



Opinion on a notification for prior checking received from the Data Protection Officer of the European Central Bank on Internal Administrative Inquiries

Brussels, 22 December 2005 (Case 2005-290)

1. Proceedings

On 3 October 2005, a notification for prior checking of a data processing operation with regard to Article 27(1) was received from Mr. Wolfgang Sommerfeld, Data Protection Officer of the European Central Bank (ECB). Attached were:

- Draft Administrative Circular on internal administrative inquiries
- Statute of the European System of Central Banks and of the European Central Bank
- Conditions of Employment for staff of the ECB
- Conditions of Short-Term Employment
- ECB Staff Rules
- Rules for Short-Term Employment
- Code of Conduct of the European Central Bank
- Rules of Procedure of the ECB
- Decision of the ECB of 3 June 2004 (OLAF investigations)

Additional information was requested by e-mail on 8 November 2005. The answer was given on 29 November.

2. Examination of the matter

2.1. The facts

Definitions

Following the request of the Executive Board, the ECB administration has developed rules to introduce internal administrative inquiries where the administration has been informed of possible breaches by ECB employees of their professional duties. The inquiry procedure is described in an Administrative Circular (AC).

Breach of professional duties means a breach of the obligations laid down in the Statute of Central Bank and of the ECB, the Conditions of Employment, the Staff Rules, the Code of Conduct and any other legal act, legal instrument or internal standard and rule applicable to the ECB employees. Administrative inquiries are conducted in order to clarify the facts. They might be followed by a disciplinary procedure.

The "competent senior manager" means a senior manager in charge of a business area competent for dealing with the submitted facts.

"Lead inquirer" means the Executive Board or a senior manager of a business area with overall responsibility for an administrative inquiry.

"Person conducting the inquiry" means the person appointed by the lead inquirer to conduct the administrative inquiry.

"The panel" means a group of at least three persons and not more than five persons including the chairman to conduct the inquiry.

All staff members (ECB employees) whatever their contract are potential data subjects for the processing operation. According to their contract, permanent or fixed term contract, they are subject to the obligations laid down in the ECB legal provisions. In addition, persons working for the ECB other than on the basis of employment contracts are also subject to this Administrative Circular; in this case the respective agreements with such persons provide the legal basis for these inquiries.

Description of the data

Both basic personal data of staff members and data related to the conduct of internal administrative inquiries are collected. The latter could be categorised as follows:

- 1) Personal information supplied to the lead inquirer at his/her request;
- 2) Personal information contained in transcripts and /or minutes of witnesses' hearings and interviews;
- 3) Personal information contained in expertises requested from relevant business areas or external independent experts;
- 4) Personal information being processed in relation to requested access (which is only allowed under strict conditions; see Art. 6.11 and 6.13 draft AC) to electronic files, hard copy files or on-the-spot searches;
- 5) Personal information being processed in relation to requested interceptions (which is only allowed under strict conditions; see Art. 6.12 and 6.13 draft AC) of telephone conversations (traffic data or/and content data);
- 6) Personal information contained in the interim reports to the lead inquirer and/or in the final report of the lead inquirer and in all the documents annexed to the reports. Copies of all relevant documents and minutes of hearings, including the results of the panel's voting, on-the-spot searches or any other inquiry acts performed by the person conducting the inquiry or the panel, shall be annexed to the reports.

Initiation of the administrative inquiry

This administrative procedure is without prejudice to any separate disciplinary procedure. That means that an administrative inquiry in a specific case does not as such prejudice a disciplinary proceeding which may subsequently follow, as a separate procedure, subject to the decision of the Executive Board.

Every ECB employee may submit facts, either orally or in writing, to any ECB manager. Any manager may in turn submit facts to the competent senior manager providing the nature of the incident, the name(s) of the possible wrongdoer(s), date and time when the incidents occurred and names of any witnesses. If they consider that the competent manager could have a conflict of interests relating to the relevant incident they may submit the facts directly to the Executive

Board. The senior manager will then be replaced by the Director General Legal Services. If the senior manager is competent, he assesses the submitted facts to establish whether the facts are not unfounded, do not fall under the scope of Decision ECB/2004/11 (European Anti-Fraud Office investigations), do not fall within the scope of any other ECB, Community or national legal act providing for a more specific procedure and having binding effect on the ECB. For instance, a disciplinary procedure may be regarded as a "special procedure" and may exclude an inquiry procedure in very clear cases of serious breaches of professional duties where there is clear evidence. If the submitted facts do not or not yet warrant the use of the internal inquiry procedure, he/she shall deal with the submitted facts himself/herself taking due account of the principles provided in the Administrative Circular (6 (6)) on the keeping and erasing of collected data.

