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correspondence

Subject: Corrigendum Public access request to a list of gifts received by ECB members of staff

Dear Ms Julibert,

In an e-mail of 27 May 2013, the European Central Bank (ECB) asked to the European Data Protection Supervisor (EDPS) his views on the following requests regarding public access requests to the list of gifts received by ECB members of staff:

- Could the Executive Board members' names be released with the list of gifts received and refused?
- Should any of the elements (name, position, organisation, country) identifying the sources/donors of such gifts be deleted?

These questions aim at knowing whether data can be provided following a public access request pursuant to ECB Public Access Decision ECB/2004/3 and for which categories of data subjects the names and list of gifts received and refused should be disclosed. This request is considered as a consultation under Article 46(d) of Regulation 45/2001 (the "Regulation").

Facts

As explained by the ECB, the collection of data on the gifts received by ECB staff members is part of the Ethical framework rules of the ECB¹. The rule on gifts states that:

"Members of staff may neither solicit nor accept any gifts with the following exceptions:

- (a) private sector entertainment or hospitality with a value of up to EUR 50,*
- (b) gifts which do not go beyond what is customary and considered appropriate in relations with other central banks, national public bodies and international organisations.*

Members of staff shall endeavour to return to its source any gift received against the applicable rules and inform such source of the ECB rules in this respect. If the return of a gift is not possible, members of staff shall hand it over to the ECB. Members of staff shall report any gift received or refused in the template provided on the Intranet, except gifts in (b) above and gifts of up to EUR 10".

This last sentence in particular mentions the obligation for members of staff to provide information on gifts received. At the ECB, this is captured via an electronic form into a register of gifts.

Three categories of data subjects must be considered here: (i) the staff members; (ii) the Executive Board members who may receive gifts and (iii) the donors (when they are individuals and not legal persons).

The categories of personal data processed in this respect are: name of the staff member or Executive Board member who receives a gift; name of the provider of the gift, position, organisation, country.

Furthermore, with regard to making the gift register public upon public access requests², this processing operation is based on Article 4(1) of the ECB decision ECB/2004/3³ on public access to European Central Bank documents, which states:

"1. The ECB shall refuse access to a document where disclosure would undermine the protection of:

(...)

(b) the privacy and the integrity of the individual, in particular in according with Community legislation regarding the protection of personal data;

(...)".

¹ Section 0.10.2 of the ECB's Staff Rules

² The EDPS understands that there is no special procedure provided for by the ECB for making the gift register public and thus any request would be based on the procedures the ECB applies for requests for public access to documents pursuant to Article 15 TFEU.

³ Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents. Available on the ECB website: http://www.ecb.int/ecb/legal/pdf/1_08020040318en00420044.pdf.

Taking this into account, the ECB considers that this legal provision provides a basis to justify excluding the names of members of staff (other than Executive Board members) and personal names of donors from the list. Faced with a public access request, the ECB is therefore proposing to release a list including the name of the recipients only when these are Members of the Executive Board but not for any other member of staff. The ECB is also of the view that the personal data associated to donors would also have to be deleted from the list provided to the applicant.

Legal analysis

First of all, the EDPS wants to clarify that the processing operations of personal data in the context of the management of a gift register does not fall under one of the conditions of Article 27(1) and (2) of the Regulation and is therefore not subject to prior-checking. Given the fact that the ECB's policy does not provide for a public register or publication on the ECB website, the incidental publication of personal data upon request pursuant to ECB Public Access Decision ECB/2004/3 would not qualify the processing as prior checkable pursuant to Article 27(1) of the Regulation either.

With regard to the possible making public of the gift register to third parties upon public access request (which is not based on a register or by publication on the ECB website), this would qualify as a transfer which would need to comply with the conditions of Articles 8 or 9 of the Regulation (depending on the place of establishment of the party requesting access to the gift register) taking also into account the legitimate interests of the data subject.

The EDPS Paper on "*Public access to documents containing personal data after the Bavarian Lager ruling*" provides further guidance how such balance of interests should be made⁴.

In this paper, the EDPS described the Court's ruling and analysed the consequences in case of public access requests. Specifically, under Chapter IV, the EDPS considers that a disclosure of personal data upon request by an applicant situated within the EU must be dealt with by the institution involved under Article 8(b) of Regulation 45/2001. This follows from the *Bavarian Lager* judgment.

