



## **Opinion on the notification for prior checking relating to internal administrative inquiries and disciplinary procedures within the European Commission**

Brussels, 20 April 2005 (Case 2004-187)

### **Procedure**

The Investigatory and Disciplinary Office (IDOC) submitted a notification to the Data Protection Officer of the European Commission concerning the processing of data on staff regarding suspected offences and offences.

Mr Dieter KÖNIG, Data Protection Officer of the European Commission, served notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 by e-mail and regular mail on 16 November 2004. The regular mail was received on 24 November 2004.

On 9 December 2004, a member of the European Data Protection Supervisor's staff sent a letter containing a number of queries about the dossier.

In an e-mail dated 7 February 2005, Mr Dieter KÖNIG, Data Protection Officer of the European Commission, provided the EDPS with answers to the questions.

A meeting was held on Monday 11 April 2005, so as to provide additional information; it was attended by Ms BIERRY (IDOC Coordination), Mr Hendrik VAN LIER (Director of IDOC), Mr MARCELLI (DG ADMIN Data Protection Advisor), Mr BAYO DELGADO (Assistant Data Protection Supervisor), Ms LOUVEAUX and Ms LONGREE.

### **The facts**

In order to adjust the provisions of Commission Decision C(2002) 540 to the requirements of the new Staff Regulations, the Commission must replace Decision C(2002) 540 of 19 February 2002 on the conduct of administrative inquiries and disciplinary procedures. It has been replaced by Decision C(2004) 1588 of 28 April 2004, which alone is relevant for this prior check.

The Investigatory and Disciplinary Office (IDOC) was established by the new Commission Decision C(2004) 1588 of 28 April 2004.

- IDOC carries out administrative inquiries. (Articles 3 and 4 of the Decision)
- IDOC may be asked to carry out other inquiries to ascertain certain facts, in particular under Articles 24, 73 and 90 of the Staff Regulations.
- IDOC carries out disciplinary procedures for the Appointing Authority (Articles 5 and 6 of the Decision).
- IDOC coordinates preventative measures as regards discipline.

For the case in hand, data processing allows files to be compiled in hard copy, lists of inquiries underway to be drawn up on computer, lists to be drawn up of cases resulting in disciplinary measures since 1985, and consultation of internal databases (in particular SYSPER and SYSPER 2), and also of the personal files of officials and other servants in the course of checks or inquiries or during disciplinary procedures.

The purpose of data processing is to put together a file that enables the Appointing Authority (AA) to determine whether an official or other servant has failed to fulfil his/her obligations under the Staff Regulations and, where appropriate, impose a disciplinary sanction in accordance with the Staff Regulations.

Administrative inquiry:

- IDOC carries out administrative inquiries. For the purposes of these implementing provisions "administrative inquiries" means all actions taken by the authorised official to establish facts and, where necessary, determine whether there has been a failure to comply with the obligations incumbent on Commission officials.
- The Director and other members of IDOC exercise their powers of administrative inquiry independently. In the exercise of those powers, they neither seek nor receive instructions. They have the power to obtain documents, summon any person subject to the Staff Regulations to provide information and carry out on-the-spot investigations.
- Administrative inquiries are carried out thoroughly and include all aggravating and extenuating circumstances; they last for a period appropriate to the circumstances and complexity of the case.
- IDOC may receive assistance from other officials or specialist departments.
- An administrative inquiry is opened either by IDOC itself or, at the request of a Director-General or Head of Department, by the Director-General for Personnel and Administration in agreement with the Secretary-General.
- Before opening the inquiry, the Director-General for Personnel and Administration consults the European Anti-Fraud Office (hereinafter OLAF) to ascertain that that Office is not undertaking an investigation for its own purposes and does not intend to do so. As long as OLAF is conducting an investigation within the meaning of Regulation No 1073/99, no administrative inquiry under the preceding paragraph is opened regarding the same facts.
- The decision to open an administrative inquiry makes IDOC responsible for the inquiry, defines the purpose and scope of the inquiry and requires the officials responsible for it to determine responsibilities on the basis of the particular facts and circumstances, and, if appropriate, the individual responsibility of the officials concerned.
- As soon as an administrative inquiry suggests that an official may be personally involved in an affair, that official is kept informed provided that information does not hinder the inquiry. In any case, conclusions referring to an official by name may not be drawn at the end of the inquiry unless that official has had the opportunity to express an opinion on all the facts which relate to him or her. The conclusions record that opinion.
- Where absolute secrecy is required by the aims of the inquiry requiring investigative procedures which are the responsibility of a national judicial authority, the obligation to invite the official to express an opinion may be deferred by the Secretary-General in agreement with the Director-General for Personnel and Administration. In that eventuality, no disciplinary procedure

