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Subject: Prior Checking Opinion on EIOPA's evaluation procedure of EIOPA's Chair and Executive Director, preceding the end of their respective five-year term of office, and the decision of extending the term of office (Case 2015-0693).

On 27 August 2015, the European Data Protection Supervisor ("EDPS") received a notification for prior checking from the Data Protection Officer ("DPO") of EIOPA regarding the evaluation procedure of EIOPA's Chair and Executive Director, preceding the end of their respective five-year term of office, and the decision of extending the term of office. The EDPS understands that EIOPA and the European Parliament consider the evaluation for the extension of the term of office of the Chair and the Executive Director similar to the selection for the appointment of the Chair and the Executive Director, namely that the evaluation in question is intended for the "selection and recruitment" purpose (extension of the mandate). This is confirmed by the fact that the EDPS has received one notification concerning the participation of the European Parliament in the procedure for appointing and extending the terms of office of Chairs and Executive Directors of the European Supervisory Authorities (case 2015-1028).

The EDPS takes note of the fact that the processing operation has already been established, making this de facto an ex post prior check. The two-month deadline therefore does not apply and this case was dealt with on a best effort basis.

The notified processing falls under the scope of the EDPS Guidelines concerning the processing of personal data in the area of staff evaluation¹ ("the Guidelines"). This Opinion

¹ Available on the EDPS website.

therefore will not contain a full analysis of the procedure, but will focus on those aspects that diverge from standard practice and/or require improvement. In light of the accountability principle guiding his work, the EDPS highlights that *all* relevant recommendations made in the Guidelines apply to the processing operations under consideration.

Description of facts and legal assessment

Grounds for prior-checking

The notification refers to Article 27(2) points (b) (evaluation of personal aspects) and (d) (processing intended to exclude from a right, benefit or contract) as reasons for prior-checking. The EDPS underlines that Article 27(2)(d) is not relevant here, since it concerns processing operations such as blacklists and asset freezing². This provision should therefore be deleted from the notification.

Grounds for lawfulness

EIOPA bases the lawfulness of the processing on Article 5(a) and (d) of the Regulation. The EDPS understands on the one hand that the second subparagraph of Article 48(4) of Regulation (EU) No 1094/2010 establishing EIOPA states that the Board of Supervisors may extend the term of office of the Chairperson subject to confirmation by the European Parliament. The transfer of the Chairperson's evaluation report is thus lawful under Article 5(a) of the Regulation.

While Article 51(2) of Regulation (EU) No 1094/2010 states that the Executive Director shall be appointed by the Board of Supervisors, after confirmation by the European Parliament, the EDPS observes that on the other hand the second subparagraph of Article 51(4) of Regulation (EU) No 1094/2010 states only that the Board of Supervisors may extend the term of office of the Executive Director. The European Parliament has requested by analogy its confirmation on the extension of the Executive Director's term of office. The notification states that the evaluation report of the Executive Director might be transferred to the European Parliament with his/her unambiguous consent. EIOPA considers Article 5(d) as a legal ground justifying the transfer of the Executive Director's personal data to the Parliament. The EDPS considers that the consent of the data subject is not the appropriate ground for lawfulness of the transfer. The transfer of the evaluation report is necessary for the Parliament to verify whether the current Chair or Executive Director indeed merits the extension of the term of office or should an open selection procedure be organised instead. The transfer is therefore lawful under Article 5(a) of the Regulation.

EIOPA should therefore delete the reference to Article 5(d) from the notification and the privacy statement.

Categories of personal data processed

The notification and the privacy statement do not mention certain categories of personal data processed.

² Exclusion databases offer an example of Article 27(2)(d): if a person is placed on the exclusion list, she is worse off (in that he/she is no longer eligible for participation in calls for tender) than if the exclusion database did not exist. Article 27(2)(d) therefore applies to such databases. See cases 2010-0426 and 2009-0681.

EIOPA should complete the notification with a more detailed description of the evaluation report (the self-assessment, proposed evaluation report of the Management board and the final evaluation report) and a reference to the deliberations of the Management Board in closed evaluation sessions .

Right of access

The evaluated persons (the Chairperson and the Executive Director) should be able to exercise their right of access not only to the deliberations of the Board of Supervisors, but also to the deliberations of the Management Board. Access should of course not be granted neither to the comparative results concerning the other evaluated person, nor to the individual opinions of the members of the Management Board, if such access would undermine the rights of the others (Article 20(1)(c) of the Regulation).

The EDPS therefore recommends that EIOPA provides the evaluated persons with the possibility to receive their personal data regarding the deliberations of the Management Board. This should be indicated in the notification.

Information to data subjects

In light of Articles 11 and 12 of the Regulation, EIOPA should add the following information to the privacy statement:

i) Categories of data concerned

EIOPA should clearly indicate all the categories processed as explained above.

ii) Recipients

EIOPA should include the relevant staff members of the HR and Legal team, among the list of recipients, and specify the data received.

iii) Right of access

EIOPA should indicate that the two evaluated persons may have the possibility to request formally information on the deliberations of the Board of Supervisor's evaluation sessions by contacting EIOPA's Alternate Chair or Legal Department. They may also have access to their personal data regarding the deliberations of the Management Board.

As a good practice, EIOPA should also indicate in the privacy statement that the two evaluated persons will receive their respective Evaluation report, drawn up by the Management Board, for comments before the final approval by the Board of Supervisors.

Completion of the notification

For fairness and transparency reasons the notification should provide all relevant and necessary information about the processing.

EIOPA should complete the notification with the additional information, which had been provided to the EDPS, in order to clarify the automated processing operation, the data storage media and the security measures to be adopted for the processing.

Conclusion

Based on the information provided, the EDPS has no reason to believe that the procedure breaches the Regulation.

In light of the accountability principle, the EDPS trusts that EIPO will ensure that all the above recommendations will be duly implemented in accordance with the Regulation.

We have therefore decided to **close the case 2015-0685**.

Kind regards,

[signed]

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Cc: [...], DPO, European Insurance and Occupational Pensions Authority