Article 8(b), in addition to the other basic provisions of the data protection regulation, determines the conditions under which access to personal data may be granted. This means that (1) the recipient has to establish the necessity of having the data transferred and (2) the institution must see whether there is no reason to assume that the data subject's legitimate interests might be prejudiced. According to the Court, Article 8(b) entails a balance of interests to be made by the institution concerned⁵.

Pursuant to Article 8(b) of the Regulation, data subjects thus should be able to present their views so that the institution/body can take a well-informed decision. However this does not mean that they need to consent to the transfer. Such an interpretation would make the

⁴ EDPS Background Paper "*Public access to documents containing personal data after the Bavarian Lager ruling*" of 24 March 2011, available on the EDPS website: http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/11-03-24_Bavarian_Lager_EN.pdf.

⁵ Commission v Bavarian Lager, see para 78 of the judgment (C-28/08 P).

required balance of interests of Article 8(b) of the Regulation devoid of substance. Nevertheless, the data subject should in any event be informed about an envisaged transfer, which enables the data subject to invoke his/her right to object as laid down in Article 18 of the Regulation.⁶

Article 9 of the data protection Regulation is applicable to requests for access to documents containing personal data, if the applicant is situated outside the EU.

As to the **categories of data subjects** concerned, the EDPS understands that the balancing of interests to be made by the ECB could lead to the outcome that public access to the information on gifts of the Executive Board members and even some senior management team members should be given. Such publication could be justified in terms of transparency requirements to allow control by peers and the public and processing would thus be legitimate provided, as expressed above, that the Executive Board members (or other senior management) are duly informed about the possibility of their personal data in the gift register being made public (for instance in a privacy statement) and have the right to object pursuant to Article 18 of the Regulation on compelling legitimate grounds.

As regards staff members, the EDPS recognises that the staff members are bound by the Staff Regulations and must work independently. The ECB should examine specifically the purpose of the publication and the proportionality of this measure. In conducting his analysis, the ECB should balance the necessity to ensure the independence of the ECB (notably by ensuring transparency) and the necessity to protect data subject rights to data protection as analysed by the Court of Justice⁷. However, no automatic priority can be conferred on the objective of transparency over the right to protection of personal data, even if important economic interests are at stake⁸.

As to the question regarding the deletion or not of any of the elements (name, position, organisation, country) identifying the sources/donors of such gifts, the EDPS understands that references to legal persons/organisations could be maintained, also in view of the transparency rule, as explained above. However, it would therefore not be necessary as such to provide the name of the individual representing the legal person; the information could be limited to the latter. Regarding gifts that would be received solely from a natural person, the ECB would need to also conduct another specific balance of interest pursuant to Article 8(b). In such case, it would be difficult to implement a system requiring the consent of the gift provider beforehand. However, it should be ensured that his/her right to be informed and to object be ensured.

Conclusion

Pursuant to the proactive approach the EDPS has taken in its Paper "*Public access to documents containing personal data after the Bavarian Lager ruling*", the ECB should assess the possible public nature of the gift register and make it clear to data subjects -before

⁶ See in this respect also the Opinions of the EDPS on making declarations of interests public, notably cases 2010-0914 and 2013-0409.

⁷ The ECJ 9 November 2010, *Schecke and Eifert*, joined Cases C-92/09 and C-93/09 and in particular, § 85: "It is necessary to bear in mind that the institutions are obliged to balance, before disclosing information relating to a natural person, the European Union's interest in guaranteeing the transparency of its actions and the infringement of the rights recognised by Articles 7 and 8 of the Charter. "

⁸ See, to that effect, *Commission v Bavarian Lager*, Case 28-08 P, paragraphs 75 to 79).

or at least at the moment they collect their data- the extent to which the processing might include its public disclosure. Consequently the data subject would need to be informed before the personal data is disclosed for the first time and should have the right to object to disclosure on compelling legitimate grounds pursuant to Article 18 of the Regulation.

In addition, given the fact that currently no public register on the website exists for Executive Board member of the ECB, the disclosure of a gift register under a request would qualify as a transfer and thus needs to respect the conditions of Articles 8 or 9 of the Regulation, in particular a balance of interests taking into account the data subject's legitimate interests.

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor

Cc: Mr Frederik MALFRERE, Data Protection Officer, ECB