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WW/SS/sn/D(2017)1380 C 2015-1107
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Subject: Prior-checking Opinion regarding probation periods and the e-probation tool at the European Investment Fund (EDPS case 2015-1107)

Dear [...],

On 16 December 2015, the European Data Protection Supervisor (EDPS) received a notification for prior checking under Article 27 of Regulation (EC) No 45/2001¹ ("the Regulation") on the probation periods and the e-probation tool from the Data Protection Officer (DPO) of the European Investment Fund ("EIF")².

The EDPS has issued Guidelines concerning the processing of personal data in the area of staff evaluation³ ("the Staff evaluation guidelines"). Therefore, this Opinion analyses and highlights only those practices which do not seem to be in conformity with the principles of the Regulation as outlined the Staff evaluation guidelines. In the light of the accountability principle guiding his work, the EDPS would nonetheless like to highlight that *all* relevant recommendations made in the Staff evaluation guidelines apply to the processing operations put in place for probation at the EIF.

1. Facts and analysis

1.1. Information to data subjects

The notification refers to two documents, "Rules and Procedures governing probationary periods" and "Quick Guide to using e-probation", as the information given to data subjects.

¹ OJ L 8, 12.1.2001, p. 1.

² As this is an ex-post case, the deadline of two months does not apply. The case was suspended from 15 April to 22 August 2016. This case has been dealt with on a best-effort basis.

³ Available on the EDPS website: https://edps.europa.eu/data-protection/our-work/our-work-by-type/guidelines_en.

The "Rules and Procedures governing probationary periods" are annexed to the Staff Rules. They explain the rules and the process of recruitment probationary periods and mobility probation periods. The "Quick Guide to using e-probation" is the instructions guide to Reporting Officers and staff members explaining how to complete the online documentation in the e-performance tool and is available on the Intranet and within the e-performance tool.

However, the two documents do not include all the required information in line with Articles 11 and 12 of the Regulation about the processing of staff members' personal data, nor has the EIF adopted a specific data protection notice, which would provide that information.

Articles 11 and 12 of the Regulation provide a minimum list of information on the processing of personal data that need to be provided to the concerned individuals. In order to ensure transparency and fairness of the processing, the following information should be provided to staff members:

- identity of the controller;
- purpose of the processing;
- data categories;
- whether replies to the questions are obligatory or voluntary, as well as possible consequences of failure to reply;
- possible data recipients;
- existence of rights of access, rectification and recourse to the EDPS;
- legal basis of the processing;
- applicable data retention periods.

1. The EDPS **strongly recommends** adopting a specific data protection notice in line with Articles 11 and 12 of the Regulation and making the specific data protection notice available on the Intranet.

2. Furthermore, the EDPS **strongly recommends** adding a link and/or a reference to the data protection notice to the respective probation report forms (Probation Document, Mid Probation Document, End Probation Document), to the forms in the e-probation tool in the different stages of probation (setting evaluation criteria, mid- and end-probation reviews) and/or to the messages sent to the staff members in the different stages of probation.

3. The EDPS also **recommends** amending the notification to include the required information in Section 7 (Information to be given to data subjects).

1.2. Rights of data subjects

According to Article 4(1)(c) of the Regulation, personal information must be adequate, relevant and non-excessive in relation to the purposes for which they are collected and/or further processed. They must also be accurate and, where necessary, kept up to date (Article 4(1)(d)). Granting a data subject the right to access, check and rectify inaccurate data and to provide comments contributes to ensuring the accuracy of the data in line with Article 4(1)(d) of the Regulation. Under Articles 13 and 14 of the Regulation, data subjects have the right of access to their personal data within 3 months from the receipt of the request and the right to have their personal data corrected without delay if inaccurate or incomplete. Under Article 15 of the Regulation, data subjects have the right to have their personal data blocked under certain circumstances. Under Article 16 of the Regulation, data subjects have the right to obtain the erasure of their personal data if their use is unlawful. The rights of blocking and erasure may be complementary to the right of rectification.

