EUROPEAN DATA PROTECTION SUPERVISOR

WOJCIECH RAFAŁ WIEWIÓROWSKI
ASSISTANT SUPERVISOR

Mr Pier Luigi GILIBERT
Chief Executive
European Investment Fund (EIF)
37B, avenue J.F. Kennedy
L-2968 Luxembourg.

Brussels, 14 December 2016
WW/XK/sn/D(2016)2715 **C 2015-1103**
Please use edps@edps.europa.eu for all correspondence

Subject: **EDPS prior-check Opinion on *"administrative inquiries and disciplinary proceedings"* at EIF (case 2015-1103).**

Dear Mr Gilibert,

We have analysed EIF's notification on administrative inquiries and disciplinary proceedings at EIF sent on 22 February 2016 for prior-checking under Article 27of Regulation 45/2001 (the Regulation).

As this is an ex-post case, the deadline of two months for the EDPS to issue his Opinion does not apply.

The EDPS has issued Guidelines[1] on the processing of personal data in administrative inquiries and disciplinary proceedings by the EU institutions and bodies (the EDPS Guidelines). We are currently revising these existing Guidelines, introducing some further recommendations. On this basis, the EDPS will identify and examine the Agency's practices which do not seem to be in conformity with the principles of the Regulation as further outlined by the EDPS Guidelines, providing EIF with specific recommendations in order to be in compliance with the Regulation.

[1] Available on our website: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/10-04-23_Guidelines_inquiries_EN.pdf

1) Grounds for prior-checking

The notification states that the processing operations under analysis are justified for prior-checking under Articles 27(a) (b) and (d) of the Regulation.

The processing operations in the context of an administrative inquiry or disciplinary proceeding are likely to present specific risks to the rights and freedoms of individuals involved, as they may entail the processing of data relating to suspected offences, criminal convictions or security measures within the meaning of Article 27(2)(a) of the Regulation. Furthermore, the processing operations under analysis are intended to evaluate personal aspects relating to the individuals involved, in particular their alleged misconduct. Article 27(2)(b) of the Regulation is therefore also considered a legal ground for prior-checking.

Nevertheless, the primary purpose of conducting an administrative inquiry or a disciplinary proceeding is not to exclude individuals from a right, benefit or contract, but to investigate and assess potential misconduct. Article 27(2)(d) of the Regulation is therefore not applicable in the present case.

Recommendation:

1. EIF should erase from the notification Article 27(2)(d) of the Regulation as a legal ground for prior-checking the processing operations under analysis.

2) Lawfulness of administrative inquiries

The lawfulness of a processing must be justified on the basis of one of the five legal grounds under Article 5 of the Regulation.

Processing operations for administrative inquiries and disciplinary proceedings can in principle considered to be lawful under Article 5(a) of the Regulation.

Article 5 (a) of the Regulation requires two elements: the processing must be based on the Treaties or on an EU legal instrument based on the Treaties (legal basis) and it must be necessary for the performance of a task carried out in the public interest (necessity test).

Legal basis

As to the legal basis, Articles 38 to 41 of the EIF's Staff Regulations provide the legal basis of disciplinary measures and disputes, but they do not provide sufficient details as to the conduct of a disciplinary proceeding. The EIF's Staff Regulations do not provide a legal basis for the conduct of administrative inquiries either. The EDPS therefore recommends EIF to adopt a legally binding decision, policy or implementing rules regarding administrative inquiries and disciplinary proceedings. This specific legal instrument should define the purpose of an administrative inquiry and of a disciplinary proceeding, establish the different stages of the procedures to be followed and set out detailed rules and principles to be respected in the context of an inquiry and a disciplinary proceeding. A specific legal instrument will set out the process of an administrative inquiry or a disciplinary proceeding with legal certainty, safeguards and clarity in the interest of EIF. It should also enable those implicated in the process to have the necessary information about their rights and how to exercise them. This legal instrument could

then serve as a specific legal basis for administrative inquiries and disciplinary proceedings, which is missing so far.

Necessity test
Provided that the EIF adopts a legal basis which further implements the procedures applicable in administrative inquiries and disciplinary proceedings, the processing of personal data in this context can be considered as necessary in compliance with the Staff Regulations.

Recommendation:

2. EIF should adopt a specific legal instrument, to set out specific rules about the processing operation in an administrative inquiry and a disciplinary proceeding.

3) Necessity and proportionality when collecting data

On the basis of the information provided, it seems that EIF has not adopted written rules on the use of different means for collecting potential evidence in the context of an administrative inquiry or disciplinary proceeding.

