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WW/OL/sn/D(2015)0579 C 2015-0016  
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Dear Mr [...],

On 6 January 2015, the Data Protection Officer (DPO) of the European Central Bank (ECB) notified the handling of personal data during the different stages of the Single Supervisory Mechanism (SSM) performance feedback process to the European Data Protection Supervisor (EDPS) for prior checking under Article 27 of Regulation (EC) 45/2001<sup>1</sup> ("the Regulation").

The EDPS has already issued guidelines on staff evaluation procedures.<sup>2</sup> While the notified processing operations do not concern staff appraisal in a strict sense, they are sufficiently similar to apply the guidelines by analogy. For this reason, the EDPS will not analyse all aspects of the performance feedback process, but only those which differ from the approach taken in the guidelines or otherwise could benefit from improvement.

The case has been suspended for further information and comments from 09 to 30 January 2015 and from 24 March to 02 April 2015.<sup>3</sup>

**The facts**

Under Council Regulation (EU) 1024/2013<sup>4</sup> ("the SSM Regulation"), the ECB carries out certain tasks in banking supervision in the context of the SSM. These tasks are further particularised in

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<sup>1</sup> OJ L 8/1, 12/01/2001

<sup>2</sup> Available on the EDPS website.

<sup>3</sup> According to Article 21(4) of the EDPS Rules of Procedure, if the final date is a public holiday or another day on which the EDPS' services are closed, the next working day shall be considered as the final date for delivering the Opinion (OJ L 273/41, 15/10/2013).

<sup>4</sup> OJ L 287/63, 29/10/2013,

further detailed in ECB Regulation (EU) 468/2014<sup>5</sup> ("the SSM Framework Regulation"). In order to fulfil these tasks, Joint Supervisory Teams (JSTs) and On-Site Inspection Teams (OITs) are designated. These teams include staff members of the ECB and of National Competent Authorities (NCAs). NCA staff members working for JSTs and OITs remain under the authority of their home NCA.

The SSM performance feedback process serves to provide performance feedback to ECB and NCA staff members working in JSTs and OITs.<sup>6</sup> While it is not a formal appraisal procedure, the feedback given may feed into such formal appraisals, either at the ECB (for its own staff members; the completed forms will be transferred to the relevant line manager), or by the home NCA of NCA staff members, to feed into their local appraisal systems (if permitted under national law). In a more general sense, the purpose of providing this feedback is also to allow the local supervisors at NCAs to manage the workload of their staff (who may be working part-time for a JST/OIT and part-time for their home NCA) and to give information on development and training needs, as well as on the skills and knowledge acquired working for a JST/OIT. The ECB intends to provide the performance feedback to all home NCAs of NCA staff concerned.<sup>7</sup>

### **Legal analysis**

According to Article 6(1) of the SSM Regulation, the ECB is responsible for the effective and consistent functioning of the SSM. The SSM Framework Regulation provides that the ECB is responsible for the establishment, composition and functioning of JSTs and OITs in Articles 3 and 4 and 143, 144 and 146, respectively. While these provisions do not explicitly attribute a role concerning performance feedback for staff members working in JSTs and OITs to the ECB, some degree of performance feedback is necessary for the management of JSTs and OITs.<sup>8</sup> The precise way of how this performance feedback mechanism will operate should be **defined in an internal legal basis adopted at the appropriate level.**

For ECB staff members, the performance feedback form will be made available to their line manager. Such transfers appear to be justified under Article 7 of the Regulation.

For NCA staff members, the ECB plans to transfer the performance feedback forms to the home NCA of the staff member, if permitted under the relevant national rules. Given that NCA staff members remain under their home NCA's authority during their work for JSTs or OITs, transfers for such purposes appear to be justified under Article 8(a) or (b). It is for the ECB to establish that one of these two provisions applies. **The ECB should ensure that such transfers only occur when the legitimacy of the transfer is duly established.**<sup>9</sup> The question of whether the data may be further used for performance appraisal by the NCA is for the relevant NCAs to determine. The data protection notice provided to data subjects mentions that the data may be used for local appraisal systems (i.e. by the home NCA) where permitted by local laws. This implies that data may be made transferred to the relevant home NCA; this aspect could be **clarified by explicitly referring to possible** (see above) **transfers to the relevant home NCA** in the data protection notice.

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<sup>5</sup> OJ L 141/1, 14/05/2014

<sup>6</sup> Only for staff members who either (a) spend more than 25-30% of their working time in JSTs or (b) participate in OITs for more than three months per review cycle.

<sup>7</sup> i.e. those mentioned in footnote 5.

<sup>8</sup> See also recital 27 of the Regulation on processing operations necessary for the management and functioning of EU institutions and bodies.

<sup>9</sup> See also EDPS case 2013-0744, dealing with transfers in a comparable situation.

**Conclusion**

The EDPS expects the ECB to implement the recommendation indicated in bold above and **closes case 2015-0016.**

Yours sincerely,

**(signed)**

Wojciech WIEWIÓROWSKI

Cc: Mr [...], Data Protection Officer, ECB