To initiate an administrative inquiry, the senior manager has to have the agreement on the need of such a process from the Director General Human Resources, Budget and Organisation, the Director Internal Audit and the Director General Secretariat and Language Services. They then propose the initiation of an inquiry to the ECB Executive Board which decides whether to open an administrative inquiry or not. The decision to open an inquiry stipulates the subject matter and the scope as well as the senior manager in charge of the administrative inquiry or the Executive Board itself.

The lead inquirer appoints the person conducting the administrative inquiry and the panel. The person conducting the inquiry and the panel members are chosen from amongst ECB employees or where necessary from external persons who possess relevant qualifications and expertise. Both the person conducting the inquiry and the panel are appointed as soon as possible from the date of the decision to open the administrative inquiry.

Indication of the date of delivery of the reasoned report is given. The administrative inquiry is conducted over a period of time proportionate to the circumstances of the case and to the complexities of it. All steps of the administrative inquiry, including any findings and documents, are personal and confidential and managed in accordance with Administrative Circular 7/2004 on the management and confidentiality of ECB documents. The length of the administrative inquiry will be determined on a case-by-case basis.

Conduct of an administrative inquiry

In order to gather information on the incident, the person conducting the inquiry or the panel may request any ECB employee to supply information, hear witnesses, conduct interviews, request expertise from relevant business areas or outside independent experts, request access to files, make on-the-spot searches of ECB premises or request interception of telephone conversations. Access to electronic files, hard copy files or on-the-spot searches may be processed following a reasoned decision of the lead inquirer, who has received an authorisation to access electronic files from the relevant manager of the Directorate General Information Systems. The Directorate General Information Systems may assist with searching electronic files. The ECB business area responsible for physical security may assist in on-the-spot searches. DG Information System verifies the authenticity of the findings of any search of electronic files. If an employee is on reasonable grounds suspected of a serious breach of professional duties, the person conducting the inquiry or the panel may, on the basis of a reasoned decision by the Executive Board, and having due regard for the principle of proportionality, check traffic data regarding ECB telephones, as well as, if appropriate intercept telephone calls other than personal calls made from ECB telephones. A "call charging facility"

is used by the ECB staff members if they want to make their private calls. This facility allows for a separation between private and business calls.

The ECB's Data Protection Officer is informed *ex ante* of the access to electronic and hard-copy files, telephone interception (Article 6 (13)), and if the person conducting the inquiry or the panel intends to restrict the information right of the data subject according to Article 7. The DPO is informed *ex ante* of the extension of the interception measure, in case the Executive Board decides to do so.

The data are processed both manually and automatically.

The findings and documents are recorded, documented and filed by the person or the panel appointed to conduct the inquiry. Minutes are taken of any interviews. The ECB employee heard has to sign the minutes and may transmit his comments within 15 days calendar of receipt of the minutes. On-the-spot search and other inquiries (accessing the electronic files) are also kept as are the panel's voting results. Information is stored in the administrative inquiry file, separately from the personal file. The person conducting the inquiry or the panel has to report regularly to the lead inquirer. Copies of all relevant documents circulate within the panel, the person conducting the inquiry, the lead inquirer and members of the Executive Board. Copies of all relevant documents and minutes of hearings, including the voting's results, on-the-spot searches or any other actions undertaken by the person conducting the inquiry or the panel are annexed to the report and stored in the administrative inquiry file.

At the end of the administrative inquiry the person conducting the inquiry or the panel submits to the lead inquirer a reasoned report setting out the facts and the circumstances of the case and the existence or absence of sufficient evidence of the alleged breach. If the person conducting the inquiry or the panel cannot adopt a reasoned report within the period of time indicated according to Article 6 (1) (a), they inform the lead inquirer. The Executive Board decide whether the period of investigation should be extended, the inquiry procedure should be closed without any further steps or to assign the inquiry procedure to another person or panel.

