



**Remuneration Policies and Credits to Senior Officials of
Significant Entities Supervised by the ECB**
Prior Checking Opinion
Case 2017-0358

As part of its banking supervision role, the European Central Bank has to assess and approve significant supervised entities' remuneration policies. This may result in adverse consequences to employees of significant supervised entities, possibly excluding them from rights under their employment contracts.

The ECB also has a role to play concerning loans of significant supervised entities to their own employees, which may also result in refusing loans to them, thus excluding them from a contract.

Brussels, 5 September 2017

1. The Facts

In its prudential supervisory processes established as part of the Single Supervisory Mechanism (SSM), the European Central Bank (ECB) has a role to play in the assessment of significant supervised entities' remuneration policies, as well as regarding credits by such entities to their own senior officials. This notification complements the one on the ECB's supervision activities in EDPS case 2014-0888 (which covers other prudential supervision tasks, such as the fit & proper procedure). The ECB notified these processing activities for prior-checking under Article 27(2)(d) of Regulation (EC) 45/2001¹ (the Regulation), as they serve for "excluding individuals from a right, benefit or contract".

1.1. Remuneration Policies

According to Articles 4(1)(e) and 9(1) of Council Regulation (EU) 1024/2013² ("the SSM Regulation"), the ECB shall ensure compliance with EU law requirements that oblige banks to have "robust governance arrangements, including [...] remuneration policies and practices" in place. These requirements are included in Articles 92 to 96 of Directive 2013/36/EU³ (Capital Requirements Directive or CRD IV) as transposed into Member State law. According to Article 4(3) of the SSM Regulation, the ECB shall apply the national implementations of applicable directives.

Under these rules, remuneration policies sometimes require approval by the competent authority (which, in the case of significant entities, is the ECB). In some cases, approval of the ECB is required for the exclusion of certain staff members from the perimeter of material risk takers, according to Article 4(5) of Commission Delegated Regulation 604/2014, implying decisions affecting a specific natural person. Also, the approval of the ECB is required for the accrual of variable remuneration in institutions which have received public aid, according to Article 93 of Directive 2013/36/EU, and for the granting of certain forms of remuneration (e.g. retention bonuses), according to Article 94 of CRD IV as transposed in certain national laws. The ECB also assesses the soundness of credit institution's remuneration systems in the context of its ongoing supervision.

To do this, it processes personal data of affected staff members of supervised entities (name, amount of remuneration, potentially split between fixed and variable remuneration). The supervised entity submits the documentation needed directly to the ECB, which then takes (where necessary) a decision.

If the ECB rejects the exemption of an individual staff member from the perimeter of material risk takers, specific provisions concerning that person's remuneration apply under CRD IV. This may result in a situation where individual staff members will not be entitled to receive (parts of) their variable remuneration, excluding them from rights included in their employment contracts⁴.

¹ OJ L 8, 12.01.2001, p. 1–22

² OJ L 287, 29.10.2013, p. 63–89

³ OJ L 176, 27.6.2013, p. 338–436

⁴ On a more general level, the ECB's assessment of remuneration systems may lead to ECB decisions affecting accrual or payment of certain forms of remuneration, again affecting rights data subjects have under their employment contracts, but not necessarily involving the processing of personal data.

1.2. Credits to senior officials

Some national laws applying to the prudential supervision of significant supervised entities, which the ECB shall apply under Article 4(3) of the SSM Regulation, require notification or prior approval of (some) loans given by significant supervised entities to their own senior employees. Laws in other Member States may impose upper limits on such loans or provide for case-by-case exemptions from such limits. In some Member States, national legislation provides for similar obligations regarding spouses / family members of senior employees and shareholders or other third parties.

The supervised entity submits the documentation needed directly to the ECB, which then takes (where necessary) a decision. According to the documentation submitted by the ECB, it uses the information received to take these decisions only and not for further analysis or cross-referencing.

Depending on the Member State law in question, this may result in excluding data subjects from loan contracts they could otherwise have entered into.

