

## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Central Bank regarding the prudential supervisory processes to be established as part of the Single Supervisory Mechanism**

Brussels, 3 November (2014-0888)

### **1. Proceedings**

On 16 September the European Data Protection Supervisor (**EDPS**) received a notification for prior checking relating to the processing of personal data in the prudential supervisory processes to be established as part of the Single Supervisory Mechanism from the Data Protection Officer (**DPO**) of the European Central Bank (**ECB**).

Questions were raised on 2 and 15 October 2014 to which the ECB replied on 10 and 16 October 2014. The draft Opinion was sent to the DPO for comments on 28 October 2014. The EDPS received a reply on 29 October 2014, with additional documentation being supplied on 30 October 2014.

### **2. The facts**

Under Regulation 1024/2013<sup>1</sup> (the SSM Regulation), the ECB has been conferred supervisory tasks and powers for the prudential supervision of all credit institutions established in participating Member States.<sup>2</sup> These powers are exercised in the Single Supervisory Mechanism (SSM), composed of the ECB and the national competent authorities (NCAs) of the participating Member States.<sup>3</sup> The detailed distribution of tasks between the ECB and the NCAs is laid down in Regulation 468/2014 (the SSM Framework Regulation).<sup>4</sup>

For the prudential supervisory processes to be established as part of the SSM, the ECB's Authorisation Division will process personal data in the following procedures notified to the EDPS:

1. Licensing;
2. Qualifying holdings;
3. Fit and proper;
4. Right of establishment by significant supervised entities;
5. Withdrawals of authorisation.

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<sup>1</sup> OJ L 287/63, 29/10/2013

<sup>2</sup> Eurozone plus those Member States which have entered into close cooperation under Article 7 of the SSM Regulation.

<sup>3</sup> Participating Member States are those whose currency is the Euro, plus those which have entered into close cooperation under Article 7 of the SSM Regulation.

<sup>4</sup> OJ L 141/1, 14/05/2014.

In procedures 1, 2 and 5, the ECB processes personal data for all such applications, whether they relate to significant or less-significant supervised entities and their staff or shareholders.<sup>5</sup> For procedures 3 and 4, the ECB is only involved if they concern significant supervised entities.

The following subsections will describe the specific features of each of these five procedures; certain common features (e.g. as regards the exercise of data subject rights) will be described in a final joint section.

## **2.1. Licensing**

Before an undertaking may take up business as a credit institution, it needs to be authorised. This procedure includes an assessment of the proposed members of managing bodies and shareholders to ascertain if they are suitable for their positions.<sup>6</sup> There are other requirements in the authorisation procedure, but in terms of processing personal data, this assessment of proposed members of managing bodies and shareholders is the relevant part.

Applications for such authorisations are sent by applicants to the National Competent Authority (NCA) for assessment. The ECB shall be notified by the NCA of such applications. In parallel, the ECB conducts its own preliminary assessment based on the documentation submitted to the NCA. If the NCA considers that all requirements are met, it formally forwards a draft decision, to the ECB. At the same time, the draft decision is notified to the applicant. Unless the ECB objects within a period of ten working days (extendable once), the authorisation is deemed granted (Article 78(1) SSM Framework Regulation). The ECB shall only object to the draft decision if the conditions set out in relevant Union law are not met.

Internally within the ECB, the final decision is prepared by the Authorisation Division in Directorate-General Micro-Prudential Supervision IV (DGMS IV)<sup>7</sup>, approved by the Supervisory Board and finally adopted by the Governing Council. The ECB can object to the NCA's draft decision if the conditions set out in relevant Union law are not met. If, in the ECB's view, conditions are not met or in case the draft decision has conditions attached, the applicant will be heard before the decision is sent for final approval to the Supervisory Board and Governing Council. The ECB transmits the final decision to the NCA and the European Banking Authority (EBA); the NCA then informs the applicant.

The categories of personal data included in the application/notification forms are based on national law; their minimum content follows Annex I of the EBA Guidelines on the assessment of the suitability of members of the management body and key function holders (EBA/GL/2012/06).<sup>8</sup>

- 1) Curriculum vitae;
- 2) Statement as to whether criminal proceedings are pending or the person or any organisation managed by him or her has been involved as a debtor in insolvency proceedings or a comparable proceeding;

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<sup>5</sup> The criteria for determining whether a supervised entity is significant or less significant are set out in Article 6(4) of the SSM Regulation.

<sup>6</sup> This part of the authorisation procedure is essentially identical to the fit and proper procedure described below in section 2.3.

<sup>7</sup> DGMS I, II or III will be involved as appropriate. The Joint Supervisory Teams (JSTs), responsible for the direct supervision of significant credit institutions are grouped in DGMS I and II; DGMS III is responsible for the indirect supervision of less-significant credit institutions, directly supervised by NCAs.

<sup>8</sup> <https://www.eba.europa.eu/documents/10180/106695/EBA-GL-2012-06--Guidelines-on-the-assessment-of-the-suitability-of-persons-.pdf>.

