



Opinion on a notification for prior checking received from the Data Protection Officer of the ECB on "Disciplinary cases (including related administrative reviews of complaints and grievances, Ombudsman and Court cases)"

Brussels, 08 March 2006 (Case 2004-270)

1. Proceedings

1.1. On 20 July 2004 the European Data Protection Supervisor (EDPS) wrote to the Data Protection Officers (DPOs) asking them to prepare an inventory of data processing that might be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) No 45/2001. The EDPS requested the communication of all processing operations subject to prior checking, including those begun before the Supervisor was appointed for which checking could never be regarded as a prior, but which would be subject to "*ex post facto*" checking.

1.2. On the basis of the inventories received from the DPOs, the EDPS identified priority topics, namely data processing operations in disciplinary, staff evaluation and medical files.

1.3. With a letter of 15 September, 2004 the DPO of the European Central Bank (ECB) reported to the EDPS the already existing processing operation "*Logbook for Administrative Reviews, Grievances, Disciplinary Procedures, Ombudsman cases, Court Cases*".

1.4. On 27 October 2005 the EDPS received by electronic mail, the filled in prior checking notification form for "Disciplinary cases (including administrative reviews of complaints and grievances, Ombudsman and Court cases)." Attached were:

- Conditions of Employment for Staff of the European Central Bank
- Conditions of Employment for Staff of the European Central Bank- Annex I: Conditions of Short - Term Employment
- ECB Staff Rules
- Rules for Short-Term Employment.

The hardcopy version of the notification form and the attachments never arrived at the office of the EDPS by mail, thus it was reproduced and resent by the DPO of the ECB. The EDPS received the resent hardcopy version on 1 December 2005.

1.5. On 28 November 2005, the EDPS requested further information from the Controller by electronic mail, and on 27 January, 2006 the EDPS received the responses to his questions. The English text of two decisions of the Court of First Instance were attached to the information received: *X v European Central Bank*¹, and *Elizabeth Afari v European Central Bank*².

¹ Judgement of the CFI of 18 October 2001 (Case T-333/99),

² Judgement of the CFI of 16 March 2004 (Case T-11/03)

1.6. On 27 February 2006, following an exchange of information with the DPO of the ECB, due to the complexity of the matter the deadline to issue the opinion was extended with 10 more days.

2. Examination of the matter

Definitions and acronyms:

"*Working files*" refer to all copies of documents related to disciplinary cases or to human resource or legal internal documents that are not filed in the staff member's personal file.

The "*Logbook for Administrative Reviews of Complaints and Grievances, Disciplinary Procedures, Ombudsman cases and Court cases*" is referred as *Logbook*.

DG-L stands for DG Legal Services, where the relevant controller is the Head of Legal Affairs Division as of 1 April 2006 (At the time of writing the opinion, the controller is called Head of Institutional Law Division, however due to the forthcoming internal reorganisation in the near future, the EDPS uses the prospective name of the controller in this opinion).

DG-H- stands for Directorate General Human Resource, Budget and Organisation (also mentioned in the text as DG HRBO).

EB- stands for the Executive Board of the European Central Bank.

AA- stands for Appointing Authority.

2.1. The facts

Preliminary comments on the procedures referred to:

The prior checking notification names the processing operation as "Disciplinary cases (including related administrative reviews of complaints and grievances, Ombudsman and Court cases)". This is because of the common recording in the Logbook, but the notification itself concentrates on the data processing operations in the framework of disciplinary cases.

Disciplinary procedure:

Upon the adoption of an administrative circular, administrative inquiries can be conducted in order to clarify facts in the ECB.³ In the new system, an administrative inquiry might be followed by a disciplinary procedure. It means that an administrative inquiry in a specific case will not as such prejudice a disciplinary proceeding which may subsequently follow, as a separate procedure, subject to the decision of the Executive Board.

Since all staff members with permanent or fixed term contracts are subject to the "Conditions of Employment for staff at the ECB" and the "ECB Staff Rules"; and all staff members with short-term contracts are subject to the "Conditions of Short-Term Employment" and the "Rules for Short-Term Employment", each and every member of the ECB staff can become potential data subjects for the data processing operations in the framework of a disciplinary procedure.

Various rules govern the disciplinary procedure, presently. The Conditions of Employment of Staff of the ECB describe that "Employment relations between the ECB and its members of staff shall be governed by employment contracts issued in conjunction with these Conditions of Employment. The Staff Rules adopted by the Executive Board shall further specify the

³ See the facts in Opinion of 22 December 2005 on a notification for prior checking on Internal Administrative Inquiries (Case 2005-290). Available at: www.edps.eu.int.

application of these Conditions of Employment." (Art. 9.(a) of Part 2) "No specific national law governs these Conditions of Employment. The ECB shall apply (i) the general principles of law common to the Member States, (ii) the general principles of European Community (EC) law (...)" "In interpreting the rights and obligations under the present Conditions of Employment, due regard shall be shown for the authoritative principles of regulations, rules and case law which apply to staff of the EC institutions. (Art. 9 (c))

Disciplinary measures must be in proportion to the gravity of the breach of discipline and the grounds on which they are based must be stated. They shall be adopted in accordance with the procedures laid down in the Staff Rules. The said procedure shall ensure that no member of staff may be subjected to a disciplinary measure without an opportunity to reply to the relevant charges first being granted.⁴

The Conditions of Employment lay down the disciplinary measures that can be taken against members of staff who fail in their duties to the ECB. A member of the Executive Board may issue a written reprimand. Temporary reduction in salary, demotion or change in the employment position, permanent reduction in salary, and dismissal can be decided by the Executive Board.⁵

The detailed rules of the ECB's disciplinary proceeding itself is currently in a draft stage. Presently, whenever there is a need to initiate a disciplinary proceedings, the ECB follows the general principles of Community Law and the relevant case law of the European Court of Justice.⁶

In order to implement the relevant legal provisions as they are laid down in the ECB Conditions of Employment and the Staff Rules, the controllers perform the necessary processing operations at the ECB, related to disciplinary cases following their responsibilities. Various units may process personal data in the context of disciplinary cases: Directorate General Human Resources, Budget and Organisation- Compensation and Staff Relations Division⁷; Directorate General Human Resources, Budget and Organisation; Directorate General Legal Services- Head of Legal Affairs Division (Institutional Law Division before 1 April 2006); and Directorate General Secretariat and Language Services.