1.3. Common aspects for remuneration policies and credits to senior officials

The ECB receives the data from the supervised entities and will instruct them to inform data subjects about the ECB's processing. To this end, the template letter to supervised entities contains a link to the data protection notice published by the ECB and an instruction to inform data subjects about the transfer to the ECB.⁵ The relevant paragraph reads as follows:

“iv) Data protection

Please note that the ECB will process all personal data received in line with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. Further information regarding processing of personal data in the context of banking supervision by the ECB can be found in the Privacy Statement on the Banking Supervision website.

In order to comply with data protection requirements, and more specifically with the obligation to provide information to the data subjects, your institution should notify the individuals that their personal data will be transferred to the ECB as part of your institution's application or notification to the ECB. This is of particular relevance for the assessment of applications to grant credits to senior officials or other related parties. Without prejudice to other information requirements under EU and national law, the institution should also inform the data subject about their right to lodge a complaint to the European Data Protection Supervisor at any time.”

⁵ This instruction is included in a letter, which was sent at the end of March 2017 to all significant institutions. The English version of the template letter is available on the ECB's webpage under https://www.bankingsupervision.europa.eu/banking/letterstobanks/shared/pdf/2017/Letter_to_SI_Entry_point_information_letter.pdf?abdf436e51b6ba34d4c53334f0197612.

Concerning the rights to access, rectification, erasure and objection, the ECB applies its standard implementing rules on data protection.⁶ According to Article 22(1) of the SSM Regulation and Article 31 of Regulation (EU) No 468/2014 (“SSM Framework Regulation”), data subjects also have a right to be heard before the ECB takes decisions which would adversely affect their rights. The ECB also refers to Articles 77, 82(3) and 87 of the SSM Framework Regulation.

In both procedures, the ECB keeps personal data for 15 years from the date of the decision taken. In case of pending administrative or judicial proceedings, this period is extended to one year after the outcome of these proceedings has become final.

This retention period of 15 years is in line with the ECB’s general retention period for supervisory decisions. The 15 years retention period has been assigned to on-going supervisory activities as a result of the business need assessment carried out to establish the retention requirements for supervisory information.

In the ECB’s views, the following reasons justify a retention period of 15 years also for credits to senior officials and remuneration assessments:

- The members of a credit institution’s management body or employees usually work for the credit institution for a longer period of time. If the ECB receives a new request from a credit institution for the approval of a specific remuneration policy or a credit to a senior official, the ECB needs to be in a position to check previous requests concerning the same person in order to ensure consistency in its supervisory decisions.
- Experience has shown that external stakeholders (members of the European Parliament or national Parliaments; European Court of Auditors; journalists; shareholders; creditors of banks) may question the ECB’s supervisory decisions even after the deadlines for legal remedies have expired. In such a case, the ECB must be in a position to retrieve the supervisory files and to explain its reasons (within the limits of the applicable rules on data protection and professional secrecy).

The ECB will review the approach towards retention of supervisory information once it has gained more experience in performing such complex and new functions.

Regarding recipients, the ECB discloses personal data, on a need-to-know basis⁷, to:

- the Joint supervisory Team’s (JST) staff (consisting of staff members from Directorates General Micro-Prudential Supervision I or II and National Competent Authorities [NCAs])⁸ for preparing decisions;
- Directorate General Micro-Prudential Supervision IV (DGMS IV) and NCA’s staff for horizontal tasks (case-by-case);
- staff in the Directorate Secretariat to the Supervisory Board (DSSB) for review before submission to the Supervisory Board and for managing the procedure during the approval process;
- Directorate General Secretariat (DGSE) staff, for processing during the adoption phase in the Governing Council;

⁶ ECB Decision of 17 April 2007 adopting implementing rules concerning data protection at the ECB (ECB/2007/1)

⁷ This list is similar to the recipients in the ECB’s other SSM-related tasks, see EDPS Opinion in case 2014-0888.

⁸ Significant supervised entities have a dedicated JST, consisting of ECB and NCA staff.

- Members of the Supervisory Board and of the Governing Council of the ECB (including the staff supporting them in the review of the documentation) for reviewing documentation (including possibly personal data) for taking ECB supervisory decisions.