- 3) If available, criminal records and relevant information on criminal investigations and proceedings, relevant civil and administrative cases, and disciplinary actions (including disqualification as a company director, bankruptcy, insolvency and similar procedures);
- 4) Information, if relevant, on:
  - a. investigations, enforcement proceedings, or sanctions by a supervisory authority which the person has been the subject of;
  - b. refusal of registration, authorisation, membership or license to carry out a trade, business or profession; or the withdrawal, revocation or termination of registration, authorisation, membership or license; or expulsion by a regulatory or government body;
  - c. dismissal from employment or a position of trust, fiduciary relationship, or similar situation, or having been asked to resign from employment in such a position;
  - d. whether an assessment of reputation as a person who directs the business of a credit institution has already been conducted by another competent authority (including the identity of that authority and evidence of the outcome of this assessment);
  - e. whether any previous assessment by an authority from another, non-financial, sector has already been conducted (including the identity of that authority and evidence of the outcome of this assessment).
- 5) Description of any financial (e.g. loans, shareholdings) and non-financial interests or relationships (e.g. close relations like a spouse, registered partner, cohabitee, child, parent or other relation with whom the person shares living accommodations) of the person and his/her close relatives to members of the management body and key function holders in the same credit institution, the parent institution and subsidiaries and controlling shareholders;
- 6) The position for which the person is/will be appointed;
- 7) Record of the credit institution's suitability assessment results.

It may also include:

- 1) National identification document number;
- 2) Tax identification document number;
- 3) Telephone number;
- 4) Fax;
- 5) E-mail.

The ECB has prepared a privacy statement for this procedure, which will be made available to the applicant before submitting the application. This privacy statement does not mention whether it is mandatory to provide the information and what the consequences of not providing it will be.

Personal data processed in this procedure may be disclosed on a need-to-know basis to the relevant parts of the ECB, the Supervisory Board (via its secretariat) and the Governing Council of the ECB. The final decision will be made available to EBA and the relevant NCA; the latter then informs the applicant.

## **2.2. Qualifying holdings**

When there are changes in ownership of credit institutions (either a complete change in ownership or by disposal/purchase of a significant stake, except in the case of a bank resolution), the suitability of the new owner is assessed. If the ECB comes to the conclusion that the proposed acquirer is not suitable, it can oppose to the proposed transaction.

Notifications of such changes are first sent to and assessed by the NCAs of the target credit institution by the proposed acquirer. The ECB shall be notified by the NCA of such notifications. In parallel, the ECB conducts its own preliminary assessment based on the information provided to the NCA. The NCA then formally forwards a draft decision to oppose or not to oppose the acquisition, to the ECB. The ECB then decides whether to oppose the acquisition; if it plans to oppose the acquisition or to apply conditions, it will conduct a hearing with the applicant. Internally within the ECB, the decision is prepared by the Authorisation Division in DGMS IV<sup>9</sup>, approved by the Supervisory Board and finally adopted by the Governing Council. If there are conditions imposed, their implementation will be monitored either by the relevant NCA (for less-significant entities) or the relevant Joint Supervisory Team (JST) (for significant entities).

The notifications to the NCAs follow the national implementation of Article 23(1)(a) and (b) of Directive 2013/36/EU (CRD IV)<sup>10</sup> and aim to assess the reputation of the proposed acquirer as well as the reputation, knowledge, skills and experience of any member of its senior management who will direct the business of the credit institution as a result of the proposed acquisition. Their minimum content is defined in Appendix II – Part I of the Committee of European Banking Supervisors (CEBS), Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and Committee of European Securities Regulators' (CESR) Joint Guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector required by Directive 2007/44/EC of 18 December 2008 (CEBS/2008/214).<sup>11</sup>

- 1) Curriculum vitae (full name, place and date of birth, address, detailed description of relevant education and training, previous professional experience, and activities or additional functions currently performed);
- 2) Information on any:
  - a. relevant criminal records, or criminal investigations or proceedings, relevant civil and administrative cases, and disciplinary actions (including disqualification as a company director or bankruptcy, insolvency or similar procedures);
  - b. investigations, enforcement proceedings, or sanctions by a supervisory authority which the person has been the subject of;
  - c. refusal of registration, authorisation, membership or licence to carry out a trade, business or profession; or the withdrawal, revocation or termination of registration, authorisation, membership or licence; or expulsion by a regulatory or government body;
  - d. dismissal from employment or a position of trust, fiduciary relationship, or similar situation, or having been asked to resign from employment in such a position;
- 3) Information as to whether an assessment of reputation as an acquirer or as a person who directs the business of a financial institution has already been conducted by another supervisory authority (the identity of that authority and evidence of the outcome of this assessment);
- 4) Information as to whether a previous assessment by another authority from another, non-financial, sector has already been conducted (the identity of that authority and evidence of the outcome of this assessment);

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<sup>9</sup> DGMS I, II or III will be involved as appropriate.

<sup>10</sup> OJ L 176/338, 27/06/2013.

<sup>11</sup> [http://www.esma.europa.eu/system/files/08\\_543b.pdf](http://www.esma.europa.eu/system/files/08_543b.pdf); Directive 2007/44/EC was the predecessor to CRD IV; its Article 15b(1)(a) and (b) imposed broadly similar obligations to Article 23(1)(a) and (b) of CRD IV.

