinion was sent to the DPO for comments on 2 August 2013 and these were received on 5 August 2013.

2. Facts

The **purpose** of the processing operation outlined in the UPP aims at identifying cases of underperformance and bringing the respective staff members back on track again. Each individual underperformance case will be separately reviewed by the ECB's Directorate General Human Resources, Budget and Organisation (DG/H), who is entrusted with the processing on behalf of the ECB as controller.

Against this background, the UPP consists of the following **three step procedure**:

Step 1: Initiating of Underperformance Procedure

- 1) Establishment through two consecutive appraisals¹;
- 2) Written Proposal to initiate UPP;
- 3) Initiation of UPP.

Step 2: Establishment of a Performance Improvement Plan (PIP)

- 4) Establishment of Performance Improvement Plan (PIP), containing objectives and review dates (the staff member concerned is invited to contribute and has the opportunity to provide written observations);
- 5) Final assessment of performance based on PIP.

Step 3: Underperformance Hearing and Decision

- 6) Appointment of members Underperformance hearing panel
- 7) Underperformance hearing by Underperformance hearing panel
- 8) Decision by Underperformance hearing panel and/or the ECB's Executive Board. The Underperformance hearing panel shall transmit its decision to the member of staff, the Director General Human Resources, Budget and

¹ See EDPS Opinion on the ECB's staff appraisal procedure in case 2004-0274.

Organisation or their Deputy, and where applicable, to the Executive Board, within 20 working days from the underperformance hearing.

The **legal basis** of the UPP is anchored in the Conditions of Employment for Staff of the ECB² and contained in the ECB Staff Rules³.

The **data subjects** concerned by the application of the UPP are members of staff in accordance with the definition given in Article 1 of the Conditions of Employment for Staff of the ECB⁴. Short-term staff members (employment contract not more than one year) are thus not subject to the UPP. In accordance with Article 8.5.3 of the ECB Staff Rules, the UPP shall also not be initiated for staff members:

- who have not completed their probationary period;
- 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;
- for whom the ECB's Medical Adviser has established that a medical condition is the main and direct cause of the underperformance;
- who have been 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.

The personal **data processed** relate to the staff members identified underperformance which is documented in the various stages of the UPP (the initiation of the UPP, the establishment of a PIP with agreed objectives and review, and the Underperformance hearing and decision). The UPP also makes use of a staff member's assessment in the yearly appraisal exercise as defined in the relevant legal provisions of the Staff Regulations. In the yearly appraisal exercise, staff members are measured against their (a) Key responsibilities & agreed objectives; (b) Assessment on values & competences required by the respective job profile and (c) Management competencies in case the staff member is an ECB Manager.

Only the reply from the Medical Adviser whether or not the underperformance is based on the staff member's medical condition shall be processed; no other data related to health is collected or processed. This follows from Article 8.5.3 of the ECB's Staff Rules⁵, according to which the UPP shall not be initiated: "[...] c) for

² As amended by the draft Decision of the ECB amending the Conditions of Employment for Staff of the ECB attached as Annex 2 to the notification. The Conditions of Employment for Staff of the ECB 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.

³ As amended by the draft Decision of the ECB attached as Annex 3 to the notification. The ECB's Staff Rules complement the Conditions of Employment for Staff of the ECB and give more precise information on the provisions that govern the employment relationship with the ECB.

⁴ "1. For the purposes of these Conditions of Employment, "member of staff" of the European Central Bank...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."

⁵ As amended by the draft Decision of the attached as Annex 3 to the notification.

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"⁶.

Depending on the different stages of the UPP, the **recipients** of the personal data are:

- Step 1 (Initiating of Underperformance Procedure): line manager, Area Head of staff member, Director General Human Resources, Budget and Organisation (or Deputy)
- Step 2 (Establishment of a Performance Improvement Plan): line manager, Area Head of staff member, Director General Human Resources, Budget and Organisation (or Deputy)
- Step 3 (Underperformance Hearing and Decision): Underperformance hearing panel (consisting 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); line manager, Area Head of staff member, other individuals called during the panel to testify; Executive Board. A proposal to the Executive Board by the underperformance hearing panel shall be accompanied by the fully documented record of the underperformance procedure.