- may be opened until the official has been able to express an opinion.
- If, following an administrative inquiry, no charge is brought against an official against whom allegations have been made, the administrative inquiry concerning that official is closed with no further action by decision of the Director-General for Personnel and Administration, who so informs the official in writing. The official may request that that decision be placed in his or her personal file.
  - The closure of the administrative inquiry does not prevent its being reopened if new facts come to light.
  - IDOC submits a report on the inquiry to the Director-General for Personnel and Administration, after consulting, if appropriate, the Specialised Financial Irregularities Panel ("the Panel") pursuant to Commission Decision C(2003)2247 of 9 July 2003. That report sets out the facts and circumstances in question; it establishes whether the rules and procedures applicable to the situation were respected and determines any individual responsibility, having regard to aggravating or mitigating circumstances. Copies of all the relevant documents and records of interviews are attached to the report.
  - The Director-General for Personnel and Administration informs the official concerned of the conclusion of the inquiry together with the conclusions of the inquiry report and, on request, all documents directly linked to the allegations made, subject to the protection of the legitimate interests of third parties.
  - After receiving an inquiry report from OLAF, the Director-General for Personnel and Administration may, if appropriate, either ask OLAF to supplement the report or decide to open an administrative inquiry himself or immediately open a disciplinary procedure or indeed close the file without any disciplinary consequences.

Disciplinary procedures:

- An official heard pursuant to Article 3 of Annex IX to the Staff Regulations signs the record of the hearing or makes comments and/or remarks within 15 calendar days from receipt of the record. Failure to do so within that period results, except in cases of *force majeure*, in the record being considered approved.
- If the Appointing Authority or a person authorised to that effect has to conduct interviews with certain persons following the hearing referred to in Article 3 of Annex IX to the Staff Regulations, the official concerned may, on request, receive a copy of the signed records of those interviews provided that the facts mentioned there have a direct bearing on the preliminary allegations made against him or her.
- The representation of the appointing authority before the Disciplinary Board, pursuant to Article 16(2) of Annex IX to the Staff Regulations is undertaken by the Director of IDOC or his or her deputy.
- Where an administrative inquiry has already been held into a case before the Disciplinary Board, the officials who conducted that inquiry may not represent the appointing authority before the Disciplinary Board but may, if appropriate, be called by it as witnesses.

With regard to Articles 24, 73 and 92 of the Staff Regulations of officials of the European Communities, in respect of which the IDOC may conduct inquiries, the

relevant procedures are regarded as equivalent to the procedures followed under an administrative inquiry.

### The handling of files

- The complete file of the administrative inquiry is given to the Appointing Authority (AA), namely to the Director-General for Personnel and Administration, and possibly to the College for members, officials and other servants of grade A14 to A16 level.
- In the event of allegations of financial irregularities, the factual findings of the inquiry reports are communicated to the Specialised Financial Irregularities Panel (Commission Decision C(2003) 2247).
- The file is also submitted to the Disciplinary Board or the Tripartite (according to the severity of the sanction envisaged by the AA) if a disciplinary procedure is opened.
- The complete file of the disciplinary procedure is communicated to the tripartite AA (the Director-General for Personnel and Administration, the Director-General of the person concerned and a third Director-General), to the Legal Service and, where appropriate, to the College.
- Only the disciplinary decision is forwarded to Admin/B/3 to be put into the personal file. The decision is communicated to OLAF if OLAF requested disciplinary follow-up. Where the disciplinary decision has a financial impact it is forwarded to the Pay Master's Office (for adjustment of the salary) and to Admin/A/4 (for Sysper to be adjusted) and to the human resources management for the person concerned (in the event that the person's grade is altered in such a way that involves a change in function).
- If the person concerned contests the AA disciplinary decision, the dossier may be referred to the Court of First Instance or the Court of Justice of the European Communities.