Regarding recipients of data outside the EU, NCAs have entered into “cooperation agreements” with third-country NCAs under Article 55 CRD IV in the past. As long as these cover at least in part matters conferred to the ECB by the SSM Regulation (such as the tasks at issue in this Opinion), the ECB “may decide to participate in such existing cooperation arrangements in accordance with the procedure applicable to the arrangements” (Article 152 SSM Framework Regulation). The ECB may also enter into “administrative arrangements” with third countries and international organisations on its own (Article 8 SSM Regulation).

In addition to their normal confidentiality obligations under Article 37(1) of the Statute of the European System of Central Banks and of the European Central Bank⁹, ECB staff dealing with these cases have additional confidentiality obligations under Article 27(1) of the SSM Regulation. NCA staff members have similar obligations under the respective national transpositions of Article 53(1) CRD IV.

Concerning security of the processing, the data to be processed will be stored in DARWIN, the ECB’s case management system. Access is restricted to the designated ECB and NCA staff members with a need-to-know for the specific transaction. All actions performed on the documentation stored in DARWIN generate audit trails.

2. Legal analysis

This prior checking Opinion¹⁰ under Article 27 of Regulation (EC) 45/2001¹¹ (the Regulation) will focus on those aspects which raise issues of compliance with the Regulation or otherwise merit further analysis. For aspects not covered in this Opinion, the EDPS has, based on the documentation provided, no comments.

2.1. Legal bases (Article 5)

EU institutions shall only process personal data on the grounds in Article 5 of the Regulation. Point (a) of Article 5 is the most relevant here, mentioning processing that is “necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof”.

For both parts of the notified processing operations, the ECB mentioned Article 127(6) TFEU as a legal basis. This Article empowers the Council, by special legislative procedure, to confer specific tasks relating to the prudential supervision of credit institutions (excluding insurance undertakings) to the ECB. This Article is the legal basis for the SSM Regulation, but not on its own a legal basis for processing of personal data by the ECB.

⁹ Protocol No. 4 to the TFEU

¹⁰ As this is an ex-post case, the deadline of two months for the EDPS to issue his Opinion does not apply. The notification was received on 31 March 2017. The case was suspended for requests for further information and consultation on the draft opinion from 5 to 7 April 2017 and 31 July to 23 August 2017. This case has been dealt with on a best-effort basis.

¹¹ OJ L 8, 12.1.2001, p. 1.

2.1.1. Remuneration policies

According to Article 4(1) of the SSM Regulation, the ECB “*shall, in accordance with paragraph 3 of this Article, be exclusively competent to carry out for prudential supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States: [...] (e) to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose requirements on credit institutions to have in place [...] remuneration policies and practices.*”

In order to do so, the ECB shall, according to Article 4(3), first subparagraph, of the SSM Regulation, “*apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options*”.

Article 9(1) states that the ECB shall be the competent/designated authority under the relevant Union law and have the powers and obligations assigned competent/designated authorities under the same law.

Given that it is not within the tasks of the EDPS to analyse the national implementations of e.g. CRD IV, the analysis below will stay on the level of regulations and directives, i.e. it does not analyse their national implementation. For the case at hand and in the light of its supervisory role under Article 1(2) of the Regulation, the EDPS assumes that what can be considered lawful based on the text of the directives will also be lawful following their respective national implementations.

According to Article 92(2) CRD IV, competent authorities (here: the ECB) “*shall ensure that, when establishing and applying the total remuneration policies, inclusive of salaries and discretionary pension benefits, for categories of staff including senior management, risk takers, staff engaged in control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile, institutions comply with the following principles in a manner and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities: [list of principles]*”.

This Article covers the ECB’s assessments of remuneration policies of supervised entities. Articles 92 to 96 of CRD IV provide more detail.

Commission Delegated Regulation 604/2014¹² lays down the criteria for determining which persons have “a material impact on the risk profile” of their organisation. Article 4(4) and (5) oblige supervised entities to notify and in some cases request prior authorisation from the competent authority (here: the ECB) when excluding employees from the scope of persons having “a material impact on the risk profile” of the supervised entity.