Where an administrative inquiry is not followed by any further steps (such as the initiation of a disciplinary procedure), the administrative inquiry file is kept for a period of no longer than 24 months from the year of closure of the administrative inquiry procedure (AC 7/2004 of 17 September). The telephone interception recordings are regularly deleted and at the latest when the case is resolved.

The data are transferred to the members of the Executive Board, the members of the inquiry panel, experts of relevant ECB business areas or external independent experts, if so requested, members of staff who, for professional reasons, need to have access to the relevant information and whose access is authorised by the lead inquirer. These parties will be subject to the legal obligation of professional secrecy (see inter alia Art. 5.8, 6.3 and 6.13 of the draft AC). Where an administrative inquiry is followed by other steps, the data will be transferred to the competent addressee, for example, the Directorate General Human Resources Budget and Organisation in the case of the initiation of a disciplinary procedure.

When the person or the panel group is/are aware of evidence implying criminal offence or in case of alleged discrimination, harassment or mobbing the relevant competent national authorities are informed accordingly.

The ECB plans to keep a list of the administrative inquiries performed.

Right of the data subject

The subject of the administrative inquiry is informed of the subject matter and objective of the administrative inquiry as early as possible after initiating the administrative inquiry unless this would be harmful to the administrative inquiry and is informed, prior to the submission of the report, of the content of the alleged breach of professional duties and has access to the document related to the allegations made against him/her. He/she may present his/her view. He/she is informed of the outcome of the inquiry.

ECB employees, a witness or any person concerned with an administrative inquiry is informed of the subject matter and objective of the administrative inquiry as early as possible after initiating the administrative inquiry unless this would be harmful to the administrative inquiry. Conclusions referring to persons by name are not drawn before the persons have been given the opportunity to express their views on all the facts which concern them.

The anonymity of the whistle-blower is ensured at his/her request when the information is provided on a purely voluntary basis and if the person conducting the inquiry or the panel have accepted the information. The identity of the whistle-blower is kept in a sealed envelope and stored separately from the inquiry file with the lead inquirer. The related documentation (reports) or debriefings refer to the person as to a 'whistle-blower' without mentioning his identity. The identity of the whistle-blower is classified and labelled as SECRET according to Article 5(2) fourth indent of the AC 7/2004 on the management and confidentiality of ECB documents. Thus, access to this information is basically limited to the Inquiry Panel members and the Lead Inquirer.

In the course of an administrative inquiry data subjects shall contact the relevant controller who is the respective lead inquirer in order to exercise their rights. Once the administrative inquiry has been closed, data subjects shall contact the relevant Controller who is the Director General Secretariat and Language Services.

Staff members are informed in specifically organised "induction seminars" about the most important provisions concerning the professional duties laid down in the "Conditions of Employment for staff of the ECB" and the "ECB Staff Rules" or "Conditions of Short-Term Employment" and the "Rules for Short-Term Employment", when they start working at the ECB. The relevant documents are also published on the ECB's intranet site. The ECB's Staff Committee is being consulted on the draft Administrative Circular "On Internal Administrative Inquiries". The draft will be adopted by the Executive Board, subsequent to which all staff members will be informed thereof per e-mail. The Administrative Circular will then also be published on the ECB's intranet site.

2.2. Legal aspects

2.2.1. Prior checking

The notification received on 3 October 2005 relates to processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)) by a Community body in the exercise of activities within the scope of Community law.

The data are processed both automatically and manually. The personal data which are processed manually are stored in an administrative inquiry file. Therefore, this processing of personal data falls within the scope of the Regulation (EC) 45/2001 as the processing is partly automated and when is manual the data form part of a filing system (Article 3 (2) of the Regulation).

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS 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". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks.

Internal administrative inquiries qualify for prior checking on various grounds. They may contain data relating to suspected offences, offences, criminal convictions or security measures as foreseen in Article 27 (2) a. Furthermore, the documents are intended to evaluate personal aspects relating to the data subject and notably his/her conduct (Article 27 (2) b). The processing operation is therefore subject to prior checking.