As highlighted in the Privacy Notice incorporated in the intranet page, these parties will be subject to the legal obligation of professional secrecy. With regard to the personal data contained in the personal file and in the HR SAP application (ISIS), according to Article 1.1.4 of the ECB Staff Rules, the personal file shall be confidential. Access to it will be granted only to (a) the staff member concerned; (b) members of the Executive Board; (c) staff members 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. In addition, a staff member 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.

The data might also be disclosed to the European Ombudsman, the EDPS or the European Court of Justice in case of complaints, disputes or legal proceedings falling within their legitimate competence.

Regarding **information given to data subjects**, a Privacy Notice available on a dedicated intranet page will inform data subjects of the following elements: the purpose of the processing operation; the legal basis of the processing operation; the identity of the controller; the categories of data concerned; the recipients of the data; the existence of the right of access to, and the right to rectify, the data concerning him or her; the retention periods and the right to have recourse to the EDPS.

⁶ Article 8.5.4 of the ECB's Staff Rules additionally stipulates that "[...] 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."

Furthermore, Article 8.5 of the ECB's Staff Rules⁷ outlines which information is exchanged with data subjects at which step of the procedure. This includes inter alia the following steps:

- Under Article 8.5.4, the line manager shall inform the member of staff of the proposal to initiate an UPP and of the possibility of requesting a hearing;
- Under Article 8.5.5, The Director General Human Resources, Budget and Organisation or their Deputy shall inform the member of staff in writing of their decision as to whether or not to initiate an underperformance procedure;
- Under Article 8.5.6, the line manager shall communicate the draft PIP to the member of staff, who may present their written observations within 10 working days of receipt thereof;
- Under Article 8.5.7, at the regular performance review dates, the line manager shall provide feedback to the member of staff on the development of his/her performance;
- Under Article 8.5.8, within 10 working days from the final performance review, the line manager shall assess the performance development and its sustainability in writing and communicate it to the member of staff;
- Under Article 8.5.21, 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.

As concerns the **rights of individuals with respect to their personal data**, next to Article 9 of the ECB Decision of 17 April 2007 adopting implementing rules concerning data protection at the ECB (ECB/2007/1)⁸, the following specific provisions of the ECB Staff Rules⁹ 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”*.

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 informed of the decision not to initiate an underperformance procedure, the staff member may request at any 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.

Retention period:

⁷ As amended by the draft Decision of the ECB attached as Annex 3 to the notification.

⁸ “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. ...”

⁹ As amended by the draft Decision of the ECB attached as Annex 3 to the notification.

a) In accordance with Article 8.5.23 of the Staff Rules¹⁰, all documents established in conjunction with or as a result of the UPP, and all documents submitted by the staff member in the course of such procedure, shall be stored in the staff member's personal file. With the exception of appraisals, and where applicable, the decision by the Executive Board to demote the staff member 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 UPP that has not been followed by an UPP, three years following completion of the second annual appraisal establishing underperformance, or at the request of the staff member at any point in time, after the staff member was informed of the decision not to initiate an UPP, unless during that period another annual appraisal establishes underperformance or the documents are needed for a possible follow-up, such as judicial proceedings.

b) 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.

c) The case folder in the Electronic Documents and Records Management System (EDRMS) serves for internal collaboration purposes only and shall be deleted within six months after closure of the underperformance procedure.

With respect to **security measures**, (...)

3. Legal aspects

3.1. Prior checking

Applicability of Regulation (EC) No 45/2001 ("the Regulation"): The processing by the ECB of data relating to staff constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*", Article 2 (a) of the Regulation). The data processing is performed by the ECB, an EU body, in the exercise of activities which fall within the scope of EU law (Article 3(1) of the Regulation in the light of the Lisbon Treaty).

Data are processed by both automated and manual means, i.e. appraisal information is manually inserted into the HR SAP application by the appraiser and appraisee. The digital personal file is held electronically in SAP (ISIS). Once an UPP has been initiated, the documentation for the on-going procedure is stored in the EDRMS of the ECB in order to allow for collaboration between the recipients listed above.

Therefore, the Regulation is applicable.

Grounds for prior checking: According to Article 27(1) of the Regulation, "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purpose shall be subject to prior checking by the European Data Protection Supervisor*". Article 27(2) of the

¹⁰ As amended by the draft Decision of the ECB attached as Annex 3 to the notification.