In order to process these notifications and requests for authorisation, the ECB may need to process personal data of the persons affected. Therefore, the processing is lawful under Article 5(a).

2.1.2. Loans to senior officials

¹² OJ L 167, 6.6.2014, p. 30–35

Similarly, for the case at hand and in the light of its supervisory role under Article 1(2) of the Regulation, the EDPS will not provide an in-depth analysis of the different national legal bases mentioned by the ECB for its role regarding loans to senior employees of significant supervised entities.

According to Article 4(1) of the SSM Regulation, the ECB “*shall, in accordance with paragraph 3 of this Article, be exclusively competent to carry out for prudential supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States: [...] (e) to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose requirements on credit institutions to have in place robust governance arrangements, [...], risk management processes [...]*”. This includes in the context of the granting of loans to senior employees the assessment of the counterparty risk in the sense of Article 79 CRD IV as well as the assessment of governance arrangements to prevent conflicts of interest (Article 88 CRD IV).

Article 9(1) states that the ECB shall be the competent/designated authority under the relevant Union law and have the powers and obligations assigned competent/designated authorities under the same law.

This includes supervisory powers granted under national law provided they (i) are inside the scope of the ECB’s tasks under Article 4 of the SSM Regulation and (ii) are inextricably linked to a supervisory function, which is itself explicitly mentioned in Union law. In this sense, rules on loans to senior officials complement the ECB’s competence for prudential supervision of significant supervised entities in the case at hand.

2.2. Information to persons affected (Article 12)

Article 12 of the Regulation explains how controllers have to inform those whose data they process in situations where the data are not directly collected from them, as is the case here (the data are initially collected by the significant supervised entity, which then provides them to the ECB).

By default, Article 12 obliges the controller to provide this information to the data subject individually. Mere publication of a data protection notice is usually not sufficient. The controller is exempt from providing the information where the data subject already has it (Article 12(1)).

In addition to the general publication of a data protection notice, the ECB has instructed significant supervised entities to provide some information to data subjects at the initial collection.¹³

This may be an appropriate way of ensuring that data subject are informed about the processing, provided that instructions are clear enough to ensure that data subjects will receive all the information required under Article 12. The ECB should clearly instruct supervised entities to provide the ECB’s data protection notice to data subjects or at the very least to include information about the transfer to the ECB and a link to the ECB’s data protection notice in the information they provide to data subjects.

The instructions to significant supervised entities only tell them to inform data subjects about the transfer of their data to the ECB and about the right to lodge a complaint with the EDPS

¹³ see section 1.3 above

(concerning the ECB's processing). This does not cover all the elements of Article 12 of the Regulation. The ECB should therefore clearly tell significant supervised entities to provide (a link to) the ECB's relevant data protection notice to data subjects. This appears to be the best way for ensuring that data subjects to have *all* the information required under Article 12, thus enabling the ECB to rely on the exemption from information obligations for situations in which the data subject "already has" the information.

The EDPS **recommends** clearly instructing significant supervised entities to provide the ECB data protection notice to data subjects.

Regarding the content of the data protection notice, Article 12(1)(b) obliges controllers to inform data subjects about "the purposes of the processing operations".

The currently published data protection notice covers activities under the SSM Regulation in general. It refers to a number of activities that the ECB carries out under that Regulation, including remuneration assessments. It does not specifically mention the ECB's role regarding notification or prior approval of (some) loans given by significant supervised entities to their own senior employees.

The EDPS **recommends** adding information on loans to senior employees in the data protection notice.

2.3. Data subject rights (Articles 13 to 19)

Concerning the exercise of data subject rights (access, rectification, erasure, objection...), the ECB refers to its standard implementing rules on data protection, to Article 22(1) of CRD IV and Articles 31, 77, 82(3) and 87 of the SSM Framework Regulation, all granting a right to be heard, "as applicable".

Article 77 of the SSM Framework Regulation is about the right to be heard in procedures for obtaining the authorisation to take up the business of a credit institution. Article 82(3) SSM Framework Regulation is about the right to be heard in procedures concerning withdrawals of authorisations to take up the business of a credit institution. Article 87 SSM Framework Regulation is about the right to be heard regarding decision on acquisition of qualifying holdings. Article 31 SSM Framework Regulation is the general rule on the right to be heard before the ECB takes a supervisory decision.