The Head of Compensation and Staff Relations Division performs operations undertaken upon the personal files of the staff members concerned, where the original documents related to the disciplinary procedure are stored. He/she can be a member of a Disciplinary Board appointed by the Executive Board and may act as a chairperson.

The Deputy Director General of Human Resources, Budget and Organisation performs processing operations undertaken upon separate confidential electronic and hardcopy "working files" where copies of documents related to the disciplinary cases are stored. He/she may be a member of the Disciplinary Board appointed by the Executive Board and may act as a

⁴ Article 43 of Conditions of Employment for Staff of the European Central Bank. The Conditions of Short-Term Employment lays down similar rules in Article 34.

⁵ Article 43 of Conditions of Employment and see similarly Article 34 of Conditions of Short-Term Employment.

⁶ The Court of First Instance already has examined some questions in the context of the ECB disciplinary procedure, see e.g: X v European Central Bank, Judgement of the Court of First Instance (third Chamber) of 18 October 2001, Case T-333/99; and Afari v ECB, Judgement of the Court of First Instance (First Chamber) of 16 March 2004, Case T-11/03.

⁷ Due to an internal reorganisation this division is responsible to handle personal files as of March 2006.

chairperson. It is the responsibility of the Deputy Director General HRBO to convey the reasoned Executive Board decision to the staff member(s) in question.

The Head of the Legal Affairs Division performs processing operations necessary to provide the DG-HRBO as well as the Executive Board with consistent legal advice for their decisions in disciplinary cases; and provides the ECB with legal advice as well as legal representation in Court cases and Ombudsman cases by fulfilling their responsibilities. He/she operates the "Logbook for Administrative Reviews of Complaints and Grievances, Disciplinary procedures, Ombudsman cases, Court cases". The processing operations by the *Head of the Legal Affairs Division* are undertaken in the Logbook, which is confidential and upon the confidential electronic and hardcopy "working files", where "print outs" of the Logbook and copies of documents are stored.

The *Director General Secretariat and Language Services* (who is the "Secretary of the EB") stores the summary proceedings of the Executive Board meetings, and all originals of the Executive Board documentation, which formed the basis for its decision making.

Original documents referring to disciplinary cases are incorporated in the personal file, kept by the Head of Compensation and Staff Relations Division. Some of the original documents are not filed in the personal file, like the HR or legal internal documents. The final Executive Board decision which is conveyed to the staff member is stored in the personal file. A final decision which does not impose any disciplinary measure on the staff member, or written reprimand issued by a member of the Executive Board is stored in the personal file as well.

The ECB keeps a "Logbook" of the cases (including disciplinary cases), which contain: the log number of the case, the name of the staff member concerned, subject matter of the case and current status of the procedure. The purpose of the logbook is principally to manage a file of a specific case thus keeping its status. Secondly, the logbook enables a search for documents relevant to specific cases and consistency between the procedures.

Once the original documents referring to disciplinary cases are incorporated in the personal file, kept by the Head of Compensation and Staff Relations Division, each member of staff has the right at any time, even after leaving the ECB, to access his/her personal file and consequently to the information related to his/her disciplinary cases.⁸

For accessing the data in the separate electronic and hardcopy "working files", kept by the Deputy Director General Human Resources, Budget and Organisation (where copies of the documents relevant to the disciplinary cases are stored); for accessing data kept by the *Head of the Legal Affairs Division* (where copies of documents relevant to the disciplinary cases and print outs of the Logbook are stored); for accessing the data in the Logbook, and for accessing documents kept by the Director General Secretariat and Language Services the data subject shall contact the respective controllers.

Staff members receive directly copies of documents the access to which is not restricted e.g. minutes of hearings. However, staff members do not have access to the DG-H/DG-L working files which can include restricted documents submitted to the Executive Board and which are not filed in the staff member's personal file. Staff members do not have access to the relevant excerpts of the Executive Board summary proceedings either.

⁸ Article 7 Conditions of Employment; Article 12 Conditions of Short-term Employment; Article 1.3.3 ECB Staff Rules and Article 1.3.3 Rules for Short-term Employment.

In order to exercise all other rights laid down in Section 5 of the Regulation (EC) No 45/2001, the data subject shall contact the respective Controller.

The ECB may restrict temporarily one or several rights laid down in Section 5 of the Regulation (EC) No 45/2001, by applying Article 20 of the Regulation, where such a restriction constitutes a necessary measure to safeguard one or more of the provisions described in Article 20.

As concerns the part of data contained in the personal file according to the Staff rules/ Rules for Short-term Employment the only recipients of the documents in the personal file can be:

- Members of the Executive Board,
- Members of staff who, for professional reasons, need to have access to the information contained in the file and whose access is authorised by the Director General Human Resources, Budget and Organisation or his/her Deputy Director General. These parties will be subject to the legal obligation of professional secrecy,
- A member of staff may authorize the Director General Human Resources, Budget and Organisation - subject to the approval of the Executive Board- to make his/her file available to third parties.⁹
- The Courts or the European Ombudsman.