- 5) Information by the acquirer regarding his financial position and strength: details concerning his sources of revenues, assets and liabilities, pledges and guarantees, etc.;
- 6) Description of the professional activities of the acquirer;
- 7) Financial information including ratings and public reports on the companies controlled or directed by the acquirer and if available, ratings and public reports on the acquirer himself;
- 8) Description of the financial (e.g. credit operations, guarantees, pledges) and non-financial (e.g. familial relationships) interests or relationships of the acquirer with:
  - a. any other current shareholders of the target institution;
  - b. any person entitled to exercise voting rights of the target institution;
  - c. any member of the board or similar body, or of the senior management of the target institution;
  - d. the target financial institution itself and its group;
  - e. any other interests or activities of the acquirer that may be in conflict with the target financial institution and possible solutions to those conflicts of interest.<sup>12</sup>

It may also include:

- 6) Nationality;
- 7) National identification document number;
- 8) Tax identification document number;
- 9) Telephone number;
- 10) Fax;
- 11) E-mail.

The ECB has prepared a privacy statement that is to be linked to in the questionnaires used by the NCAs (to be translated in the national languages) and shall also be published on their websites. The privacy statement does not inform data subjects about whether or not replies or mandatory and what the consequences of a failure to reply might be.

Personal data processed in this procedure may be disclosed on a need-to-know basis to the relevant parts of the ECB, the Supervisory Board (via its secretariat) and the Governing Council of the ECB.

### **2.3. Fit and proper**

The ECB also assesses whether persons responsible for the management of significant credit institutions meet the "fit and proper" requirements, i.e. whether they possess sufficient knowledge, skills and experience to fulfil their duties and are of sufficiently good repute.<sup>13</sup> This assessment is normally carried out when the data subject takes up a management function. Applications under the fit and proper procedure are sent by the significant supervised entity to the NCA and forwarded to the ECB. Where required under national law, other financial supervisors may be consulted during the fit and proper procedure as well. The ECB may also start the fit and proper procedure on its own initiative if it becomes aware of new facts that may affect the initial assessment during its supervisory activities. If the ECB intends to reject the appointment or request the dismissal of the proposed manager, it will conduct a hearing of the significant credit institution and of the concerned manager. Internally within the ECB, the decision is jointly prepared by the Authorisation Division in DGMS IV and the competent JST coordinator<sup>14</sup>, approved by the Supervisory Board and finally adopted

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<sup>12</sup> Point 8 is basically a check on conflicts of interests, see Article 91(8) CRD IV.

<sup>13</sup> For less significant credit institutions, this is done by the relevant NCA.

<sup>14</sup> DGMS I or II, as appropriate.

by the Governing Council. The final decision is notified to the applicant, the relevant NCA, the involved JST, and the Authorisation Division in DGMS IV by the secretariat of the Supervisory Board.

The categories of data included in the application/notification forms are based on national law; their minimum content is defined in Annex I of EBA/GL/2012/06 (see subsection 2.1 above).

If persons do not fulfil these requirements, the ECB has the power to remove them from their posts.<sup>15</sup>

The ECB has prepared a privacy statement that will be linked to in the questionnaires used by the NCAs (to be translated into the national languages) and shall also be published on their websites. The privacy statement does not inform data subjects about whether or not replies or mandatory and what the consequences of a failure to reply might be.

#### **2.4. Right of establishment by significant supervised entities**

When credit institutions established in participating Member States wish to establish a branch within the territory of another Member State (whether participating – “within SSM” or not – “outgoing”)<sup>16</sup>, they have to provide information on the persons responsible for managing the branch and several other key function holders to the NCA of their home Member State; this information is forwarded to the ECB. Internally within the ECB, the Authorisation Division in DGMS IV is the entry point of such notifications, with the JSTs assessing if requirements for passporting are met (hence, exercising the powers of the competent authority of the home Member State).<sup>17</sup> In case of an intended adverse decision, the intended proposal for a complete draft decision is communicated to the applicant for its views to be submitted orally or in writing, before it is sent to the Supervisory Board for approval and finally adopted by the Governing Council.

If the ECB considers that the persons do not meet the requirements, it can request the credit institution to appoint new persons. If the credit institution fails to do so, the ECB may oppose the establishment of the branch.

Data subjects are persons responsible for the management of the branch, as well persons fulfilling several specific functions in the branch.

The minimum categories of personal data to be provided to the NCA (and then forwarded to the ECB) are defined in Annex I of Commission Implementing Regulation (EU) 926/2014<sup>18</sup>; this includes details of the professional experience of the persons responsible for the management of the branch, as well as contact information for several other function holders.<sup>19</sup>

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<sup>15</sup> Article 16(2)(m) SSM Regulation.

<sup>16</sup> There is also a third procedure in case credit institutions established in non-participating Member States intend to open a branch in participating Member States (“incoming”). In this case, the ECB cannot oppose the opening of the branch, but shall simply prepare for the supervision of the branch, if deemed significant.

<sup>17</sup> DGMS I or II, as appropriate.

<sup>18</sup> OJ L 254, 28.8.2014, p. 2–21. The ECB’s supporting documentation also refers to the EBA final draft Implementing Technical Standards on passport notifications under Articles 35, 36 and 39 of CRD IV (EBA/ITS/2013/05); this draft technical standard has in the meantime been codified in the Commission Implementing Regulation mentioned above.