The processing of personal data in the context of internal telecommunications networks (in this case traffic data regarding ECB telephones and interception of telephone calls) presents specific problems, which are so important that a specific provision and special safeguards have been provided in Chapter IV of the Regulation (EC) 45/2001. Furthermore, the proposed processing may have consequences for the data subjects, namely the launching of disciplinary procedure which can lead to disciplinary measures and criminal or civil liability. This gives additional grounds for prior checking in the light of Article 27 (1): "processing operations likely to present specific risks to the rights and freedom 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".

Two other prior checking cases in the ECB deal with e-monitoring aspects; the prior checking case 2005-376 on "recording, storing, accessing and listening to telephone conversation in DG M and DG P" and the prior checking case 2004-271 on "Investigation procedures regarding the usage of telephones".

The administrative inquiry may be followed by diverse procedures such as, for instance, disciplinary procedure. Disciplinary cases (including administrative reviews of complaints and grievances, Ombudsman and Court cases) will be prior checked separately as in the prior checking case 2004-0270.

The prior checking concerns processing of personal data in the context of an internal administrative inquiry. It does not intend to give an opinion on the internal administrative inquiry procedure in itself.

The notification from the DPO was received on 3 October. The present opinion must be delivered within a period of two months that is no later than 4 December 2005. Further request for information suspends the deadline for 21 days, which postpones the date of issue to 25 December 2005. Taking into account that during Christmas and New Year period, institutions are closed, the opinion on the notification is to be issued no later than the 3 January 2006.

2.2.2. Legal basis for and lawfulness of the processing

The legal basis of the processing operation is the draft Administrative Circular on Internal Administrative Inquiries once adopted by the Executive Board of the ECB. According to Article

11.2 of the ECB's Rules of Procedure (which determine the internal organization of the ECB and its decision making bodies), Administrative Circulars are binding for ECB employees.

Alongside the legal basis in relation to Regulation (EC) 45/2001 the lawfulness of the processing operation must also be considered. Article 5 (a) of the Regulation stipulates that personal data may be processed only if: "processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instrument adopted on the basis thereof or in the legitimate exercise of the public authority vested in the Community institution or body (...)". As internal inquiries are necessary for the legitimate exercise of official authority vested in the institution, the processing operation is lawful. The legal basis found in the Administrative Circular on Internal Administrative Inquiries supports the lawfulness of the processing operation.

2.2.3. Processing of special categories of data

In the course of an investigation, personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership may be processed. The EDPS would like to warn the controller on the use of those data. The processing should be "necessary for the purposes of complying with the specific right and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof" (Article 10.2 (b)). The other exceptions provided by Article 10. 2 could also apply. In this case the ECB has the duty to monitor that the ECB employees do not breach their professional duties. Therefore, processing of sensitive data during the procedure which are relevant for the case and proportionate to the purpose may be justified on this basis.

Internal administrative inquiry files may contain data relating to offences, criminal convictions or security measures (mesures de sûreté) which may only be processed if authorised in accordance with Article 10(5) of Regulation (EC) 45/2001. The Administrative Circular on Internal Administrative Inquiries must be seen as an authorisation to process such data.

2.2.4. Data Quality

Data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed (Article 4.1. (c)). The EDPS welcomes Article 6 (6) of the AC that mentions that: "the processing operation shall be adequate, relevant and proportionate to the purposes for which they are collected and/or processed". The EDPS recognises that it is difficult to determine, at the outset, which data are relevant to the subject of the inquiry and so welcomes the vigilance in this respect laid down as a general requirement.

The "call charging facility" set up by the ECB administration is a means of guaranteeing that the data collected through the interception of telephone calls are not excessive as it allows the separation between private and business calls. The EDPS welcomes the possibility for the ECB employees to separate their private calls from the professional ones (see point 2.2.5 confidentiality of communications).

The data collected may not be further processed in a way incompatible with the purposes for which they have been collected (Article 4.1. (b)). The EDPS approves of the fact that "information acquired in the course of the administrative inquiry shall be used only for the

purposes of relevant administrative inquiries". The AC is compliant with Articles 4.1. (b) and 4.1. (c).