Furthermore, recipients of documents in the personal file can be the *Head of the Legal Affairs Division* at the ECB, or his/her members of staff who need to have access for professional reasons in order to operate the Logbook. These members of staff will be subject to the legal obligation of professional secrecy. The same rules apply to recipients of the separate "working files", kept centrally by Deputy Director General Human Resources, Budget and Organisation, and to the "working files" kept by the *Head of the Legal Affairs Division*.

Following consultation with the ECB's DPO the Controllers responsible for the "working files" in DG-H and DG-L have started the process of creating only one shared "working file" related to disciplinary cases (with classified access rights).

The only recipients of the data contained in the Logbook may be the Directorate General of Human Resources, Budget and Organisation, and members of the staff who, for professional reasons, need to have access to the information contained in the file and whose access is authorized by the *Head of the Legal Affairs Division*. These members of the staff will be subject to the legal obligation of professional secrecy.

As concerns the files, kept by the Director General Secretariat and Language Services the only recipients of the documents in the personal file can be:

- Members of the Executive Board,
- Members of staff who, for professional reasons, need to have access to the information contained in the file and whose access is authorized by the Director General Secretariat and Language Services. These parties will be subject to the legal obligation of professional secrecy.

The European Data Protection Supervisor is not mentioned as a possible recipient.

The disciplinary procedure can imply data in "hardcopy" files and electronic files. It is possible that tape recordings may take place during the disciplinary procedure. Tape recordings are used

⁹ Article 1.3.4 of Staff Rules and Article 1.3.4 of Rules for Short -Term Employment.

only for the purpose of establishing a meeting/interview minutes. In case of discrepancy between parties-the relevant disciplinary panel and the staff member involved by a disciplinary procedure- the recording may be used to check the actual statements. Video recording has not been used in the ECB.

Data contained in the personal files, data contained in the electronic and hardcopy "working files", data contained in the Logbook and data contained in the files kept by the Director General Secretariat and Language Services shall be destroyed 10 years after staff members have left the ECB if there are no pending claims or any other open issues concerning their ECB employment relationship. The files of pensioners will be destroyed 10 years after the end of the year in which the last ECB pension payment was made to either the pensioner or to one of his entitled dependants, respectively, provided that there are no pending claims or other open issues. As to tape recordings: after the finalisation/approval of the minutes by the parties the recordings have no further relevance and shall be destroyed no later than 6 months from the closure of the disciplinary proceedings.

There are no specific rules or procedures in place concerning longer storage periods for historical, statistical or scientific purposes. There is no special period foreseen for blocking the data.

Staff members are informed about the provisions 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, which describe the rules and procedures concerning disciplinary cases, when they start working at the ECB in specifically organised "induction seminars". The relevant documents are also published on the ECB's intranet site. Staff members can contact the respective Controller for any additional information falling under the scope of Article 11 and 12 of the Regulation.

The grounds on which disciplinary measures are imposed must be stated. Data subjects may not be subjected to a disciplinary measure without first being granted an opportunity to reply to the relevant charges¹⁰. In compliance with those provisions, the relevant Controller (the Deputy Director General HRBO) will provide ad hoc the member of staff who may be subject to a disciplinary measure with information laid down in Article 11 and/or 12 of the Regulation, including the identity of the respective controller, in order to enable him/her to get access to information and reply to the relevant charges.

At the end of March 2006 the electronic version of the ECB's DPO register described in Article 25 and 26 of Regulation No 45/2001 will be available to all ECB staff via the DPO website which forms an integral part of ECB's Intranet. Staff members will be able to search in the register for the controllers of a business area, and the purpose of the processing operations. All ECB staff members will have the opportunity to be informed about the processing operations relevant to the disciplinary cases in general and the respective controllers.

Security measures:

Various security measures are put in place.

¹⁰ Article 43 of the Conditions of Employment and similarly Article 34 of ECB Conditions of Short-Term Employment.

2.2. Legal aspects

2.2.1. Prior checking

The management of disciplinary files constitutes processing of personal data within the meaning of Article 3 (2) of Regulation (EC) No 45/2001 insofar as it consists of collecting, consulting, transferring and retaining personal data.

The notification received on 27 October 2005 relates to processing of personal data ("any information related to an identified and identifiable natural person"-Article 2(a) of Regulation (EC) No 45/2001) by a Community body in the exercise of activities within the scope of Community law (Article 3 (1) of the Regulation).

Both manual and automated data processing takes place. Manual processing concerns the handling of documents in the personal file of the staff member, hardcopy "working documents" and printouts of the "Logbook". The data processed form part of a filing system. Automated processing concerns the operation of "Logbook", electronic working files and tape recordings. Thus, Article 3 (2) of the Regulation applies.

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.

The data processing operations in the framework of a disciplinary procedure qualify for prior checking on various grounds. They are intended to evaluate personal aspects relating to the data subject and notably to his/her conduct (article 27 (2) (b)). Data processing operations may also contain data relating to suspected offences, offences, criminal convictions or security measures as foreseen in Article 27 (2)(a), which adds another ground for prior checking by the EDPS.