<sup>19</sup> Internal auditor, external auditor (where applicable), person in charge of ensuring compliance with anti-money-laundering arrangements, person in charge of dealing with complaints in relation to investment activities/services, person in charge of ensuring compliance with arrangement relating to investment services/activities.

The notification may also include contact details, date and place of birth, nature of the functions performed, details of the responsibilities held in the last 10 years, language level, a “certificate of good repute” of the person who will be responsible for the management of the branch signed by one of the senior manager of the credit institution and details on professional, administrative or judicial penalties.

For the other function holders<sup>20</sup>, only the name and contact details needs to be notified.

The ECB has prepared a privacy statement that will be linked to in the questionnaires used by the NCAs (to be translated in the national languages) and shall also be published on their websites. The privacy statement does not inform data subjects about whether or not replies or mandatory and what the consequences of a failure to reply might be.

Personal data processed in this procedure may be disclosed on a need-to-know basis to the relevant parts of the ECB, the Supervisory Board (via its secretariat) and the Governing Council of the ECB. The ECB informs the applicant if the establishment is opposed; if the establishment is not opposed, the ECB informs the relevant NCA, which then in turn informs the applicant.

## **2.5. Withdrawals of authorisation**

The ECB is competent to withdraw the authorisations of credit institutions in order to ensure that only credit institutions with a sound economic basis, an organisation capable of dealing with the specific risks and suitable directors may operate. This procedure may start on the initiative of a NCA or of the ECB itself. An example<sup>21</sup> could be becoming aware of e.g. criminal convictions of senior management omitted in the fit and proper procedure. There are other reasons for withdrawals which do not entail an assessment of individuals.

Internally within the ECB, the decision is prepared by the Authorisation Division in DGMS IV and the JST (where there is one), approved by the Supervisory Board and finally adopted by the Governing Council. The relevant NCAs are kept informed and consulted throughout the procedure. The national authorities competent for the resolution of credit institutions will be involved as well. Before the draft decision is sent to the Supervisory Board for final approval, the credit institution concerned will be heard.

Data subjects are management members of credit institutions for which a withdrawal procedure is started.

The categories of data may include information to be provided in the applications for the licensing procedure if it was omitted or falsely communicated (e.g. omitted criminal convictions, misrepresented professional experience, etc.) as well as any personal data (as within the fit and proper procedure) that renders managers unsuitable and where their replacement/dismissal is not possible.

These data are either supplied by the NCA submitting the draft withdrawal decision to the ECB, or are part of the circumstances the ECB (JST, DGMS III) becomes aware of in carrying out its supervisory tasks.

The ECB has prepared a privacy statement which will be communicated to data subjects. However, the ECB envisages deferring this information in an early stage of the investigation.

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<sup>20</sup> See footnote 19 above.

<sup>21</sup> There are several reasons for starting the withdrawal procedure, many of which do not involve the processing of personal data.

The findings of the investigation will be communicated to the competent authorities for investigation and prosecution. It will be notified to the supervised entity, relevant NCA(s), DGMS III or the relevant JST, depending on whether the supervised entity is less significant or significant, relevant national resolution authorities and EBA.

The ECB also adopts a formal decision in case the licence is not withdrawn, which is communicated to the above recipients, except EBA.

The conservation period is 15 years from the date of decision, to be extended to one year after the result of any administrative or judicial proceedings has become final.

## **2.6. Common aspects: data subject rights, security, conservation periods and third-country transfers**

As concerns the exercise of data subject rights, the privacy statements for all notified procedures provide a contact point and instructions on how to exercise them. The ECB applies its standard rules<sup>22</sup> as concerns access, rectification and other data subject rights.

The conservation period is 15 years for applications/notifications, starting from:

- 1) The date of application/notification if withdrawn before a formal decision is reached;
- 2) The date of decision in case of a negative decision;
- 3) The date data subjects ceases his/her function as manager/board member/shareholder in case of a positive decision.

In case administrative or judicial proceedings are initiated, the conservation period is extended to one year after the decision in these proceedings will have become final.

The ECB plans to review its retention policy within the next 5 years.

After this conservation period, only the names, positions, terms of office of members of management bodies and key function holders as well as the names of qualifying shareholders, the percentages of holdings and their period will be permanently stored in a register. This concerns only those person who could in the end take up their tasks / acquire qualifying holdings, so it is implied that they passed the fit and proper / qualifying holdings / etc. checks.

This register serves two functions: (a) to monitor and keep track of supervisory decisions ("procedure module") and (b) to store institutional facts about supervised entities (name, seat, activities pursued, management bodies and their members, qualifying shareholders, etc.) ("supervised entities module").<sup>23</sup> The ECB stated that it has requested to join existing cooperation agreements between NCAs and competent authorities in non-SSM countries. These non-SSM countries include both non-participating EU Member States and third countries outside the EU. In the future, the ECB also plans to establish cooperation agreements on its own. For that case, it announced planning to consult the EDPS under Article 28(1).

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<sup>22</sup> [https://www.ecb.europa.eu/ecb/legal/pdf/l\\_11620070504en00640067.pdf](https://www.ecb.europa.eu/ecb/legal/pdf/l_11620070504en00640067.pdf) .