Personal data must also be accurate and where necessary kept up to date. The Regulation further provides that "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). The AC states that DG-IS (Information Systems) shall verify the authenticity of the findings of any search of electronic files. This is a way to ensure the accuracy of the data collected. The right of access of the data subject to his/her data is a means of guaranteeing the accuracy and of updating his/her data (see right of access 2.2.10).

2.2.5. Confidentiality of communications

According to Article 36 of the Regulation (EC) 45/2001, "Community institutions and bodies shall ensure the confidentiality of communications by means of telecommunications networks and terminal equipment, in accordance with the general principles of Community law".

The interception of communications in the frame of administrative or disciplinary investigations is covered by Article 36 and any restrictions to the principle must be in accordance with the "general principles of Community law". The concept of "general principles of Community law" refers to the notion of fundamental human rights, notably as laid down in the European Convention on Human Rights.

In practice this means that any restrictions to the principle of confidentiality of communications must be in accordance with fundamental human rights as laid down in European Convention on Human Rights. Any restrictions must be "in accordance with the law", "necessary in a democratic society" in the interests of national security, public safety, for the prevention of disorder or crime, for the protection of morals or for the protection of rights and freedoms of others.

The restrictions to the principle of confidentiality will therefore have to be examined according to strict criteria, notably:

The breach of confidentiality has to be proportionate. In this respect, the EDPS approves of the fact that telephones interception may take place only if all other intrusive means of investigation have been exhausted. The check of traffic data and the interception of telephone calls may take place providing that "serious" breaches of professional duties are suspected. The fact that the ECB's Data Protection Officer is informed *ex ante* of the telephone calls interception (Article 6 (13)) is an additional means of guaranteeing the compliance with Article 36. Furthermore, the limitation of the interception to business calls and not personal calls (see above "Data Quality") is also a means of guaranteeing the proportionality of the measure. The EDPS also welcomes the fact that the decision to check traffic data or intercept telephone call is taken by the highest authority of the ECB: the Executive Board.

The EDPS therefore supports the fact that a breach of the confidentiality of communications may only take place in exceptional circumstances of investigation into an administrative inquiry case where no other less invasive means are possible, may not be a standard procedure and must always be limited to data which are strictly necessary.

2.2.6. Conservation of data/ Data retention

According to Article 4(1)(e) of the Regulation, 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.

The EDPS welcomes the pre-determined period of 24 months established for keeping the internal administrative inquiry file when the inquiry is not followed by any further step. When the inquiry is followed by further steps, data are kept following the rules established by the following procedure (such as a disciplinary procedure for instance).

Traffic data are subject to Articles 37(1) and 37 (2). Article 37(1) states that "without prejudice to the provisions of paragraphs 2, 3 and 4, traffic data relating to users which are processed and stored to establish calls and other connections over the telecommunications network shall be erased or made anonymous upon termination of the call or other connection". Article 37 (2) states "the data shall be erased or made anonymous as soon as possible and no later than six months after collection, unless they need to be kept for a longer period to establish, exercise or defend a right in a legal claim pending before a court".

Therefore, as the general traffic retention has the limit of six months, no traffic data older than six months can be checked by the lead inquirer (Article 37 (2)). Nevertheless, relevant and proportionate traffic data may be kept longer following Article 20, interpreted in the light of the *ratio legis*, which provides for restriction to Article 37 (1) in case of traffic data processed and stored in the course of a specific inquiry (see 2.2.9, information to the data subject). Therefore, when relevant and proportionate, traffic data are incorporated into the inquiry file. Those data are subject to the rules of conservation of the inquiry file. The Administrative Circular should be clear on the retention period following these lines.

As to the recordings of telephone interceptions, a clarification should be added in the Administrative Circular in the sense that non relevant recordings should be deleted immediately and that the relevant recordings, incorporated to the inquiry files, follow the same rules of retention as the inquiry file itself.

If the senior manager or the Executive Board comes to the conclusion that the facts collected prior to the opening of an internal inquiry do not justify the opening of an internal inquiry, the personal data collected to that date follow the same rules on keeping and erasing as the ones provided for an inquiry not followed by any further step (Article 6.6 of the AC) (that is a 24 months period for keeping the data).