### Conservation of data

- The IDOC may keep files relating to administrative inquiries and disciplinary procedures for up to 20 years as of the date on which the inquiry was closed or the disciplinary decision was issued.
- So that precedents can be compared and to ensure that the Staff Regulations are applied uniformly, and so that statistics can be compiled, disciplinary decisions can in any case be kept for 50 years.
- With regard to the length of time for which the disciplinary decision is kept in the person's personal file, Article 27 of Annex IX to the Staff Regulations establishes the time limits after which the person concerned may request that all references to the penalty be removed from the disciplinary file, but the final decision lies with the AA.

### **Legal aspects**

## 1. Prior checking

The notification received on 24 November 2004 relates to processing of personal data ("*any information relating to an identified or identifiable natural person*" – Article 2(a)) and therefore falls within the scope of Regulation (EC) No 45/2001.

Under Article 27(1) of Regulation (EC) No 45/2001 all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes shall be subject to prior checking by the European Data Protection Supervisor".

Notified processing is also subject to:

- Article 27(2)(a): "processing of data relating to ... suspected offences, offences, ....
- Article 27(2)(b): "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct"

The data processing described (how the IDOC conducts an administrative inquiry or a disciplinary procedure) may have serious and considerable consequences for the data subjects (current and former members of the Commission, current and former Commission officials, current and former temporary and contract Commission staff) such as disciplinary measures, civil and/or financial liability.

The notification from the Commission's Data Protection Officer was received on 22 November 2004 through the post. In a letter dated 9 December 2004 (i.e. 16 days later), a member of the European Data Protection Supervisor's staff raised a number of questions with a view to obtaining clarification on some points of the dossier. Under the terms of the first subparagraph of Article 27(4) of Regulation (EC) No 45/2001, this letter suspended the two-month period within which the European Data Protection Supervisor had to issue an opinion.

On 7 February 2005, the Commission's Data Protection Officer sent an e-mail replying to these queries. On 7 February 2005, one month and 14 days remained within which to issue an opinion. On 21 March 2005, the Assistant Supervisor sent an e-mail announcing an extension of the deadline due to the complexity of the matter. The European Data Protection Supervisor will therefore issue his opinion by 21 April at the latest.

Prior checking concerns the processing of personal data in the framework of administrative inquiries or disciplinary procedures. Its aim is not to issue an opinion on the administrative inquiry or disciplinary procedure itself.

Prior checking also concerns comparable procedures (Articles 24, 73 and 92) since the basis taken for prior checking is essentially the same. However, if medical data can be mentioned during the inquiries undertaken in accordance with Article 73 of the Staff Regulations (occupational disease) the relevant procedure will need to be notified, owing to the very existence of medical data which would give rise to prior checking based on Article 27(2)(a).

## **2. Legal basis and lawfulness of the processing operation**

The legal basis for data processing is covered by Article 86 of the Staff Regulations of officials of the European Communities and by Annex IX to the Staff Regulations, in particular Article 2(3) *"The institutions shall adopt implementing arrangements for this Article, in accordance with Article 110 of the Staff Regulations"* as well as Article 30 thereof *"Without prejudice to Article 2(3), each institution shall, if it sees fit, adopt implementing arrangements for this Annex after consulting its Staff Committee"*. The legal basis is therefore valid.

Alongside the legal basis in relation to Regulation (EC) No 45/2001, the lawfulness of the processing must also be considered. Article 5(a) of Regulation (EC) No 45/2001 stipulates that the processing shall be *"necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities ... or in the legitimate exercise of official authority vested in the Community institution ..."*.