The EDPS does not consider the other procedures referred to in the notification (administrative reviews of complaints and grievances procedures, Court and Ombudsman cases) as falling under the prior checking scope. Whereas a disciplinary procedure is initiated by the institution against the staff member in order to evaluate his/her conduct, all the other procedures referred to are initiated by the staff member against a decision (or lack of any decision) of the European Central Bank. Obviously these procedures do not aim at evaluating the conduct of the staff member. Without the intention to evaluate the conduct of the data subject, data processing operations within the frame of the other procedures referred to do not fall under the scope of prior checking by the European Data Protection Supervisor under Article 27 (2)b. No other grounds for prior checking appear either. As a consequence, the related procedures are considered in this opinion inasmuch as transfer of personal data originating from the disciplinary procedure or in relation to it may take place. The Logbook is covered by the scope of examination.

It is to be noted that an internal administrative inquiry may precede disciplinary proceedings upon the adoption of the respective administrative circular, which procedure itself was already examined by the European Data Protection Supervisor.¹¹

¹¹ Opinion of 22 December 2005 on a notification for prior checking on Internal Administrative Inquiries (Case 2005-290) Available at: www.edps.eu.int

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case however the processing operation has already been established. This is not a serious problem however as far as any recommendations made by the EDPS may still be adopted accordingly. This is all the more true since the detailed rules of ECB disciplinary proceedings are being drafted, and the recommendations by the European Data Protection Supervisor can be thus taken into account.

The prior checking concerns the processing of personal data in the framework of disciplinary procedures. The aim is not to issue an opinion on the disciplinary procedure as such.

The electronic version of the notification of the DPO was received on 27 October 2005. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than the 28 December, 2005. In an electronic mail a number of questions and points for clarification of the dossier were raised on 28 November, 2005. To this information request the responses were received by the EDPS on 27 January, 2006. This period suspends the deadline with 60 days. The opinion must be delivered by 27 February, 2006. However, the extension of the deadline with 10 more days makes the opinion to be delivered no later than the 9 March, 2006.

2.2.2. Legal basis for and lawfulness of the processing

The legal basis for disciplinary cases are the following: Article 9(c) of Conditions of Employment for Staff of the ECB describes that the ECB apply (...), the general principles of European Community (EC) law and in interpreting the rights and obligations under the Conditions of Employment, due regard shall be shown for authoritative principles of the regulations, rules and case law which apply to the staff of the EC institutions. Article 43 of the Conditions of Employment for Staff of the ECB specify the disciplinary measures that may be imposed on the staff who fail in their duties to the ECB, and it lays down the main rules of the disciplinary procedure (proportionality of the disciplinary measure to the gravity of the breach of discipline, grounds on which disciplinary measures are based should be stated, opportunity for the individual to reply to the charges before being subjected to a disciplinary measures). Article 43 makes the reference to the Staff Rules, saying that disciplinary measures "shall be adopted in accordance with the procedures laid down in the Staff Rules". Article 44 describes the suspension from duty and Article 8.3. of Staff Rules lays down the related rules in more detail (See parallel rules also in Article 34, 35 of Conditions of Short-Term Employment and Article 7.3 of the Rules for Short-Term Employment).

Although the legal basis is clear, the EDPS welcomes the fact that the ECB's disciplinary procedure is currently under preparation, because more detailed rules will enable staff members to have the necessary information to exercise their rights as data subjects.

Alongside the legal basis, the lawfulness of the processing operation must also be considered. Article 5 (a) of the Regulation (EC) 45/2001 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 conducting disciplinary procedures is necessary for the legitimate exercise of official authority vested in the ECB, the processing operation is lawful. The legal basis found in the Conditions of Employment and the Staff Rules supports the lawfulness of the processing operation.

2.2.3. Processing of special categories of data

In the course of a disciplinary proceeding, the file of the data subject may reveal data which Article 10 of Regulation (EC) No 45/2001 classifies as "special categories of data". Personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life, may come into light in the file. The European Data Protection Supervisor draws the controller's attention to the use of such data. The processing must comply with Article 10 (2) of Regulation (EC) No 45/2001. It should be *"necessary for the purposes of complying with the specific rights 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) of the Regulation). The other exceptions set out in Article 10 (2) could potentially be applicable, such as for example the express consent of the data subject given to the processing operation of that data. If in the context of a disciplinary proceeding, special categories of data were to appear, they should be relevant in the light of the file and in proportion to the intended purpose.

Files of disciplinary proceedings may contain data on offences and criminal convictions or security measures, which may only be processed if authorised in accordance with Article 10 (5) of Regulation (EC) No 45/2001. Article 43 of Conditions of Employment for the Staff of the ECB and Article 34 of Conditions of Short-Term Employment must be considered as authorizing such data processing.

2.2.4. Data Quality

Data must be *adequate, relevant and non excessive* in relation to the purposes for which they were collected and/or further processed (Article 4.1.c).

There are no systematic rules on the type of data which may be included in a disciplinary file. The nature of the data depends to a large extent on the case in question. That being the case, rules should be drawn up on the criteria to be applied before entering evidence or data in a disciplinary file in order to ensure that only relevant data are kept. Staff responsible for processing disciplinary files must be informed of these rules and comply with them. This principle should preferably be included in the rules of procedure currently being drafted.

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 were further processed, are erased or rectified*" (Article 4 (1)(d) of the Regulation).

The European Data Protection Supervisor underlines that the data processing system should be designed in a way which makes updating, erasure and rectification part of the system. If the Court changes a disciplinary decision, for example, it should come to the disciplinary file, and the decision in the personal file should be consequently replaced or removed. Furthermore after the pre-defined period of time, disciplinary decisions should be erased (removed) from the personal file.

2.2.5. Conservation of data

Regulation (EC) 45/2001 provides that the personal data may only be kept in a form which permits the identification of the data subjects for no longer than is necessary for the purposes for which the data are collected or for which they are further processed (Article 4 (1) e)).

Data relating to disciplinary proceedings within the ECB are kept in various files: personal file, "working documents", and Logbook. Tape recordings may also carry personal data.