In light of Article 4(1)(c) of the Regulation[2], investigators should rigorously apply the principles of necessity and proportionality when choosing the means of inquiry. The principle of data minimisation should be applied for all means and steps of the investigation. Investigators should limit the collection of personal information to what is directly relevant and necessary to the purpose of the inquiry and of the disciplinary proceeding. They should also retain the information only for as long as it is necessary to fulfil that purpose. In other words, investigators should collect only the personal data they really need, and they should keep it only for as long as they need it.

There are some more and less intrusive means of collecting data in the context of an inquiry or a disciplinary proceeding.

For example, the *hearing* of the person under investigation and of witnesses and victim is usually a proportionate option, as it is the least intrusive and the most transparent means to conduct an inquiry and establish the alleged facts relevant to the inquiry.

When collecting *paper information*, investigators should consider blanking out irrelevant or excessive information to the inquiry.

If *electronic information* related to the person under investigation is necessary and relevant evidence to the inquiry, the IT service should be in charge of implementing the technical aspects of the collection on instructions of the investigators. The number of authorised IT officers in charge should be strictly limited (need-to-know principle). The investigators' request should be specific so that the IT service will extract only relevant information[3].

---

2 *"Personal data must be adequate and not excessive in relation to the purposes for which they are collected and/or further processed".*

3 See section 2.6 of the "EDPS Guidelines on personal data and electronic communications in the EU institutions" about different methods that can be employed to investigate serious offences (access to e-Communications data, covert surveillance, forensic imaging of the content of computers and other devices, available on our website: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/15-12-16_eCommunications_EN.pdf.

EIF should consult its DPO in this regard and take into consideration the DPO's practical guidance and advice.

Recommendation:

3. EIF should ensure that the data protection rules on the use of different means for collecting potential evidence for the investigation are reflected in a Manual including specific guidance.

4) <u>Retention periods</u>

In accordance with Article 4(1)(e) of the Regulation, personal data must not be kept longer than necessary for the purpose for which they are collected or further processed.
The notification indicates "*personal data concerning sanctions is retained until termination of the employment contract*". This information is vague and not sufficient. EIF should consider three possible scenarios:

Pre-inquiry file: When EIF makes a preliminary assessment of the information collected and the case is dismissed. In such cases, EIF should set up a maximum retention period of two years after the adoption of the decision that no inquiry will be launched. This maximum retention period could be necessary for audit purposes and complaints to the Ombudsman.

Inquiry file: When EIF launches an inquiry including the collection of evidence and interviews of individuals, there are three possibilities: i) the inquiry is closed without follow-up, ii) a caution is issued or iii) the Appointing Authority of the institution adopts a formal decision that a disciplinary proceeding should be launched.

For cases i) and ii), a maximum of five-year-period from closure of the investigation is considered to be a necessary retention period, taking into account audit purposes and legal recourses from the affected individuals.

For case iii), EIF should transfer the inquiry file to the disciplinary file, as the disciplinary proceeding is launched on the basis of the evidence collected during the administrative inquiry.

Disciplinary file: EIF carries out a disciplinary proceeding with the assistance of internal and/or external investigators. In principle, EIF should take into consideration the nature of the sanction, possible legal recourses as well as audit purposes and set up a maximum retention period, after the adoption of the final Decision. EIF's Staff Regulations are silent as to whether a staff member may submit a request for the deletion of a written reprimand or for other more serious disciplinary measures, as provided in Article 38 of the EIF's Staff Regulations. EIF should introduce the possibility of a staff member to request the deletion of a decision on a disciplinary measure from his personal file at the discretion of the Appointing Authority. If the Appointing Authority decides that the Decision should be deleted from the personal file, the disciplinary file that led to the disciplinary measure should also be deleted. In any case, the EIF could grant the possibility to the staff member to submit a request for the deletion of their disciplinary file 10 years after the adoption of the final Decision. The Appointing Authority should assess whether to grant this request in light of the severity of the misconduct, the seriousness of the disciplinary measure imposed and the possible repetition of the misconduct during that period of 10 years.

Recommendation:

4. EIF should make a distinction of different retention periods according to the above possible scenarios and update the notification and its Decision accordingly.