As administrative inquiries and disciplinary procedures which involve collecting and processing personal data relating to officials or other servants come under the legitimate exercise of official authority vested in the institution, the processing is lawful. The legal basis found in the Staff Regulations of officials of the European Communities (Article 86 and Annex IX) supports the lawfulness of the processing.

Lastly, in the framework of administrative inquiries and disciplinary procedures, the file of the data subject may reveal data which Article 10 of Regulation (EC) No 45/2001 classes as "special categories of data". Personal data such as political or trade-union membership may come to light, usually by chance, in the file. The data must be relevant regarding the file and/or handling of the file (taking account of the factors mentioned below under point 7 on data quality).

## **3. Collection and transfer of data**

The data are of a disciplinary nature and relate to the:

- behaviour, action or inaction of persons under investigation and/or forming the subject of disciplinary procedures;
- legal definition of such action or inaction with regard to the Staff Regulations and to other obligations by which the persons in question are bound;
- individual responsibility of the persons concerned, including financial liability;
- sanctions imposed on the persons concerned, if required.

The categories of personal data to be protected are those relating to administrative inquiries and disciplinary procedures.

The SYSPER and SYSPER 2 databases may be consulted as part of these administrative inquiries or disciplinary procedures. The processing operation being reviewed involves no structural change to the specified purpose of the staff database, nor is the use of SYSPER and SYSPER 2 as part of inquiries or disciplinary proceedings incompatible with this purpose. This means that Article 6(1) of (EC) Regulation No 45/2001 is not applicable to the case in point and that Article 4(1)(b) (*"data must be collected for specific, explicit and legitimate purposes, and must not be*

*further processed in a way incompatible with those purposes") of the Regulation is observed.*

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. Processing under Article 7(1) is the transfer of personal data within or between Community institutions or bodies "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

We are dealing with a case involving a transfer between institutions (CFI or CJEC) and within one and the same institution (ADMIN, OLAF, LS, other DGs, PMO). However, the parties referred to are not regarded as recipients within the meaning of Article 2(g) as they are covered by the exemption provided for in that Article, given that they are likely to receive data in the framework of a particular inquiry (see information for data subjects in point 5.2).

#### **4. Conservation of data**

Article 4(1)(e) of Regulation (EC) No 45/2001 sets forth the principle that "*personal data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data are collected or for which they are further processed.*"

A distinction should therefore be made between the conservation of data in personal files, in disciplinary files and the retention of decisions in IDOC archives.

- Personal files

The conservation of data relating to disciplinary penalties in personal files is governed by Article 27 of Annex IX to the Staff Regulations. The data subject may therefore request that certain information be withdrawn from his/her personal file, although this is not an absolute right and remains subject to the AA's discretion. There is therefore no deletion of the information after a given period of time. The reason for this provision is to avoid certain penalties being taken into account when the data subject is being evaluated.

However, the data protection rules imply that the AA must justify the reasons for which the data are being kept and any refusal to delete data where the data subject so requests.

The data concerning disciplinary measures in personal files should only be kept until the end of the period during which an official in active employment, a retired official or his/her legal successor may claim entitlement. Any subsequent data conservation beyond that period may only be justified on historical, statistical or scientific grounds.

- Disciplinary files

Files on administrative inquiries and disciplinary files are kept by IDOC for a maximum period of 20 years from the date on which the inquiry was closed or the disciplinary decision was issued. The Commission bases such retention on Article 10(h) and (i) of Annex IX to the Staff Regulations, according to which "*to determine the penalty to be imposed, account is taken in particular of: (...) (h) whether the misconduct involves repeated action or behaviour (i) the conduct of the official throughout the course of his career*".

The European Data Protection Supervisor considers this justification to be sound. However, the information is kept in the disciplinary files, whether or not it has been deleted from the personal file in accordance with Article 27 of Annex IX to the Staff Regulations. The existence of files in which the information does not entirely match may be called into question as this may harm the interests of the data subject<sup>1</sup>.

- Retention of decisions in IDOC archives.