- Personal file

It seems, from the available information that, in general, original documents related to a disciplinary proceedings are kept in the personal file, except for those original documents which are considered to be "restricted" (See part on the confidentiality and restricted access to documents).

The European Data Protection Supervisor draws the attention that only certain categories of original documents can be stored in the personal file. The only disciplinary decisions which can be kept in the personal file of the official are those in which the data can have an impact on the employment relationship of the data subject with the ECB. This is the final disciplinary decision and possibly the interim decision to suspend an official from his/her duty.

According to ECB Staff Rules there shall be only one personal file for each member of staff. (Article 1.3.1.) The personal file of a member of staff shall contain "all documents concerning his/her administrative status and all *reports relating to his/her ability, efficiency and conduct*". (Article 1.3.3)¹²

The present practice of filing data related to disciplinary case as original in the personal file, without limiting the type of documents that can be kept there, results in data processing excessive for the purpose and implies that those documents can be used for further decisions, thus also contravene the basic principle of law *non bis in idem*. Furthermore, it may violate Article 4(1) c) of Regulation No 45/2001.

In addition, storing original documents in the personal file would mean that those having access (even if authorised) to data included in the personal file for a specific purpose could gain access to broader scope of personal data coming from the documentation related to the disciplinary procedure. That could violate Article 22 (1) of Regulation (EC) No 45/2001 on "security of processing", because it could constitute unauthorised access (or even disclosure of) to otherwise more "sensitive" type of data like those included in the original disciplinary documentation, which should thus be avoided.

Therefore, the EDPS recommends to state in the respective rules explicitly that the personal files and disciplinary files are kept separate in the ECB, and only the final disciplinary decision and the decision on suspension from duties are to be stored in the personal file.

Regarding the final decisions which do not impose any disciplinary measure at the end of the investigation, the EDPS draws the attention to Article 22 (2) of the Staff Regulation of Officials of the European Communities, to which the ECB should show due regard under Article 9 (c) of Conditions of Employment for Staff of the ECB, providing that *"If the Appointing Authority decides to close the case without imposing any disciplinary penalty, it shall so inform the official concerned in writing without delay. The official concerned may request that this*

¹² The omission regarding the storing of documents relating to the "conduct" of short-term contract employee in the Rules for Short-Term Employment (Article 1.3.3) as was commented by the ECB will be rectified in due course.

decision be inserted in his personal file." The EDPS recommends a differentiated treatment of the decisions not imposing any sanction, giving the possibility for the data subject to request to file those decisions in their personal file. Those decisions should be kept in the personal file only at the request of the data subjects.

The EDPS invites the ECB to reconsider the data conservation period of 10 years after staff members have left the ECB or the person entitled received the last pension payment (save the frame of a pending legal claim) and to put it in line with Article 4 (1) e) of Regulation (EC) No 45/2001. The European Data Protection Supervisor recommends that the ECB shows due regard to Annex IX of the Staff Regulation of Official of the European Communities when determining the time-restraint of disciplinary procedure related data being stored in the personal file. Article 27 specifies: *"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."* Even if the EDPS does not find the provision as to the granting of discretion to the AA to remove disciplinary penalties from the file fully satisfactory, and expressed that the AA must justify the reason for which data are being kept further in case of refusing a request for deletion,¹³ the EDPS underlined that *"the reason for this provision is to avoid certain penalties being taken into account when the data subject is being evaluated"*.¹⁴

- "Working files"

In the dossier of the case there was no mention of a "disciplinary file", which in general contains all the documents and information upon which the appointing authority brings its disciplinary decision. The European Data Protection Supervisor considers that "working files" kept by the Deputy Director General HRBO and by the Head of Legal Affairs Division and all originals of the Executive Board documentation which formed the basis for its decision making and which documents are stored with the Directorate General Secretariat and Language Services qualify as such. Only summary proceedings of meetings covered by the secrecy of deliberation are exempted from this rule.

The practice of the European institutions show that there is a separate disciplinary file of the official, and only some decisions (penalties) are kept in the personal file. The European Data Protection Supervisor has already laid down the principle, -which should be taken into regard by the ECB as authoritative principle-, that a personal file and a disciplinary file should be separated under the Staff Regulation applicable to officials of the European Communities: "There are no provisions mentioning the documents that must be kept in the disciplinary files. Although the concept of a disciplinary file is not defined explicitly in the Staff Regulation, it is clear that all documents must be stored in the disciplinary file and that under no circumstances should they all be kept in the data subject's personal file".¹⁵

The EDPS welcomes the fact that following consultation with the DPO of the ECB, the Controllers responsible for the "working files" in DG-H and DG-L have started the process of creating only one shared "working file" relating to disciplinary cases (with classified access

¹³ See in Part 4 of Opinion of 20 April 2005 on the notification for prior checking relating to internal administrative inquiries and disciplinary procedures within the European Commission (Case 2004-187). Available at: www.edps.eu.int.

¹⁴ Ibid.

¹⁵ See in Part 5. "Data retention" subheading "disciplinary files" in Opinion of 22 December 2005 on a notification for prior checking on internal administrative enquiries and disciplinary proceedings (Case 2005-316). Available at: www.edps.eu.int.

rights). This measure avoids the unnecessary duplication of "working documents" and will enhance data quality as well. The European Data Protection Supervisor recommends that all originals of the documentation which the Executive Board took into consideration for its decision making should be stored together with the other "working documents" in the disciplinary file, with the exception of documents covered by the secrecy of deliberation (e.g.: the summary proceedings of the EB meetings).