5) Information to be given to the affected individuals

Informing affected individuals

EIF has not provided a data protection notice. Personal data must be processed fairly[4]. In order to guarantee fairness and transparency about the information processed regarding a specific inquiry, affected individuals should be informed about it in accordance with Articles 11 and 12 of the Regulation. EIF should therefore prepare a privacy notice and publish it where all other relevant documents about administrative inquires and disciplinary proceedings are found (i.e intranet). In addition, EIF should provide the affected individuals with the data protection notice as soon as it is practically possible, for example before starting the interview of the person. In principle, EIF should inform them of the opening and closing of the administrative inquiry related to them. This concerns the formal opening of an inquiry as well as the following stage, when the available information will for example be transferred to the Joint Committee appointed by EIF.

Content of the data protection notice

EIF should ensure that all relevant information is included in the data protection notice in accordance with the elements listed in Articles 11 and 12 of the Regulation. The EDPS draws the attention to EIF to some necessary information that should be provided in the context of a processing operation related to an administrative inquiry and a disciplinary proceeding. For example,

i) In light of Articles 11(1)(e) and 12(1)(e) of the Regulation, EIF should include in the data protection notice some clarifications as to the meaning of the right of rectification in the context of an administrative inquiry and a disciplinary proceeding. It does not only refer to factual inaccuracies; it refers to the right of affected individuals to add second opinions and include their comments as well as any additional testimonies, or other relevant documents to their inquiry file (i.e. a legal recourse or appeal decision)[5].

ii) Under Articles 11(1)(f)(ii) and 12(1)(f)(ii) of the Regulation, EIF should indicate clearly the three different scenarios and their respective retention periods.

Possible limitations to the rights of information, access and rectification of the affected individuals:

[4] See Article 4(1)(a) of the Regulation.

[5] To give an example: "this is not the statement I made in my hearing" as opposed to "this is an incorrect inference from the statement I made in my hearing" - for the latter case, review procedures or the possibility to provide second opinions are the appropriate way of remedying any issues.

The privacy notice should also refer to the possibility that EIF might need to restrict the right of information, access or rectification of an individual involved in the specific processing of their personal data in accordance with Article 20 of the Regulation.

For example, **informing** the person under investigation about the inquiry or the disciplinary proceeding at an early stage may be detrimental to the investigation. In these cases, EIF might need to restrict the information to the person under investigation to ensure that the inquiry or disciplinary proceeding is not jeopardised[6].

The **right of access** of a person under investigation to the identity of a witness may be restricted in order to protect the witness' rights and freedoms. Furthermore, a witness of the case might ask to have access to the final decision of the inquiry; yet, it is possible that the final decision does in the end not include personal data of that witness; it would thus be out of scope for a request for access from that person. EIF should however inform the person under investigation or the witness of the principal reasons on which the application of the restriction is based as well as of their right to have recourse to the EDPS[7]. In some specific circumstances, it might be also necessary to defer the provision of such information so that the investigation process will not be harmed[8].

Recommendations:

5. EIF should prepare a privacy notice indicating all necessary information under Articles 11 and 12 of the Regulation, i) including the meaning of the right of rectification in the context of an administrative inquiry and of a disciplinary proceeding and ii) specifying the applicable retention periods depending on the various scenarios.

6. EIF should ensure that the privacy notice is easily accessible to all staff, for instance on intranet where the policy on administrative inquires and disciplinary proceedings is uploaded.

7. EIF should inform all affected individuals about the opening, the different steps and the closing of a specific administrative inquiry or a disciplinary proceeding and provide them with the privacy notice on this occasion.

8. EIF should refer in the privacy notice to possible restrictions to the rights information and access in light of Article 20 of the Regulation.

Reminder:
In cases where EIF decides to apply a restriction of information, access, rectification etc. under Article 20(1) of the Regulation, or to defer the application of Article 20(3) and 20(4)[9], such decision should be taken strictly on a case by case basis. In all circumstances, EIF should document the reasons for taking such decision (i.e. motivated decision). These reasons should prove that the restriction is necessary to protect one or more of the interests and rights listed in

[6] See Article 20 of the Regulation regarding the exemptions and restrictions.
[7] See Article 20(3).
[8] See Article 20(5).
[9] under Article 20(5) of the Regulation.

Article 20(1) of the Regulation and they should be documented before the decision to apply any restriction or deferral is taken[10].

In the context of the follow-up procedure, please send to the EDPS a copy of EIF's policy on the processing operations under analysis, a revised version of the notification and a copy of the privacy notice, **within a period of three months**, to demonstrate that the above EDPS recommendations have been duly implemented.

Yours sincerely,

(**signed**)

Wojciech Rafał WIEWIÓROWSKI

Cc: Mr Jobst NEUSS, Data Protection Officer.
Ms Martine LEPERT, Human Resources.

[10] This is the kind of documentation the EDPS requests when investigating complaints relating to the application of Article 20.