The retention of decisions for a 50-year period is based on Article 2 of Decision C(2004) 1588, which stipulates that IDOC is to coordinate preventative measures as regards discipline. Such preventative measures must be based on the experience gained throughout the years (development over time of the number of infringements penalised, acts or misconduct most frequently encountered, nature of penalties imposed as a result of infringements reported etc).

Such conservation must be carried out in accordance with Article 4(1)(e) of Regulation No 45/2001 which stipulates that "*The Community institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific use should be kept either in anonymous form only or, if that is not possible, only with the identity of the data subjects encrypted. In any event, the data shall not be used for any purpose other than for historical, statistical or scientific purposes*".

However, in this case we are told that "the data in question are restricted to disciplinary decisions. These are referenced by a file number (CMS number) on the basis of which they are kept in the IDOC archives. In view of the need for data on the official's conduct throughout his/her career, disciplinary decisions are not however anonymous".

If the purpose of such files is to ensure the continuity and harmony of disciplinary decisions or to compile statistics, the European Data Protection Supervisor fails to see how this could not be attained with anonymous data.

If the purpose referred to above is to keep data on the official's conduct for 50 years, this is contrary to the ban on parallel files as already referred to above.

At present, therefore, data on disciplinary penalties may be kept for a period of 20 years in disciplinary files or 50 years in IDOC archives. This raises a problem in view of the principle of limited storage time referred to in Article 4(1)(e) of (EC) Regulation No 45/2001, which is itself merely an expression of a basic right. The introduction of limited periods for data retention would therefore help to ease the current tension between the Staff Regulations of officials and the Regulation on Data Protection.

## **5. Information to be given to the data subject**

### **5.1. Obligation to provide information**

Articles 11 and 12 of Regulation (EC) No 45/2001 lay down that the controller must provide information to the data subject. When the data have been directly collected

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<sup>1</sup> See *Baltsavias v. Commission*, T-39/93 and T-533/93.

from the data subject, the information must be provided at the time of collection. If the data have not been collected from the data subjects, the information must then be given at the time of recording the data or the initial communication to third parties.

Article 20 of the Regulation provides for certain exemptions from the obligation to provide information particularly where this limitation is necessary for "the prevention, investigation, detection and prosecution of criminal offences" or "the protection of the data subject or of the rights and freedoms of others".

In this case, the data are collected either directly from the data subject or from third parties. The information must then be provided either at the moment of collection or before the data are recorded or transmitted to third parties (e.g. OLAF).

Article 4(4) of Decision C(2004) 1588 states: "As soon as an administrative inquiry suggests that an official may be personally involved in an affair, that official shall be kept informed provided that information does not hinder the inquiry".

Moreover, Article 1(1) of Annex IX to the Staff Regulations states: "Whenever an investigation by OLAF reveals the possibility of the personal involvement of an official, or a former official, of an institution, that person shall rapidly be informed, provided this is not harmful to the investigation".

The phrase "does not hinder the enquiry" includes exceptions such as "the prevention, investigation, detection and prosecution of criminal offences" or "the protection of the data subject or of the rights and freedoms of others" but its scope extends beyond these exceptions. In certain cases it may be necessary not to inform the data subject so as not to harm the proper functioning of the inquiry even though it is not a criminal investigation within the meaning of Article 20 of Regulation (EC) No 45/2001.

Nevertheless, the Supervisor considers that Article 20 must take account of the *ratio legis* of the provision and must allow for restrictions on the obligation to provide information during a disciplinary procedure. This is backed up by the fact that Article 13 of Directive (EC) 95/46 makes provision for limiting the right to information of the data subject when such a restriction "constitutes a necessary measure to safeguard...: (d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions". Article 13(d) is therefore wide-ranging and extends from prevention, investigation, detection and prosecution of criminal offences to breaches of ethics for regulated professions. Even though this is not explicitly stated, there is reason to believe that breaches of discipline by public servants are also covered by the provision.