The EDPS notes that copies of all relevant documents may be circulated within the panel, the person conducting the inquiry, the lead inquirer and members of the Executive Board (see point 2.2.6, transfer of data). The EDPS welcomes the fact that all those copies are taken back and stored in the administrative inquiry file and therefore subject to the same rules of conservation.

The EDPS assumes that electronic files follow the same rules as paper documents.

There is no legal basis for keeping a list of the internal administrative inquiries. The EDPS is of the opinion that the keeping of this list is not necessary and proportionate and therefore would be excessive.

2.2.7. Transfer of data

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".

In the same line, any transfer to the relevant competent national authority falls under Article 8(a) of the Regulation and should fulfil each requirement as to the necessity and competence of the receiving authority.

This case of prior checking involves a transfer of data within the institution (the panel, the lead inquirer, the Executive Board). 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. Article 2(g), analysed in its context, must be understood as an exception to the right of information (see information for data subjects in point 2.2.9) but not as an exception to Articles 7 or 8.

2.2.8. Right of access and rectification

According to Article 13 of Regulation (EC) 45/2001, "the data subject shall have the right to obtain without constraint and at any time within three months from the receipt of the request and free of charge from the controller information at least as to the purposes of the processing operation, the categories of data concerned, the recipients to whom the data are disclosed and communication in an intelligible form of the data undergoing processing and of any available information as to their source". Article 14 provides: "the data subject shall have the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data".

As for the right of access, the EDPS welcomes the right of access granted to the subject of the inquiry which is stated in the AC (see 2.2.9, information to the data subject). The right of access to the personal data of persons involved in the inquiry should also be granted.

As for the right of rectification, the data subject has the right to obtain from the controller the rectification without delay of inaccurate or incomplete data. The EDPS notes that in the context of a "conduct evaluation" it is difficult to determine whether personal data are "inaccurate" or not. A means of guaranteeing rectification should be to allow the data subject to add his comments (not only "present") but also to ensure the completeness of his report (his administrative inquiry file).

The EDPS welcomes Article 7.3 of the draft AC and recommends adding in the text the possibility for the subject of the inquiry to include his views in the report as well as to ensure the completeness of his administrative inquiry file. It is a way to guarantee a fair processing. Other persons involved in the inquiry should also be granted the right of rectification of their own personal data as far as possible.

2.2.9. Information to the data subject

Articles 11 and 12 of Regulation (EC) 45/2001 specify that the controller must provide information to the data subject. When the information is collected directly from the data subject, Article 11 provides that it must be provided at the time of collection. If the data are not directly collected from the data subject, then it must be provided either at the time it is recorded or, if a disclosure to a third party is envisaged, no later than the time the data are first disclosed.

Article 20 of Regulation (EC) 45/2001 provides for certain restrictions to this obligation notably where such a restriction constitutes "a measure necessary to safeguard: a) the prevention, investigation, detection and prosecution of criminal offences; b) an important economic interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters; c) the protection of the data subject or the rights and freedoms of others.

Personal data contained in inquiry files may be collected from the data subject, but also from third parties. Information must therefore be given either at the time of collection of the data or before it is first recorded or transmitted to a third party.

The EDPS notes the fact that any person affected by an administrative inquiry is informed of the subject matter and objective of the administrative inquiry unless this would be harmful to the administrative inquiry (Art. 20 of Regulation EC No 45/2001) as early as possible after initiating the administrative inquiry.

The terms "not harmful to the administrative inquiry" include exceptions such as the "protection of the data subject or the rights and freedoms of others", "an important economic interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters (that might be specially relevant in the context of the ECB)" or "the prevention, investigation, detection and prosecution of criminal offences", but have a much broader scope than these exemptions. Indeed it may be necessary not to inform the data subject for the purpose of protecting persons giving testimony (rights and freedoms of others), but also for the smooth continuation of the investigation. If this is not an investigation into a criminal offence, the exception is not provided for in the terms of Article 20 of the Regulation (EC) 45/2001 *stricto sensu*.