Since a disciplinary file may bear relevance only until rights and obligations related to disciplinary proceedings can be contested, or entitlement can be claimed in relation to those, the retention period of "working files" should be put in line with the deadlines of such procedures. Conservation beyond that period can be justified only for historical, statistical or scientific use in an anonymous form in accordance with Article 4 (1) e) of Regulation (EC) No 45/2001.

In any case, when disciplinary procedure related documents are removed from the personal file, there is no justification to keep the disciplinary file any longer.

The European Data Protection Supervisor invites the European Central Bank to reconsider its data conservation policy and to put it in line with Article 4(1) (e) of the Regulation.

- Logbook

The purpose of the logbook is principally to manage a file of a specific case thus keeping track of its status. Secondly, the logbook enables a search for documents relevant to specific cases and consistency between the procedures.

The differing two main purposes of keeping the Logbook require a different approach as when determining the conservation policy. As to the first purpose, the European Data Protection Supervisor underlines that in order to meet Article 4 (1) (e) requirement of Regulation (EC) No 45/2001, data can be stored in a form permitting identification of the data subjects in the Logbook only whilst it is necessary for managing the file of a specific case and to follow up its status.

Beyond the first purpose, the purpose of consistency between procedures and search for documents could be achieved with data kept on an anonymous basis. Therefore, the EDPS recommends that beyond the data conservation period for the first purpose of keeping the Logbook, data subjects should be made anonymous or their identity encrypted, in order to meet Article 4 (1) (e) requirement: *"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"*. The Controller should ensure that the provision is complied with.

In the ECB there are no specific rules or procedures in place concerning longer storage periods for historical, statistical or scientific purposes. Therefore the European Data Protection Supervisor recommends adopting such rules, not only because of the secondary purpose of the Logbook, but also in case it is considered necessary to keep personal data originating from a disciplinary proceedings for historical, statistical or scientific purposes.

- Tape recordings

Tape recording may take place during a disciplinary procedure, and they may contain personal data. The recordings are kept by the responsible senior manager in his vault. They are used for

the purpose of establishing the minutes of a meeting/interview. In case of discrepancy between parties- the relevant disciplinary panel and the staff member involved in a disciplinary procedure- the recordings may be used to check the actual statements. After the finalisation/approval of the minutes by the parties the recordings have no further relevance and shall be destroyed no later than 6 months from the closure of the disciplinary proceedings.

The EDPS welcomes this retention period since it meets the requirement of Article 4(1)e of Regulation (EC) No 45/2001.

2.2.6. Transfer of data

The transfer of data should be scrutinized under Article 7 (1) of Regulation (EC) No 45/2001, which require that *"personal data shall only be transferred within or to other Community institutions or bodies of the data are necessary for the legitimate performance of tasks covered by the competence of the recipients"*.

This case of prior checking involves data transfers within the European Central Bank, where different services (Human Resources, Legal service, DG Secretariat and Languages Services) or the Executive Board may receive personal data. It may also involve data transfers to other Community bodies, for example when a disciplinary decision is challenged before the European Union Civil Service Tribunal or upon appeal on question of law before the Court of First Instance¹⁶, or a complaint of maladministration in relation to a disciplinary proceedings is made to the European Ombudsman, or to OLAF in cases where the disciplinary procedure is related to fraud. Transfer of personal data is necessary for the legitimate performance of the task of those units and institutions and covered by their competence. Article 7 is therefore respected.

The European Data Protection Supervisor would like to note that he can receive personal data related to the disciplinary proceedings as well on various grounds of Regulation (EC) No 45/2001. For example on the basis of Article 33 (complaints by Community staff), or on the basis of Article 47 (2) (a) having the power to obtain from the controller or Community institution or body access to all personal data and to all information necessary for his enquiries..

Article 2 (g) of Regulation No 45/2001 defines the "recipient" as *"natural or legal person, public authority or any other body to whom data are disclosed, whether a third party or not; however authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients"*.

The parties referred to above 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 investigation of a disciplinary procedure. All transfer of data must be regarded as taking place "in the framework of an inquiry". But, taken in context, Article 2 (g) is to be understood as an exception to the right to information (see Part 2.2.8) rather than as an exception to the application of Article 7.

2.2.7. Right of access and rectification

According to Article 13 of Regulation (EC) No 45/2001: *"The data subjects 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*

¹⁶ Or in exceptional cases the decision of the Tribunal can be reviewed by the Court of Justice.

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 the available information as to their source; (d) knowledge of the logic involved in any automated decision process concerning him or her." 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 to the data subject's right to access the data contained in their personal files, the European Data Protection Supervisor is satisfied, though would like to point out that Staff Regulation of officials of the European Communities include not only the right of data subject even after leaving the service, to acquaint himself with all the documents in his personal file, but also to take copies of them (Article 26), which right is not present in the Staff Rules of the ECB.

The right of access by the data subject to the disciplinary files should be precisely defined.

Electronic and hardcopy working files kept by the Deputy Director General of HRBO and the Head of Legal Affairs Division as well as the Logbook are confidential. Human resource and legal internal working files can include restricted documents submitted to the EB. It seems, that there are no systematic rules on exercising the right of access to data contained in the "working files" and other "restricted" or "confidential" documents, to which access should be granted by the particular decision of the controller.

In principle, the EDPS draws the attention that access is essential not only for the right under Regulation (EC) No 45/2001, but also to the exercise of the right to defence. Restrictions may be made, where restrictions constitute a necessary measure to safeguard the various interest envisaged in Article 20 of the Regulation. In particular where such restrictions constitute a necessary measure to safeguard (a) *"the prevention, investigation, detection and prosecution of criminal offences"* or (b) *"to an important economic or financial interest of a Member States or of the European Communities including monetary, budgetary and taxation matters"* or (c) *"to the protection of the data subject or the rights and freedoms of others"*. The right of access is not unlimited, restrictions can be imposed under Article 20. See below, under 2.2.8., the considerations as to the inclusion of disciplinary proceedings in the scope of Article 20.