Regulation (EC) No 45/2001 must be read in the light of Directive (EC) 95/46. Paragraph 12 of the preamble encourages "consistent and homogeneous application of the rules for the protection of individuals' fundamental rights and freedoms with regard to the processing of personal data". Article 286 of the Treaty also provides "*Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of, this Treaty.*" There is therefore no reason to believe that a restriction on the right to information may not be justified by the fact that a disciplinary procedure is underway. This is also supported by the fact that no information must be provided regarding the "recipients" in the context of an inquiry (see above).

The phrase "does not hinder the inquiry" suggests that the real need not to provide information be demonstrated and that information be withheld no longer than is strictly necessary for the proper functioning of the inquiry.

Moreover, any fair procedure implies the exercise of a right of defence. In order for it to be possible to exercise such a right, the official must be informed that a procedure has been opened concerning him/her.

## 5.2. Content of the information

The main components of the information provided for in Articles 11 and 12 of the Regulation are given in Decision C(2004) 1588. Officials and other servants have been notified of this Decision by publication in Administrative Notices IA No 86-2004 on 30 June 2004. Officials and other servants working in all institutions and former officials and other servants may consult the Commission's Administrative Notices via IntraComm.

Information regarding the transfer of the file between institutions (CFI or CJEC) and within a single institution (ADMIN, OLAF, GS, other DGs, PMO) does not specifically have to be given to the data subject on the grounds that he is not a recipient within the meaning of Article 2(g) of the Regulation, but is desirable that this general information be provided when it is not given in Decision C(2004) 1588, in order to ensure the procedure is transparent.

Particular mention should be made of the length of time during which data are withheld. Article 27 of Annex IX to the Staff Regulations states that: "*An official against whom a disciplinary penalty other than removal from post has been ordered may, after three years in the case of a written warning or reprimand or after six years in the case of any other penalty, submit a request for the deletion from his personal file of all reference to such measure. The Appointing Authority shall decide whether to grant this request*". Officials subject to administrative inquiries or disciplinary procedures must be informed that, whereas the reference to a disciplinary penalty may be deleted from their personal files, it will not be deleted from their disciplinary files for a period of 20 years. Moreover, if the data has not been rendered anonymous, the officials must be informed that the disciplinary decision will be kept in the IDOC archives with the reference to the number of the file (CMS number) for a period of 50 years.

Insofar as IDOC decides to render the data kept in the archives anonymous at the end of the retention period for disciplinary files (20 years), this information must be made known to the officials.

In view of these different considerations, the European Data Protection Supervisor wants the official to be explicitly informed that, where deletion of the reference to a disciplinary penalty from the official's personal file is granted pursuant to Article 27 of the Staff Regulations, the reference will not be deleted from the disciplinary file. Finally, if the official concerned is not informed on the grounds of a possible hindrance to the functioning of the inquiry, he should be informed once the hindrance no longer exists and that a time limitation applies to the withholding of information.

## 6. Rights of access

In accordance with Article 13 of Regulation (EC) No 45/2001

*"The data subject shall have the right to obtain, without constraint, at any time within three months from the receipt of the request and free of charge from the controller:*

- (a) confirmation as to whether or not data related to him or her are being processed;*
- (b) information at least as to the purposes of the processing operation, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed;*
- (c) communication in an intelligible form of the data undergoing processing and of any available information as to their source;*
- (d) knowledge of the logic involved in any automated decision process concerning him or her".*

In the case in point, reference is made, in the context of an administrative inquiry, to Articles 1 and 2 of Annex IX to the Staff Regulations and to Article 4(4) of the IDOC Decision, which state that the person concerned may comment on the conclusions of an administrative inquiry report insofar as these set out facts concerning him/her.