<sup>23</sup> Point (b) will be moved to a different system (the "bank information system" IMAS) at some point in the future.



### 3. Legal analysis

#### 3.1. Prior checking

The processing of personal data under analysis is carried out by a Union body in the exercise of activities which fall within the scope of Union law. The processing of the data is done at least partly through automatic means. Therefore, Regulation (EC) 45/2001 is applicable.

Article 27 of the Regulation subjects certain risky processing operations to prior checking by the EDPS. Paragraph 2 of this Article contains several categories of such risky operations, the following of which were mentioned by the ECB as grounds for prior checking:

- a) Processing of data related to (suspected) offences, criminal convictions or security measures – all notifications;
- b) Processing operations intended to evaluate personal aspects relating to the data subject – all notifications except withdrawal of authorisation;<sup>24</sup>
- d) Processing operations for the purpose of excluding individuals from a right, benefit or contract – all notifications except withdrawal of authorisation.<sup>25</sup>

The notified processing operations are subject to prior checking.

The notification of the DPO was received on 16 September 2014. According to Article 27(4) the present Opinion must be delivered within a period of two months that is no later than the 26 November 2014, taking into account the suspensions for further information from 2 October to 10 October 2014 and for comments from 28 October to 29 October 2014.

#### 3.2. Lawfulness of the processing

Personal data may only be processed if grounds can be found in Article 5. Point (a) of Article 5 is the most relevant here; it mentions 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".

The notification mentions Article 127(6) TFEU as a legal basis for all five procedures. This Article empowers the Council to confer specific tasks relating to the prudential supervision of credit institutions to the ECB via regulations to be adopted under a special legislative procedure. It is the legal basis on which several of the specific legal bases to be analysed below, e.g. the SSM Regulation, have been adopted but it is **not a direct legal basis for the processing of personal data by the ECB in the notified procedures**.

When carrying out its tasks, as will be explained in the subsections below, according to Article 4(3) of the SSM Regulation, the ECB "shall 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". 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 include their national implementation.

The different specific legal bases of the notified procedures are analysed below.

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<sup>24</sup> Not mentioned for the withdrawal procedure.

<sup>25</sup> Not mentioned for the withdrawal procedure.

### **3.2.1. Licensing**

According to Article 4(1)(a) of the SSM Regulation, the ECB is exclusively competent "to authorise credit institutions and to withdraw authorisations of credit institutions"; the procedure is elaborated in Article 14 of the same Regulation: applications for licenses are to be submitted to the NCA, in accordance with relevant national law; the NCA assesses the application and, if the applicant complies with all relevant national law, notifies a draft decision to grant the authorisation to the ECB and the applicant.

The national implementations of Articles 13(1), 14(2), 16(3), 23<sup>26</sup> and 91 of CRD IV provide the criteria to be used in this assessment.<sup>27</sup> In accordance with Article 4(3) SSM Regulation, the ECB shall apply these national provisions (see section 3.2 above).

Articles 73 to 79 of the SSM Framework Regulation set out the roles of the ECB and the NCAs in further detail.<sup>28</sup>

It has to be noted that the legal bases indicated above do not provide a very high level of detail as concerns the processing of personal data. For example; the data categories are not clearly defined anywhere in them.

The document explicitly outlining the data categories to be collected is EBA/GL/2012/06. This document was adopted by EBA in the exercise of Article 16 of Regulation (EU) 1093/2010, according to which EBA "shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities or financial institutions"; according to paragraph 3 of the same Article "The competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations". The data categories collected by NCAs and forwarded to the ECB are based on these guidelines.

The rules mentioned above constitute a legal basis under Article 5(a) of the Regulation.

### **3.2.2. Qualifying holdings**

According to Article 4(1)(c) SSM Regulation, the ECB shall "assess notifications of the acquisition and disposal of qualifying holdings in credit institutions, except in the case of a bank resolution, and subject to Article 15".

That Article further elaborates the procedure: notifications are to be sent by the proposed acquirer to the competent NCA, as required under national legislation. The NCA shall assess the notification and forward it and a proposal for a decision to oppose or not to oppose the acquisition to the ECB. The criteria to be applied by the NCAs in doing so are defined in Article 23(1) CRD IV, notably the "reputation, knowledge, skills and experience [...] of any member of the management body and any member of senior management who will direct the business of the credit institution as a result of the proposed acquisition" and whether "there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing [...] is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof." A minimum list of the specific data items to be included is defined in CEBS/2008/214. This list also includes a check for conflicts of interest, implementing Article 91(8) of CRD IV.

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<sup>26</sup> Via reference in Article 14(2).

<sup>27</sup> Further detailed in EBA/GL/2012/06.

<sup>28</sup> See Article 77 for the obligation to hear the applicant and Article 78 for the procedure, including the time limits.

Based on these criteria, the ECB then decides whether to oppose the acquisition. Articles 85 to 87 of the SSM Framework Regulation further detail the procedure.

The Articles mentioned above constitute a legal basis under Article 5(a) of the Regulation.

### **3.2.3. Fit and proper**

According to Article 4(1)(e) of the SSM Regulation, the ECB is competent to "ensure compliance with the acts referred to in the first subparagraph of Article 4(3) [all relevant Union law], which impose requirements on credit institutions to have in place robust governance arrangements, including the fit and proper requirements for the persons responsible for the management of credit institutions [...]".