Having said this, the EDPS considers that Article 20 has to be interpreted in the light of the *ratio legis* of the provision so as to provide for certain restrictions to the duty to inform the data subject in the course of an internal inquiry. This is supported by the fact that Article 13 of Directive (EC) 95/46 provides for exemptions and restrictions to certain rights "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. of the Directive is far reaching and extends from the prevention, investigation, detection and prosecution of criminal offences to breaches of ethics for regulated professions. Therefore, although not explicitly mentioned, there is no reason to believe that breaches of professional duties by public sector agents are not also included in this restriction.

The Regulation (EC) 45/2001 must be read in the light of Directive 95/46/EC. Indeed, paragraph 12 of the recitals of the Regulation promotes "consistent and homogeneous application of the rules for the protection of individuals' fundamental rights and freedoms with regard to the processing of personal data". Furthermore article 286 of the Treaty requires the application to the Community institutions or bodies of the Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data. There do not

seem to be any reasons therefore preventing the application of a similar restriction to the duty to inform and the corresponding right of access during an internal inquiry. The withholding of information during the investigation period is also supported by the fact that no information needs to be provided as concerns the "recipients" of the information during a particular inquiry.

It should be underlined that the terms "not harmful to the administrative inquiry" suggest that the actual need to withhold this information must be clearly demonstrated and that the withholding of the information can only last for a defined period. As soon as it is no longer harmful to the investigation, the information must be given to the data subject. In this respect the EDPS approves that the ECB's DPO is informed *ex ante* if the person conducting the inquiry or the panel intends to restrict the information right of the data subject according to Article 7 of the AC. It is an additional measure ensuring the right of information of the data subject.

The EDPS approves that the subject of the administrative inquiry is informed prior to the submission of the report, of the content of the alleged breach of professional duties and of his access to the document related to the allegations made against him/her for the exercise of his right of defence.

Information regarding the transfer of the file within the institution does not specifically have to be given to the data subject on the grounds that they are not recipients within the meaning of Article 2(g) of the Regulation. The EDPS welcomes that this general information is provided in the AC, in order to ensure the procedure is transparent.

The EDPS is of the opinion that the Administrative Circular should mention the right to have recourse at any time to the European Data Protection Supervisor as it is necessary to fully ensure that the data subject is in a position to exercise all means at his disposal.

The EDPS is of the opinion that the data subject should be informed more clearly as to who the controller is during the investigation in order to be able to exercise his rights. When information is given to the data subject on the opening of the inquiry, the specific controller to this specific inquiry should be specified.

Concerning the external person making calls to, or receiving calls from, members of the institution/body, it will not always be possible to inform her of the monitoring of the communications and the purpose behind it. In such cases, the institution/body can make use of the exception under Article 12 §2 which provides for an exception in the event the provision of information proves impossible or would involve a disproportionate effort.

2.2.10. Security measures

After careful analysis by the EDPS of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of Regulation (EC) 45/2001.

The EDPS approves that the ECB's DPO is informed *ex ante* for the access to electronic and hard-copy files, it is an additional organisational security measure.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the following considerations are fully taken into account:

- Regarding traffic data, the Administrative Circular should be clear on traffic data retention: no traffic data older than six months can be checked by the lead inquirer; nevertheless, when relevant and proportionate, traffic data are incorporated into the inquiry file and are subject to the rules of conservation of the inquiry file.
- As to the recordings of telephone interceptions, a clarification should be added in the Administrative Circular in the sense that non relevant recordings should be immediately deleted and the relevant recordings, incorporated to the inquiry files, follow the same rules of retention as the inquiry file itself.
- The keeping of a list of administrative inquiries is not necessary and proportionate and therefore would be excessive.
- The right of access to the personal data of persons involved in the inquiry should also be granted.
- To add in the AC text the possibility for the subject of the inquiry to include his views in the report as well as to ensure the completeness of his administrative inquiry file
- Other persons involved in the inquiry should be granted the right of rectification of their own personal data as far as possible.
- The Administrative Circular should mention the right to have recourse at any time to the European Data Protection Supervisor.
- When information is given to the data subject on the opening of the inquiry, the specific controller to this specific inquiry should be specified.

Done at Brussels, 22 December 2005

Peter Hustinx
European Data Protection Supervisor

Follow-up Note

7 November 2006

All acting measures have been taken by the ECB on the 6 November 2006.

The European Data Protection Supervisor