As Articles 77, 82(3) and 87 SSM Framework Regulation refer to specific procedures not covered in this notification¹⁴, they do not appear to be relevant here, and the general rule on the right to be heard in Article 31 of the SSM Framework Regulation will apply. This is independent of the rights of the persons affected under data protection law.

In conclusion, while some of the legal references cited by the ECB are not applicable in the procedures at hand, the ECB's approach sufficiently safeguards the data subjects' rights.

2.4. Conservation periods

According to Article 4(1)(e) of the Regulation, personal data shall be kept "for no longer than necessary for the purposes for which the data were collected or further processed".

Given the explanations given by the ECB for this period, it does not appear excessive.

¹⁴ They are covered in EDPS case 2014-0888.

2.5. Transfers to third countries (Article 9)

Article 9 lays down the specific rules for transfers of personal data to recipients not bound by national implementations of Directive 95/46/EC. Such transfers may only happen if the recipient third country or international organisation provides adequate protection (Article 9(1) to (5)), in the case of several derogations (Article 9(6)), or when authorised by the EDPS (Article 9(7)).¹⁵

Article 152 SSM Regulation provides for the continuity of agreements already concluded between NCAs and third countries' competent authorities that cover at least in part the tasks assigned to the ECB by the SSM Regulation. The ECB also plans to establish cooperation agreements on its own, under Article 8 SSM Regulation. For the latter case, it announced that it would inform the EDPS under Article 28(1).

The agreements the ECB intends to join were initially signed by NCAs subject to the national implementation of Directive 95/46/EC, and thus had to comply with the rules and safeguards laid down in these national implementations. The relevant rules in Articles 25 and 26 of Directive 95/46/EC and Article 9 of the Regulation are largely similar, but not necessarily identical.

Transfers (to recipients not recognised as providing adequate protection) which are not repeated, massive or structural may be justifiable under the derogations in Article 9 of the Regulation (most likely Article 9(6)(d)). Should such transfers be massive, structural or repeated, the ECB has to adduce adequate safeguards in the sense of Article 9(7).¹⁶

Depending on the form of the instrument adducing these safeguards, the ECB may need to request prior authorisation from the EDPS.¹⁷

Some of the safeguards that such arrangements should include are the following¹⁸: committing the recipient to the data protection principles; rules on onward transfers; clarification of the parties' obligations; notifying data breaches to the data exporter; mediation/arbitration procedures; rules on cooperation with supervisory authorities, and a liability clause;

The ECB has consulted the EDPS on a set of data protection clauses it intends to use in arrangements with third-country authorities.¹⁹

The EDPS **recommends** that the ECB take appropriate steps to ensure that it complies with Article 9.

¹⁵ See also EDPS Position Paper on the transfer of personal data to third countries and international organisations by EU institutions and bodies, 14 July 2014:

https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Papers/14-07-14_transfer_third_countries_EN.pdf.

¹⁶ See also EDPS Position Paper on the transfer of personal data to third countries and international organisations by EU institutions and bodies ("transfer paper"), 14 July 2014: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Papers/14-07-14_transfer_third_countries_EN.pdf.

¹⁷ Section 6.3.3 transfer paper.

¹⁸ Section 6.2.1 transfer paper.

¹⁹ EDPS case 2016-0308, EDPS Decision of 3 June 2016: https://edps.europa.eu/sites/edp/files/publication/16-06-03_decision_data_transfer_ecb_en.pdf

3. Recommendations

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

For the following **recommendations**, the EDPS expects **implementation and documentary evidence** thereof within **three months** of the date of this Opinion:

1. clearly instructing significant supervised entities to provide the ECB data protection notice to data subjects;
2. adding information on loans to senior employees in the data protection notice;
3. taking appropriate steps to ensure that Article 9 is complied with.

Done at Brussels, 5 September 2017

[signed]

Wojciech Rafał WIEWIOROWSKI