Article 16(2)(m) of the SSM Regulation grants the ECB the power to "remove at any time members from the management body of credit institutions who do not fulfil the requirements set out in the acts referred to in the first subparagraph of Article 4(3) [relevant Union law including its national implementation]".

Article 93 of the SSM Framework Regulation further spells out the ECB's powers and the procedure: significant supervised entities shall notify the relevant NCA of all changes to the members of its management bodies (including re-appointment; these notifications follow EBA/GL/2012/06); the NCA shall then inform the ECB of this change.<sup>29</sup> In order to assess the suitability of these persons, "the ECB shall have the supervisory powers that competent authorities have under the relevant Union and national law" (Article 93(2) SSM Framework Regulation).

According to Article 94 of the SSM Framework Regulation, significant supervised entities shall also inform the NCA (who in turn shall inform the ECB) of any new facts that may affect the initial assessment of a person under Article 93. According to paragraph 2, the ECB may also decide to initiate a new assessment on its own initiative when it becomes aware of new facts that may affect the initial assessment or any other issue which could impact on the suitability of a manager. The NCAs are to be informed of such own-initiative reviews.

Article 91 of CRD IV, as transposed in the Member States, provides the criteria to be used in these assessments.

The Articles mentioned above constitute a legal basis under Article 5(a) of the Regulation.

### **3.2.4. Right of establishment by significant supervised entities**

According to Article 4(1)(b) of the SSM Regulation, the ECB is competent "for credit institutions established in a participating Member State, which wish to establish a branch or provide cross-border services in a non-participating Member State, to carry out the tasks which the competent authority of the home Member State shall have under the relevant Union law" ("outgoing right of establishment").

Relevant Union law here includes Article 35 CRD IV, as transposed in the Member States, according to which credit institutions wishing to establish a branch in another Member State's territory shall inform the NCA of their home Member State. Article 35(6) CRD IV empowers the Commission to adopt implementing Regulation detailing the procedure based on EBA implementing technical standards. It is under this authorisation that the Commission has adopted Commission Implementing Regulation 926/2014, Annex I of which establishes the list of data items to be collected. The standard form in that Annex is mandatory for all

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<sup>29</sup> Again, these assessments are carried out in parallel at the NCA and ECB level, due to the short deadlines.

notifications under this procedure, so it falls under Article 5(b) (legal obligation) of the Regulation.

Article 17 of the SSM Framework Regulation further details the just mentioned “outgoing” right of establishment.

As regards the right of establishment “within the SSM”, Article 11 of the SSM Framework Regulation establishes the procedure in greater detail: significant supervised entities wishing to establish a branch in another participating Member State shall inform the NCA of their home Member State providing the information required under Article 35(2) CRD IV; the NCA in turn shall immediately inform the ECB. If the ECB approves the request or takes no decision within two months, the branch may be established. This is to be communicated to the NCA of the participating Member States where the branch will be established.

The Articles mentioned above constitute a legal basis under Article 5(a) of the Regulation (and Article 5(b) as concerns the content of the form).

### **3.2.5. Withdrawals of authorisation**

According to Article 4(1)(a) of the SSM Regulation, the ECB shall be competent to "authorise credit institutions and to withdraw authorisations of credit institutions subject to Article 14". Article 14(5) sets out the procedure to be followed in this case:

- 1) The ECB may withdraw authorisations on its own initiative following consultations with the NCA of the Member States in which the credit institution is established.
- 2) The ECB may withdraw authorisations on proposal of the NCA of the Member State in which the credit institution is established.

Where national authorities remain competent to resolve credit institutions, they have to be involved as well (Article 14(6)).

Articles 80 to 84 of the SSM Framework Regulation provide a more detailed procedure.

The criteria for a withdrawal are set out in Article 18 and 20 of CRD IV (as implemented in the respective national legislation). They include e.g. false statements when applying for the initial authorisation, having management members that are not fit and proper (see section 2.3 above) and other breaches of financial legislation.<sup>30</sup>

According to Article 4(1)(a) and 4(3) of the SSM Regulation, the ECB conduct the withdrawal of authorisation procedure in line with relevant Union law. Under Article 20(5) CRD IV, the NCA shall inform EBA of the withdrawal of the authorisation. As the withdrawal procedure is now be led by the ECB under Article 4(1)(a) SSM Regulation, the notification is also to be done by the ECB.

The Articles mentioned above constitute a legal basis under Article 5(a) of the Regulation.

### **3.3. Processing of special categories of data**

Due to their sensitivity, some categories of personal data may only be processed subject to specific stricter rules. The processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life is prohibited, unless grounds can be found in Article 10 of the Regulation. The processing of personal data related to (suspected) offences, criminal

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<sup>30</sup> See also Article 67(1) CRD IV.

convictions and security measures is allowed on a specific legal basis (Article 10(5) of the Regulation).

In the five procedures notified, data on (suspected) offences<sup>31</sup> and criminal convictions may be processed. In some cases, information about spouses may be collected, which may allow inferences about the sex life of data subjects.