The European Data Protection Supervisor would like to draw the attention to Article 20 (3): *"If a restriction provided for by paragraph (1) is imposed, the data subject shall be informed in accordance with Community law, of the principal reasons on which the application of the restriction is based and of his or her right to have recourse to the European Data Protection Supervisor"*. However, even this obligation may be deferred in accordance with Article 20 (5) of Regulation No 45/2001: *"Provision of the information referred to under paragraph 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect."* Even this is a temporary measure, and can be maintained only as long as necessary for the investigation.

Understanding that the introduction of the administrative inquiries procedure into the ECB's procedures has impact on the disciplinary procedure as well, the EDPS would like to see explicit systematic rules on the right of access. If the controller endorses the general approach that access rights are restricted during the fact finding procedure (administrative inquiry) but not during the disciplinary procedure which eventually follows such an inquiry stage, it should be made clear in the respective rules. When drafting the rules due regard should be paid to the respective provisions of Annex IX of the Staff Regulation of Officials of the European

Communities, notably to Article 3 on having a right of access to all evidence in the files; Article 13 on having the right to obtain the official's complete personal file and take copies of all documents relevant to the proceedings, including exonerating evidence, and to grant a period of 15 days to the official to prepare his/her defence.

On the other hand, if any of the interests listed in Article 20 of the Regulation ever require a restriction on the right of access during the disciplinary procedure, it is important that data subjects are aware of the rules which make a document "restricted". Restrictions should always be in line with Article 20 of Regulation (EC) No 45/2001.

To exercise the right of rectification, the data subjects should contact the respective controller. 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/her comments but also to ensure completeness of his/her disciplinary file, as decisions made during the recourse or appeal procedure should be included in the disciplinary file, and eventually the decision placed in the personal file should be replaced or removed.

2.2.8. Information to the data subject

Article 11 and 12 of Regulation (EC) No 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 the 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.

Personal data contained in the disciplinary 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 grounds on which disciplinary measures are based must be stated, according to Article 43 of Conditions of Employment for Staff of the ECB (Article 34 of Conditions for Short-Term Employment). Data subjects may not be subjected to a disciplinary measure without first being granted an opportunity to reply to the relevant charges (Article 43 of the Conditions of Employment and similarly Article 34 of ECB Conditions of Short-Term Employment), which provision in itself implies the communication of charges to the data subject in a detailed form.

The EDPS is satisfied that data subjects receive information on induction training about the relevant rules and procedures of a disciplinary proceedings and that this information is published on the intranet site; and that the Deputy Director General HRBO will provide ad hoc the data subject who may be subject to a disciplinary measure with information under Article 11 and 12, including the identity of the respective controller. Furthermore the DPO's register will be made available via intranet. The EDPS would like to note that the language of Article 11 and 12 makes it clear that the information "shall" be provided by the controller, thus an arrangement when data subjects "can contact the respective Controller for any additional information falling under the scope of Article 11 and 12 of the Regulation", would not be sufficient. In order to enhance the information right of the data subject, the EDPS would like to stress that the list of information in Articles 11 and 12 should be provided in a general form available to all data subjects (for example via the intranet), and when a staff member is concerned personally by a disciplinary proceedings, the particular information should be provided to the person subjected to the disciplinary proceedings.

Article 20 of Regulation (EC) No 4/2001 provides for certain restrictions to obligation to inform notably where such 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 data subjects or the rights and freedoms of others". Regarding the restriction constituting "a necessary measure to safeguard: a) the prevention, investigation, detection and prosecution of criminal offences...", the EDPS notes the following. In principle, if the investigation is not into a criminal offence, the exception provided under Article 20 of Regulation No 45/2001 does not apply *strictu sensu*. In some cases, however it may be necessary not to inform the data subject so as not to harm the proper functioning of the disciplinary proceedings even though it is not a criminal investigation within the meaning of Article 20 of Regulation No 45/2001.

The EDPS considers in line with his consistent application of Article 20¹⁷ that account must be taken 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 a provision for limiting the right to information of the data subject when such a restriction "constitute a necessary measures to safeguard...:d) the prevention, investigation, detection and prosecution of criminal offences, or 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 of 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. The twelfth recital of the Regulation encourages "consistent and homogeneous application of the rules for 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.

Nothing would therefore appear to stand in the way of application of a similar restriction on the duty to inform and the corresponding right of access during a disciplinary procedure, if the controller should decide to do so.

Presently, it seems that putting in place the administrative inquiries procedure will have impact on the disciplinary procedure. If the controller endorses the approach that there is no need to restrict information in the context of a disciplinary procedure, contrary to the administrative inquiries, it should be made clear in the respective rules.

¹⁷ See Opinion of 21 March 2005 on the notification for prior checking relating to data processing in the context of disciplinary files (Case 2004-198); Opinion of 22 December 2005 on a notification for prior checking on internal administrative enquiries and disciplinary proceedings (Case 2005-316); Opinion of 20 April 2005 on the notification for prior checking relating to internal administrative inquiries and disciplinary procedures within the European Commission (Case 2004-187); Opinion of 22 December 2005 on a notification for prior checking on Internal Administrative Inquiries (Case 2005-290); Opinion of 25 July 2005 on the notification for prior checking regarding data processing in the framework of the disciplinary procedure (Case 2005-102). Available at: www.edps.eu.int.