Under Article 13 of Annex IX to the Staff Regulations, the person subject to disciplinary proceedings had the right to obtain the complete file concerning him/her and to copy all documents relevant to the proceedings. Moreover, Article 5 of the IDOC Decision states:

- 1. An official heard pursuant to Article 3 of Annex IX to the Staff Regulations shall sign the record of the hearing or make comments and/or remarks within 15 calendar days from receipt of the record. Failure to do so within that period shall, except in cases of force majeure, result in the record being considered approved.*
- 2. If the appointing authority or a person authorised to that effect has to conduct interviews with certain persons following the hearing referred to in Article 3 of Annex IX to the Staff Regulations, the official concerned may, on request, receive a copy of the signed records of those interviews provided that the facts mentioned there have a direct bearing on the preliminary allegations made against him or her.*

The above provisions comply with the principles underlying Article 13 of Regulation (EC) No 45/2001. However, consideration must be given to the restrictions on this right of access mentioned in Article 20 of the same Regulation, particularly points (1)(a) and (1)(c). Restrictions are possible where necessary for *"the prevention, investigation, detection and prosecution of criminal offences"* or *"the protection of the data subject or of the rights and freedoms of others"*.

Article 1(2) of Annex IX to the Staff Regulations states: *"In cases that demand absolute secrecy for the purposes of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority,*

*compliance with the obligation to invite the official to comment may, in agreement with the Appointing Authority, be deferred. In such cases, no disciplinary proceedings may be opened before the official has been given a chance to comment".*

This restriction is in accordance with the restrictions on the right of access provided for in Article 20 of the Regulation (EC) No 45/2001 and recital 18 of Regulation (EC) No 45/2001 leaving competence to the national judicial authorities with regard to the detection, investigation and prosecution of criminal offences.

## **7. Quality of the data**

The data must be "*adequate, relevant and not excessive*" (Article 4(1)(c) of Regulation (EC) No 45/2001). The data so treated, as described in the beginning of this opinion, must be considered as fulfilling these qualifications with regard to treatment.

The European Data Protection Supervisor recognises that it is difficult to determine, at the outset, which data are relevant to the subject of the inquiry, but vigilance in this respect must be laid down as a general requirement.

Data must also be *processed fairly and lawfully* (Article 4(1)(a) of Regulation (EC) No 45/2001). The question of lawfulness has already been considered. As for fairness, considerable attention must be paid to this in the context of such a sensitive subject. It is related to the information given to the official who is the subject of an administrative inquiry or disciplinary procedure, and the speed with which this information is given, so that the rights of the defence can be respected.

Lastly, data must be "*accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified*" (Article 4(1)(d) of the Regulation). There seems to be no mention of any rules governing the possibility of updating which is granted to the official. Rules must be established so that the official can rectify his personal data to ensure that they are updated in the light of subsequent developments (a decision by the Court ruling otherwise, for instance).

## **8. Security**

Under Article 22 of Regulation (EC) No 45/2001 concerning security of processing, "*the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected*". In the context of administrative inquiries and disciplinary procedures, sensitive data are clearly involved and must be processed appropriately.

The security measures presented in the notification seems particularly appropriate for the processing of sensitive data.

## **Conclusion**

The processing proposed does not appear to entail any infringement of the provisions of Regulation (EC) No 45/2001, provided that the observations made above are taken into account. This means, in particular, that DG ADMIN (IDOC) must:

- inform officials, if they are not informed on the grounds of a possible hindrance to the functioning of the inquiry and pursuant to Article 20 of Regulation (EC) No 45/2001, that this hindrance no longer exists and that a time-limitation therefore applies to the withholding of this information.
- inform officials who are the subject of an administrative inquiry or disciplinary procedure that, whereas the reference to a disciplinary penalty may be deleted from their personal files, it will not be deleted from their disciplinary files for a period of 20 years.
- draw up rules concerning IDOC archives, providing that only anonymous data can be retained after the end of the retention period for disciplinary files (20 years) in order to ensure continuity in disciplinary decisions, and bring this information to the attention of officials.
- draw up rules to establish that only personal data which are relevant to the subject of the inquiry are included in the file, and that the official can rectify his personal data to ensure that they are updated in the light of subsequent developments (a decision by the Court ruling otherwise, for instance).
- provide general information, where information concerning the authorities to whom the file is communicated is not contained in Decision C(2004) 1588, in order to ensure the transparency of the procedure.

Brussels, 20 April 2005

*The European Data Protection Supervisor*

Peter HUSTINX