Data on (suspected) offences, in the form of extracts of criminal records or statements of data subjects about their (not) having been subject of investigations, penalties and so forth are collected in the assessment of their reputation based on Article 23 CRD IV, as implemented in Member States' legislation and interpreted in the relevant EBA Guidelines.

Information about their independence and possible conflicts of interest is collected based on Article 91(8) CRD IV, as implemented in national legislation and interpreted in the relevant EBA Guidelines. In the context of family relationships, this may allow inferences as to the data subject's sex life, e.g. when the name and interests of a spouse are collected.

The Articles mentioned above provide an appropriate authorisation for the processing of such special categories of data under Article 10(5) of the Regulation, subject to the comments on data quality in the section below.

### **3.4. Data Quality**

According to Article 4(1)(c) of the Regulation, data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed. They must also be accurate and where necessary kept up to data (Article 4(1)(d)).

For all procedures except right of establishment, the list of data categories are laid down in non-binding guidelines; in all cases, it is possible for NCAs to demand additional information in their forms. As the ECB will base itself on the information provided via the NCAs, it will process all the data provided by them.

The specific bases on which NCA include certain items in their forms are found in national implementations of CRD IV, administrative circulars or simply the interpretation of national law by the respective NCA in the light of the applicable EBA or CEBS/CEIOPS/CESR guidelines. The EDPS does not verify whether all of these forms conform to the relevant national rules, as this is a task for the national data protection authorities supervising the NCAs. That being said, the **ECB should work with NCAs towards approximating the content of the forms, limiting the amount of personal data to the amount necessary in order to ensure compliance with Article 4(1)(c) of the Regulation.** Examples could include limiting certain information requested to a certain period, as is e.g. done in the French fit and proper questionnaire.<sup>32</sup>

As concerns accuracy of data and keeping them up to date, data are collected from the data subject, ensuring accuracy; the data subject also has the right to access and the right to rectify data, so that the file can be as complete as possible. This also makes it possible to ensure the quality of data.

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<sup>31</sup> The EDPS interprets this concept in a wide way, cf. Directive 95/46/EC, where it includes breaches of ethics for regulated professions.

<sup>32</sup> See <http://acpr.banque-france.fr/agreements-et-autorisations/procedures-secteur-banque/tous-les-formulaires.html>.

### **3.5. Conservation of data**

As a general principle, personal data are to be kept in a form which permits identification of data subjects for not longer than is necessary for the purpose for which the data are collected and/or further processed (Article 4(1)(e)).

The conservation period is 15 years, starting from different points in time, the latest one being the moment where a data subject ceases to be a senior manager / board member / qualifying shareholder. The ECB justifies this period with the usual career length of data subjects.

This conservation period does not appear to be excessive.

After this period, only certain information will be permanently kept in a register as "institutional facts" related to supervised entities. The information kept in the register is limited to that fact that a certain person held a certain post in a supervised entity at some point in time.

The reason for keeping this information without any time limit is not clear; at the latest at the time of death of data subjects, there seems to be no reason for further storage. **The ECB should either provide convincing reasons, i.e. the purposes served by this further storage, or adopt a separate, but limited conservation period for the register.**

### **3.6. Transfer of data**

The rules applicable to transfers of personal data depend on the recipient. For transfers within or between Union institutions, bodies and agencies, Article 7 of the Regulation applies. This concerns e.g. transfers between different parts of the ECB or from the ECB to EBA. For transfers to recipients subject to national legislation implementing Directive 95/46/EC, Article 8 applies. This would be the case for NCAs of EU Member States. For recipients that are not subject to such legislation, Article 9 applies. This would e.g. be the case for NCAs of third countries outside the EU with which the ECB enters into cooperation agreements.

#### **3.6.1. Transfers under Article 7**

Under Article 7, personal data may be transferred within or between Union institutions, bodies and agencies if they are necessary for the legitimate performance of a task covered by the competence of the recipient.

The transfers foreseen within the ECB fall in two categories: (1) preparation of draft decisions and (2) approval of draft decisions.

Transfers in category (1) occur between the Authorisation Division in DGMS IV and the JSTs in DGMS I and II (for significant supervised entities), as well as between the Authorisation Division and DGMS III (for less significant entities). Prima facie, these transfers appear to be compliant with Article 7.

Transfers in category (2) occur to the Supervisory Board and the Governing Council (via their respective secretariats). As these bodies are competent for approving and issuing the supervisory decisions, some personal data will need to be communicated to them (e.g. for decisions on a fit and proper assessment of a proposed new board member). Prima facie, these transfers appear to be compliant with Article 7.

Transfers to other EU institutions and bodies are foreseen in the communication of certain supervisory decisions to EBA.<sup>33</sup> These transfers also appear to be compliant with Article 7 *prima facie*.

In all cases, the ECB should ensure that only those personal data necessary for the performance of the relevant tasks are transferred.

### **3.6.2. Transfers under Article 8**

Under Article 8(1) of the Regulation, personal data may be transferred to recipients subject to national implementations of Directive 95/46/EC (such as NCAs), when these data are necessary for the performance of a task carried out in the public interest or in the exercise of official authority.

Such transfers occur to NCAs (1) during the preparation of supervisory decisions and (2) when communicating the final decisions to them. They may also occur to other financial supervisors if required by national law in the fit and proper procedure. These transfers appear to be compliant with Article 8.<sup>34</sup> The ECB should in any case ensure that only necessary data are transferred.