Regulation contains a list of processing operations that are likely to present such risks. This list includes "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (Article 27 (2)(b)) as well as "*processing operations for the purpose of excluding individuals from a right, benefit or contract*" (Article 27 (2)(d)). The UPP is intended to evaluate the performance of professional duties by the staff member concerned so as to identify cases of underperformance and bringing the respective staff member back on track. Where these efforts fail, the UPP can result in the termination of the staff member's employment contract; this is, however, not the intended *purpose* of the UPP (see also Section 3.5 below). The UPP is thus subject to prior checking under Article 27 (2)(b) of the Regulation.

Deadlines: The notification of the DPO was received on 23 July 2013. According to Article 27(4) of the Regulation, the EDPS Opinion must be delivered within a period of two months. The procedure was suspended for a total of 5 days. Consequently, the present Opinion must be delivered no later than 30 September 2013.

3.2. Lawfulness of the processing

Article 5 of the Regulation provides criteria for making the processing of personal data lawful. According to Article 5(a), the processing is lawful if it is "*necessary for the performance of a task carried out in the public interest on the basis of the Treaties...or other legal instruments adopted on the basis thereof*". According to §27 of the recitals to the Regulation, this includes "*the processing of personal data necessary for the management and functioning of those institutions and bodies*".

a) The processing operation is performed by the ECB in the context of a **task carried out in the public interest** based on Article 36 of the Statute of the European System of Central Banks and of the ECB as well as Article 21 of the Decision of the ECB of 19 February 2004 adopting the Rules of Procedure of the ECB.

b) **Existence of a legal basis:** The above provisions provide the basis on which the ECB has established the Conditions of Employment for staff of the ECB and the ECB's Staff Rules, in particular Article 8.5 outlining the UPP.

c) As to the **necessity of the processing of personal data**, it is clear that in order to carry out a UPP, personal data needs to be collected and further processed.

3.3. Data Quality

Adequacy, relevance and proportionality: According to Article 4(1)(c) of the Regulation, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*".

Adequacy: The use of data derived from the last two appraisal exercises, the agreed content of the PIP and the documentation of the underperformance hearing including the underperformance decision where applicable seem adequate, relevant and non excessive for the purpose for which they are collected. Via the Privacy Notice available on the intranet, the actors involved are reminded that they are subject to the legal obligation of professional secrecy (see also Section 3.6 below).

Accuracy: Article 4(1)(d) of the Regulation provides that personal data must be "*accurate and, where necessary, kept up to date*" and that "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified*". Evaluation data will by nature be subjective and thus cannot be considered "relevant, not excessive and accurate" as such, but the fact that data subjects can ask to modify where appropriate or add further comments and/or information serves to guarantee data quality.

- a) Firstly, the EDPS notes that the evaluation in the context of the appraisal exercise (step 1) has previously been prior checked¹¹. In this context, the EDPS concluded that the procedure itself guarantees the accuracy and up-to-date nature of the data.
- b) As regards the establishment of the PIP (step 2), the fact that the staff member concerned is given the opportunity to contribute to the establishment of the PIP and to present written observations to any regular performance review under the PIP will guarantee the accuracy and up-to-date nature of the data. As regards the final assessment based on the PIP, the EDPS notes that the assessment made by the line manager is by nature based on a judgement¹². However, should the third step of the procedure be launched, the underperformance hearing grants the opportunity to the staff member concerned to comment on the observations made on his/her underperformance.
- c) In addition, the different stages of both the review the PIP as well as the underperformance hearing (step 3), provide the opportunity for the line manager to reconsider his/her assessment, or to bring it up-to-date if appropriate.

The EDPS concludes that the UPP itself guarantees the accuracy and up-to-date nature of the data.

Fairness and lawfulness: Article 4(1)(a) of the Regulation also provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (see above Section 3.2) and fairness will be dealt with in relation to information provided to data subjects (see below Section 3.8).

3.4. Data retention

Article 4(1)(e) of the Regulation 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*".

- As regards the five and three year retention periods established for all UPP documents¹³ stored in the staff member's personal file as well as the case folder in the EDRMS, which shall be deleted within six months after closure of the UPP, the EDPS considers that Article 4(1)(e) of the Regulation is respected.

¹¹ See EDPS Opinion on the ECB's staff appraisal procedure in case 2004-0274.

¹² Which is by its nature subjective, see EDPS Guidelines on Staff Evaluation, p. 7.