However, in principle, it should be underlined that in case restrictions on the duty to inform are applied by the ECB because it is considered to be harmful for the disciplinary procedure, the actual need for withholding 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 for the proceedings, the information must be given to the data subject. The EDPS therefore considers that it is legitimate for the ECB to provide for restrictions to the obligation to inform, should they decide to do so, only where it is strictly necessary for the requirements of a disciplinary procedure. The legislative instrument under elaboration should preferably include a provision in line with this position.

Furthermore, the fair processing of personal data in disciplinary proceedings implies the exercise of the right of defence. In order to exercise that right, the official must normally be in a position to know when proceedings have been initiated against him. Any exceptions must therefore be strictly limited.

Information regarding the particular transfer of file within the institution does not specifically have to be given to the data subject on the grounds that they are recipients in the framework of a particular inquiry within the meaning of Article 2 (g) of the Regulation. General information as to who may be receiving the information should be provided however for the sake of transparency of the procedure. Therefore the EDPS welcomes that by making the DPO's register available to all ECB staff as an integral part of ECB's Intranet the data subjects will have the opportunity to be informed in general terms about the identity of the respective Controllers.

The European Data Protection Supervisor welcomes the facts that a more detailed disciplinary procedure is currently in a draft stage because it will enhance the data subject's right to information. The EDPS is of the opinion that the legislative instrument under elaboration regarding the detailed rules of disciplinary proceedings should mention the right to have recourse to the European Data Protection Supervisor as it is necessary to fully ensure that the data subject is in the position to exercise all means at his disposal.

2.2.9. Security measures

Under Article 22 of Regulation (EC) No 45/2001 *"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"*. Such measures are designed *"in particular to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing."*

In the context of a disciplinary procedure, "sensitive" data are involved and must be processed in an adequate way.

The general security measures presented in the notification and the additional information provided to the EDPS seem to be adequate for the processing of data involved in the light of Article 22 of Regulation (EC) 45/2001.

Conclusion:

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

- Processing of "special categories of data" should comply with Article 10 (2) of Regulation (EC) No 45/2001. If in the context of disciplinary procedure, such data were to appear, they should be relevant in the light of the file and in proportion to the intended purpose.
- Rules should be drawn up on the criteria to be applied before entering evidence or data in a disciplinary file in order to ensure that only relevant data are kept. Staff responsible for processing disciplinary files must be informed of these rules and comply with them. This principle should preferably be included in the rules of procedure currently being drafted.
- The data processing system should be designed in a way which makes updating, erasure and rectification part of the system regarding the disciplinary files and the personal files.
- It is explicitly stated in the respective rules that the personal file and disciplinary files are kept separate in the ECB. Only the final disciplinary decision and the interim measure to suspend a staff member from his/her duties are stored in the personal file.
- Due regard is shown to Article 22 (2) of the Staff Regulation of Officials of the European Communities, and decisions not imposing any disciplinary penalty are not stored in the personal file, unless the data subject request so.
- The data conservation period of data originating from a disciplinary proceeding kept in the personal file is put in line with Article 4 (1) e) of Regulation (EC) No 45/2001. The ECB shows due regard to Annex IX of the Staff Regulation of Official of the European Communities as to the time-restraint of disciplinary procedure related data being stored in the personal file (Article 27).
- All originals of the documentation which the Executive Board took into consideration for its decision making should be stored together with the other "working documents" in the disciplinary file, with the exception of documents covered by the secrecy of deliberation (e.g.: the summary proceedings of the EB meetings).
- The data conservation period of disciplinary files is put in line with the deadlines for contesting rights and obligations related to the decision, or until entitlement can be claimed in relation to that. Conservation beyond that period can be justified only for historical, statistical or scientific use in an anonymous form.
- Documents are not kept in the disciplinary file if they are removed from the personal file.
- Data can be stored in a form permitting identification of the data subjects in the Logbook as long as it is necessary for managing the file of a specific case and to follow up its status.
- For the secondary purpose of keeping the Logbook and if such purposes are considered, rules should be put in place for historical, scientific and statistical use in line with Article 4 (1) (e) and Article 4 (2) of Regulation (EC) No 45/2001.
- If the controller intends to impose restrictions on the right of access only during the administrative inquiries procedure, but not in the disciplinary procedure, this should be explicitly stated in the respective rules. Otherwise, systematic and precise rules are laid down on exercising the right of access by the data subject to data in the disciplinary file. Restrictions, if necessary are put in line with Article 20 of Regulation (EC) No 45/2001. Due regard is paid to

the respective provisions of Annex IX of the Staff Regulation of Officials of the European Communities. Data subjects are aware of the rules which make a document "restricted".

- A means of guaranteeing rectification should be to allow the data subject to add his/her comments but also to ensure completeness of his/her disciplinary file .
- The list of information in Article 11 and 12 should be provided in a general form available to all data subjects (for example via the intranet), and when a staff member is concerned personally by disciplinary proceedings, the particular information should be provided to the person subjected to the disciplinary proceedings.
- If the controller endorses the approach that there is no need to restrict information in the context of a disciplinary procedure, contrary to the procedure for administrative inquiries, it should be made clear in the respective rules.
- In case restrictions are applied by the ECB on the duty to inform because it is considered to be harmful for the proceedings, the actual need for withholding information must be clearly demonstrated and that the withholding of the information can only last for a defined period. As soon as no longer harmful for the proceedings, the information must be given to the data subject.
- More detailed rules of the disciplinary proceedings enhance the data subject's right to information. The right to have recourse to the European Data Protection Supervisor should be mentioned in the new rules.

Done at Brussels, 08 March, 2006

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