### **3.6.3. Transfers under Article 9**

Article 9 lays down the specific rules for transfers of personal data to recipients who are not bound by national implementation of Directive 95/46/EC. Such transfers may be allowed 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)).

The ECB has announced that it would participate in many agreements already concluded between NCAs and third countries' competent authorities. In the future, the ECB also plans to establish cooperation agreements on its own. For the latter case, it announced planning to consult the EDPS under Article 28(1).<sup>35</sup>

According to Article 152 of the SSM Framework Regulation, existing cooperation agreements entered into by an NCA prior to 4 November 2014 relating to tasks (at least partly) covered under the SSM shall continue to apply. The ECB may decide to participate in such agreements in accordance with the procedures of the arrangement in question or may establish new cooperation agreements.

It should be noted that 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.

If the ECB is to transfer personal data to third countries, it needs to **ensure that Article 9 of the Regulation is complied with.**

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<sup>33</sup> See section 3.2.5 above on Article 20(5) CRD IV.

<sup>34</sup> It should be noted that in almost all cases, these decisions will be based on information communicated to the ECB by the relevant NCA.

<sup>35</sup> 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](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Papers/14-07-14_transfer_third_countries_EN.pdf).

### **3.7. Rights of access and rectification**

Under Articles 13 and 14 of the Regulation, data subjects have the right to access their personal data held by the institutions and to have it rectified where necessary.

In reply to access/rectification request, the ECB will apply its standard rules codified in its implementing rules on data protection, on which the EDPS has been consulted and which it has accepted.<sup>36</sup> The ECB will reply to access requests within a period of three months maximum. This is the maximum period allowed by the Regulation.

Additionally, under Article 22 of the SSM Regulation and Article 31 of the SSM Framework Regulation, the ECB has to conduct a hearing or request comments before any adverse decision is adopted;<sup>37</sup> this hearing/request for comments provides an opportunity for data subjects to challenge inaccurate data.<sup>38</sup> Additionally, Article 32 of the SSM Framework Regulation gives the parties a right of access to the ECB's file.

### **3.8. Information to the data subject**

Articles 11 and 12 of the Regulation impose certain information obligations on controllers; these differ depending on whether the data have been collected directly from the data subject (Article 11) or from another source (Article 12). In the first case, data subject are to be informed at the time of collection; in the second case, at the latest at the time of the first disclosure to a third party, where envisaged. In all of the notified procedures except for the withdrawal of authorisations, data subjects are in the situation of Article 11. **The privacy statement for the licensing, qualifying holdings, fit and proper and right of establishment procedures do not clearly inform data subjects about whether or not replies are mandatory and what the consequences of a failure to reply might be. This should be added.**

The privacy statements offer a clear contact point, which data subjects may contact for "queries or complaints". This could be further clarified by adding "or to exercise your rights".

The right to information may be restricted under Article 20 of the Regulation. In the notified processing operations, the ECB only mentioned the possible use of restrictions as concerns early stages of the withdrawal procedure. Article 20(1) of the Regulation contains the conditions under which the right of information may be restricted. They may be restricted if this is necessary for safeguarding a number of interests and rights mentioned in the same Article; points (a), (b) and (e) appear to be relevant here. They allow, respectively, restricting the right of access to safeguard the prevention, investigation, detection and prosecution of criminal offences<sup>39</sup>, to safeguard important economic or financial interests of a Member States or the European Union, and to safeguard monitoring, inspection or regulatory tasks connected to the exercise of official authority in the two first cases.

These exceptions may be used if informing the data subject at an early stage of the investigations would prejudice these interests. The EDPS reminds the ECB that they can only be used on a case-by-case basis following an individual and documented assessment. Article

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<sup>36</sup> see EDPS case 2006-0541.

<sup>37</sup> Article 77 SSM Framework Regulation repeats this requirement for authorisation decisions.

<sup>38</sup> In cases where an urgent decision is necessary to prevent significant damage to the financial system, decisions may adopted without a hearing; in this case, the affected party shall be given opportunity to comment afterwards (see paragraphs (4) and (5) of Article 31 SSM Framework Regulation).

<sup>39</sup> The EDPS has interpreted this provision in a wide sense, following the corresponding Article 13 of Directive 95/46/EC, which also includes breaches of ethics in regulated professions.



20(3) to (5) set out further conditions. It should be noted that these restrictions are deferrals that are limited in time.

### **3.9. Security measures**

[...]

### **4. Conclusion:**

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the recommendations indicated in bold in this Opinion are fully taken into account. To summarise, the ECB should:

- work with NCAs towards approximating the content of the forms, limiting the amount of personal data to the amount necessary in order to ensure compliance with Article 4(1)(c) of the Regulation;
- either provide convincing reasons, i.e. the purposes served by the further storage, or adopt a separate, but limited conservation period for the register;
- ensure that Article 9 of the Regulation is complied with when transferring personal data to third countries;
- add in the privacy statement for the licensing, right of establishment, fit and proper and right of establishment procedures whether or not replies or mandatory and what the consequences of a failure to reply might be.

Done at Brussels, 3 November 2014

**(signed)**

G. Buttarelli

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