The right of rectification only applies to objective and factual data, not to subjective statements (which, by definition, cannot be factually wrong). The subjective appraisal made by a superior in an evaluation report cannot be rectified, whereas the name, grade or other factual data can. It is an inherent limitation of the rectification of evaluation data due to their subjective nature. As recommended in the Staff evaluation guidelines⁴, the rectification of factual data should be possible upon request to the controller, whereas evaluation data can be rectified through providing the staff members with a possibility to add their comments directly on the respective reports as well as within the respective appeals procedure.

The notification specifies that staff on probation will have ongoing "view" access to their Probation Document and may express their comments in the Employee Comments box in the mid probation review and in the end probation review before the Chief Executive takes the decision relating to the confirmation, extension or non-confirmation of the probationary period. Further modalities of access of staff members to their personal data are described under point 1.3 on data retention.

4. The EDPS **recommends** that the notification and the data protection notice clearly set out the procedures for granting individuals' rights (cf. recommendations under point 1.1.). It is good practice to include also information on within which time limit a reaction can be expected from the data controller to the requests of the individuals (e.g. 3 months for access to personal data request, without delay for rectification, etc.).

5. Furthermore, the EDPS **recommends** that staff members should be granted access to all data kept in their personal file and in the PeopleSoft database, even after the end of employment. (cf. description of staff access to their personal data under point 1.3.).

1.3. Data retention

According to the information provided in the notification, the Probation Documents are kept online in the e-performance section of the PeopleSoft database until the end of employment of the person concerned in case of a successful probation and for additional five years in case of an unsuccessful probation to allow for possible litigation. The related letters concerning the decision on confirmation, extension or non-confirmation of the probationary period, and thus the contract, are kept in the personal files and are reflected in the "Contract Data" section in PeopleSoft database.

According to Article 4(1)(e) of the Regulation, personal data should not be kept for longer than necessary for the purpose for which they were collected or further processed. While letters containing probation decisions (extension, confirmation or non-confirmation of the probationary period) would need to be kept throughout the career of a staff member, not all related documents should be kept after a certain period. Probation reports, however, may not necessarily remain relevant during the whole career of the person concerned. As addressed in the Staff evaluation guidelines⁵, the storage period of such reports, either stored in personal files or in PeopleSoft database, for up to five years after the end of a particular probation procedure would be considered appropriate.

6. The EDPS **recommends** aligning the retention period of probation reports with the Staff evaluation guidelines, i.e. up to five years after the end of a particular appraisal procedure.

7. The EIF should include this information in the data protection notice and update accordingly the notification.

⁴ p. 7.

⁵ p. 4.

1.4. Transfer of data

The notification lists a number of recipients within EIF to whom data might be disclosed. The notification also mentions under a different point that on-line data administration is taken care of by EIB Services under the service level agreement between EIF and EIB, which includes HR administration and IT.

In line with Article 7(1) 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"*. Furthermore, pursuant to Article 7(3) of the Regulation, the recipient shall process the data *"only for the purposes for which they were transmitted"*.

In order to ensure full compliance with the Regulation, the EDPS recommends that all internal recipients be explicitly reminded of the purpose limitation obligation. Additionally, the EIB staff should also be mentioned as recipients to whom data might be disclosed to the extent required as a consequence of the system administration delegated to the EIB.

8. The EDPS **recommends** reminding all internal recipients of the purpose limitation obligation.
9. The EIB HR administration and IT staff should be added in the notification and the data protection notice as recipients to whom data might be disclosed.

2. Conclusion

In this Opinion, the EDPS has made several recommendations to ensure compliance with the Regulation. Provided that all recommendations are implemented, the EDPS sees no reason to believe that there is a breach of the Regulation.

The EDPS expects **implementation and documentary evidence** thereof within **three months** of the date of this Opinion for the recommendations made in this Opinion.

Please do not hesitate to contact us, should you have any questions.

Yours sincerely,

Wojciech Rafał WIEWIÓROWSKI

(signed)

Cc: [...], Data Protection Officer, EIF