¹³ With the exception of appraisals, and where applicable, the decision by the Executive Board to demote the staff member or to terminate the employment contract.

- As regards the recordings of underperformance panel hearings, which shall be destroyed within six months from the final decision by the Executive Board or the closure of the UPP, it could be argued that they will not need to be retained for longer than needed to draw up the minutes of the hearing. However, as the basis for drawing up the minutes of the underperformance hearing panel, the recordings constitute the full source of information on which the minutes are drawn up. In the case of one of the parties refusing to sign the minutes, or where the recordings themselves document a breach of professional duties, the recordings might need to be retained until a related dispute has been settled or adjudicated upon. The EDPS considers that this is in line with the requirements of Article 4(1)(e) of the Regulation.

The EDPS considers that Article 4(1)(e) of the Regulation is respected.

3.5. Compatible use

Article 4(1)(b) of the Regulation stipulates that personal data must be "*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*".

As noted above, step 1 of the UPP is initiated based on the establishment of underperformance through two consecutive appraisals. It cannot be considered that the UPP uses the data processed in the ECB's staff appraisal procedure¹⁴ in the analysed context for any purpose other than assessing the performance of the staff member concerned. Both procedures aim primarily at the evaluation of the performance of the staff member. The fact that the UPP can result in the termination of the staff member's employment contract in its step 3 is neither a necessary effect of the previous steps of the UPP nor its primary objective, as is obvious from the existence of the PIP stage (step 2 of the UPP).

The purpose of the UPP thus involves no change of purpose and is not incompatible with the purpose of the appraisal exercise; Article 4(1)(b) of the Regulation is respected.

3.6. Transfer of data

In line with Article 7 of the Regulation, personal data can be transferred within or to other institutions or bodies "*if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient*" (paragraph 1). The recipient shall process the data "*only for the purposes for which they were transmitted*" (paragraph 3).

Personal data processed in the UPP context are transferred to numerous recipients within the ECB. The EDPS considers that making this data available to the internal recipients listed above is necessary for the legitimate performance of the recipients' tasks. The EDPS welcomes that the Privacy Notice on the UPP available on the ECB's intranet explicitly notes that these parties will be subject to the legal obligation of professional secrecy. However, the EDPS invites the ECB to additionally and explicitly remind them as well that they can only process the data for the purposes for which they were transmitted (Article 7(3) of the Regulation).

¹⁴ See EDPS Opinion on the ECB's staff appraisal procedure in case 2004-0274.

Insofar as the data might also be disclosed to the European Ombudsman, the EDPS or the European Court of Justice in case of complaints, disputes or legal proceedings falling within their legitimate competence, the EDPS considers that the data are necessary for the legitimate performance of the tasks covered by the competence of the receiving institutions.

The requirements of Article 7 of the Regulation are met.

3.7. Rights of the data subjects

Articles 13 to 19 of the Regulation establish a number of rights for data subjects. These notably include the right to access data upon request by the data subject and the right to rectify, erase or block personal data.

The EDPS welcomes the provisions laid down in the ECB Staff Rules assuring full access to all relevant documents in the context of the UPP by data subjects and considers that the requirements of Article 13 are met.

The EDPS notes that the UPP, personal data related to data subjects other than the staff member concerned may be processed (e.g. individuals called by the Underperformance hearing panel to testify). The right of access for any person implied in the UPP should thus also be taken into account; the EDPS recommends that the right of access of these persons is restricted only within the limits of Article 20 of the Regulation.

3.8. Information to the person concerned

Articles 11 and 12 of the Regulation provide for information to be given to data subjects to ensure the transparency of the processing of personal data. When the data has not been obtained from the data subject, as in the case at hand, the information must be given when the data is first recorded or disclosed, unless the data subject already has it (Article 12 of the Regulation).

The EDPS considers that the Privacy Notice available on the intranet meets these requirements.

3.9. Security measures

(...)

4. Conclusions

The EDPS considers that there is no violation of Regulation (EC) No 45/2001 provided that the ECB fully takes into consideration the above considerations before launching the UPP. In particular, the ECB should:

- ensure that the right of access of any data subject other than the staff member concerned by the UPP (e.g. individual called by the Underperformance hearing panel to testify) is restricted only within the limits of Article 20 of the Regulation;
- remind all recipients that they can only process the data for the purposes for which they were transmitted.

Done at Brussels, 30 August 2013

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor