

Opinion on a notification for prior checking received from the Data Protection Officer of the European Central Bank on the recording, storing and listening of telephone conversations in DG-M and DG-P

Brussels, 5 May 2006 (Case 2005-376)

1. Proceedings

- 1.1. On 20 July 2004, the European Data Protection Supervisor (EDPS) sent a letter to all Data Protection Officers (DPOs) asking them to make an inventory of the cases likely to be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) 45/2001. The EDPS requested communication of all processing operations subject to prior checking, even those that started before the appointment of the EDPS and for which the Article 27 check could never be prior, but which had to be dealt with on an "ex-post" basis.
- 1.2. On 29 November 2005, the DPO of the European Central Bank (ECB) sent the notification of the recording, storing and listening of telephone conversations in DG-M and DG-P to the EDPS for prior checking.
- 1.3. On 9 January 2006, the EDPS requested further information to the DPO of the ECB. An answer was provided by the DPO on 12 January 2006. A second request was made on 11 January 2006. An answer to this request was received on 24 March 2006.
- 1.4. A request for information was also made in a telephone conversation with the DPO of the ECB on 5 April 2006. This was answered to on 6 April 2006.
- 1.5. A further request was made on 6 April 2006. This was answered to on 2 May 2006.

2. Examination of the matter

2.1. The facts

The ECB proceeds to record all telephone conversations:

- Within Directorate General Market Operations (DG-M): the Front Office Division, the Back Office Division as well as the Own Funds Management Unit and the Foreign Reserves Desk of the Investment Division,
- Within DG Payment Systems and Market Infrastructure (DG-P): the TARGET Division.

Members of staff may not prevent the recording of calls conducted on behalf of the ECB. An Administrative Circular 02/2004 on the Recording, Storing, Accessing and Listening to Telephone Conversations in Directorate General Operations and Directorate General Payment Systems (hereinafter Administrative Circular 02/2004) sets out the rules governing the recording and storing of telephone conversations and accessing and listening to recorded conversations involving the abovementioned departments.

According to the Administrative Circular 02/2004, telephone conversations may only be recorded and listened to within DG-M in order to:

- clarify the terms of a transaction or of any other communication made to market counterparties on behalf of the ECB; or
- ensure that inside information¹ regarding the European System of Central Banks (ESCB) is safeguarded; or
- identify violations of professional secrecy or the misuse of inside information;

Within DG-P, they may only be recorded and listened to in order to:

- clarify the terms of a contingency payment in the event of a CoCA (Contingency via Correspondent Accounts) via fax with recorded callback; or
- identify fraudulent actions concerning the processing of the above-mentioned payments.

Recording procedure

The relevant procedure for the recording of telephone conversations will differ according to the department in which it takes place.

- Procedure in DG-M

A recording system connected to the trading telephone system is used to record all incoming and outgoing calls on the trading system telephones. The system initially records the telephone calls on the system's hard disk in digital format. Once the hard disk is filled to a certain level, the recorded calls are automatically archived on a digital tape, which will subsequently, be stored for three months before being re-used.

- Procedure in DG-P

Within DG-P the recording is limited to a specific handset used for ESCB teleconferences, where it is manually switched on only for bilateral calls confirming CoCA contingency payments received via fax.

According to Article 4 of Administrative Circular 02/2004, as soon as the ECB as service provider receives a contingency payment via fax from the service user (a Central Bank), two members of staff shall initiate the call back via the ESCB (European System of Central Banks) teleconference system using the dedicated settlement manager's extension. At the beginning of the call the fact that it is being recorded shall be announced; this announcement

¹ "Inside information" is defined in Article 1.2.8 of the ECB Staff Rules as "information; (i) which is known to a member of staff; and (ii) which relates to the administration of the ECB or to transactions of any kind (including proposed transactions) arising in connection with the implementation of the objectives and tasks of the ECB; and (iii) which is confidential; or (iv) which is or might be perceived as being relevant to decisions made by the ECB".

shall be repeated once the recording begins. Likewise, the end of the recording shall be both announced and recorded.

The recordings are made on a tape. For each business day where CoCA via fax call back is used, a new tape has to be taken. Each call is documented in a written summary which includes the time of the call, the participants in the conversation and the confirmed payments.

Requests for access to recordings

Article 5 of the Administrative Circular establishes clear rules as to the persons authorised to listen or authorise third persons to listen to recorded conversations. These differ according to the department concerned.

Within DG-M, The following persons may listen to and authorise third persons to listen to the recorded conversations:

- a) the members of staff whose conversation is recorded;
- b) any member of the Executive Board;
- c) the Director General Market Operations.

The following persons may listen to the recorded conversations:

- a) the Deputy Director General within his/her own reporting line;
- b) the Heads of the Front Office Division, Back Office Division and Investment Division regarding conversations recorded within their own divisions;
- c) the Director General of Legal Services and any Head of Division within the field of competence of DG-L;
- d) the Director of Internal Audit and any Head of Division within the field of competence of D-IA.

Within DG-P, the following persons may listen to and authorise third persons to listen to the recorded conversations:

- a) the two members of staff whose conversation is recorded; in this case the two members of staff may only jointly authorise third persons;
- b) any member of the Executive Board;
- c) the Director General of Payment Systems and Market Infrastructure;
- d) the Deputy Director General of Payment Systems and Market Infrastructure.

The following persons may listen to the recorded conversations:

- a) the Head of the TARGET Division;
- b) the Director General of Legal Services (DG-L) and any Head of Division within DG-L within the field of competence of DG-L ;
- c) the Director of Internal Audit (D-IA) and any Head of Division within D-IA within the field of competence of D-IA.

Any person authorised to retrieve a recording, must fill in a form to that effect. The form will notably mention the name of the caller and the extension number at the ECB used by the caller; when the call was initiated (i.e. date and time); and the contact partner, or bank/company name or telephone numbers called. These forms are to be signed by the

authorised signatories as mentioned above. They are stored for 12 months after the task has been fulfilled.

Members of staff wishing to listen to their recorded conversations may only do so in the presence of their line manager. In order to clarify deals by the Own Funds Team, Investment Division Portfolio management experts may listen to their recorded telephone conversation with an ECB counterpart without the presence of their line manager. Other persons mentioned in Article 5 of the Administrative Circular as mentioned above, may listen to recorded conversations provided that at least two managers are present and the member(s) of staff concerned has/have been duly notified and is/are present.

In the absence of members of staff (for example, due to sickness) they may nominate a colleague to attend on their behalf. If they do not nominate a colleague, this shall be documented. In such cases, the recording may be listened to in the absence of the member of staff.

The managers referred to in Article 5 of the Administrative Circular shall draft an official memo to be placed in the files and copied to all persons who have listened to the recorded conversation and to the member of staff concerned; if a transcript of the conversation is produced, it shall be attached to the memo.

Only if there are clear suspicions of criminal activity, and/or insider trading in the case of DG-M, the Executive Board may decide not to notify the member of staff concerned and thus not to nominate a member of staff as an independent witness.

Information

With a view of the sensitive nature of telephone recording, all employees of the business units concerned shall sign a "proof of information form" attached to the Administrative Circular 02/2004 which shall constitute knowledge of the content of the circular.

Staff members are informed in specifically organised "induction seminars" about the most important provisions concerning the breach of professional duties. The relevant documents are also published on the ECB's intranet.

By e-mail of 6 January 2004 the Settlement Managers in the National Central Banks (NCBs) were informed of the procedure to be applied. Furthermore, there was a formal reporting on the implementation to the relevant ESCB Committee (Payment and Settlement Systems Committee –PSSC-) and Administrative Circular 02/2004 was made available to all NCBs.

As for the recording of telephone conversations in DG-P, as mentioned above, at the beginning of the call the fact that it is being recorded shall be announced; this announcement shall be repeated once the recording begins. Likewise, the end of the recording shall be both announced and recorded. As for recording in DG-M, the recording of transactions is common practice in the financial markets. Furthermore, the recording of communications is expressly marked in the master agreements governing banking and financial transactions.

As concerns the listening to telephone conversations in DG-P and DG-M: According to Article 6 of Administrative Circular 02/2004, only if there are clear suspicions of criminal activity, and/or insider trading in the case of DG-M, the Executive Board may decide not to notify the member of staff concerned and thus not to nominate a member of staff as an independent witness.

Data subjects can contact the Controller for any additional information falling under the scope of Article 11 and 12 of the Regulation.

Storage of data

Tapes of telephone conversations in DG-M and DG-P must be stored for a minimum of three months. Tapes concerning any transaction that is subject to dispute must be retained until the dispute has been resolved.

a) In DG-M once the hard disk is filled to a certain level, the recorded calls are automatically archived on a digital tape, which will subsequently – once full – be stored as an archived tape for at least three months before it is re-used.

b) In DG-P data is recorded on tapes, which are consecutively stored for three months in the safe. Whenever a new tape is put into the safe, it is checked whether there are tapes which are older than 3 months. These tapes are then taken out and the recorded conversations are erased.

c) The retention period for paper documents like the protocol listing the participants to the teleconference and some key details of the payments confirmed is, according to the TARGET Manual of Procedures, six years (in line with the legal archiving requirements). To all data belonging to certain categories the same retention period of six years applies.

Security

As concerns processing operations, security measures have been set up.

2.2. Legal aspects

2.2.1. Prior checking

Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of personal data by Community institutions and bodies and on the free movement of such data (hereinafter Regulation 45/2001) applies to the processing of personal data by Community institutions and bodies.

Personal data is defined as any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. Data contained in calls recorded and/or listened to according to the procedure laid down in the Administrative Circular 02/2004 can be attributed to specific members of staff and therefore must be qualified as personal data according to Regulation 45/2001.

The processing of the data is carried out by a Community body and is carried out in the exercise of activities which fall within the scope of Community law.

The Regulation applies notably to the processing of personal data wholly or partly by automatic means. Clearly here we are in the presence of processing which is at least partly automated.

Manual processing in DG-M can take place upon: data contained in the request forms for listening to telephone calls recorded on the ECB trading system; data contained in the official memoranda concerning listening to recorded telephone conversations pursuant to Administrative Circular 02/2004, which have to be filled in immediately after the listening

session and data contained in the “proof of information” forms filled in by the DG-M staff members.

Manual processing also takes place in DG-P as concerns: data contained in the summaries of the call-backs held in the TARGET Division in the context of CoCA via fax with recorded call-back pursuant to Administrative Circular 02/2004, which have to be filled in immediately after each call-back; data contained in the request forms for listening to recorded telephone calls; data contained in the official memoranda concerning listening to recorded telephone conversations pursuant to Administrative Circular 02/2004, which have to be filled in immediately after the listening session and data contained in the “proof of information” forms filled in by the DG-P staff members.

These manual processing operations form part of a filing system and are therefore covered by the scope of the Regulation according to Article 3§2.

Regulation 45/2001 therefore applies.

Article 27§1 of Regulation 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". The processing of traffic data presents specific problems, which are so important that a specific provision and special safeguards have been provided in Chapter IV of the Regulation. Notably, the confidentiality of communications is also guaranteed by a specific provision (Article 36). All of these provisions contribute to support the presence of a specific risk in the terms of Article 27§1 and the need for prior checking by the EDPS.

Article 27§2 of the Regulation contains a list of processing operations that are likely to present risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes notably processing of data relating to "suspected offences or offences" or processing operations intended to evaluate personal aspects relating to the data subject, including his/her ability, efficiency and conduct. The procedure described above is notably used to identify violations of professional secrecy or misuse of inside information or to identify fraudulent actions concerning contingency payments. These can be qualified as "offences" according to Article 27§2 sub a). Furthermore the processing operation is not only intended as a mean of recording a transaction to ensure the validity thereof, but can also be used to evaluate the conduct of staff involved. The case therefore clearly also qualifies for prior checking under Article 27§2 b).

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. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

The recording, storing, accessing and listening to telephone conversations in DG-M and DG-P can lead to the opening of an internal administrative inquiry and possibly lead to a disciplinary procedure. Internal administrative inquiries and disciplinary procedures were the object of separate prior checks by the EDPS (respectively case 2005/290 and 2004-0270) and are therefore not covered by the present prior check.

The notification of the DPO was received on 24 November 2005. According to Article 27(4) the present opinion must be delivered within a period of two months. The time limit was

suspended for 3 + 74 + 1 + 25 days. The opinion must therefore be delivered by 7 May 2006. This day being a Sunday, the opinion must be delivered by 8 May 2006.

2.2.2. Legal basis for and lawfulness of the processing

The procedure is based on Administrative Circular 02/2004 on recording, storing, accessing and listening to telephone conversations in Directorate General Operations (now Directorate General Market Operations (DG-M)) and Directorate General Payment Systems (now Directorate General Payment Systems and Market Infrastructure (DG-P)).

More specifically, the processing of the data for the purposes of identifying irregular conduct is based on various provisions. Notably one can mention Article 1.2.9 of the ECB Staff Rules which prohibits the use of inside information. Furthermore, Article 2 of the Code of conduct of the ECB requires that addressees "act with exclusive loyalty to the ECB, honestly, independently, impartially, with discretion and without self-interest or national interests, to subscribe to high standards of professional ethics, and to avoid any situation liable to give rise to a conflict of interest".

Analysis of the legal basis and analysis of the lawfulness of the processing go together. Article 5, a), of Regulation 45/2001 stipulates that personal data may be processed only if the "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". The recitals (§27) to the Regulation further specify that "processing of data for the performance of tasks carried out in the public interest of the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies". Clearly the recording of communications for the purpose of clarification of the terms of transactions or contingency payments and the relevant corresponding written documents can be considered as necessary for the performance of the activities of the ECB. The legal basis as provided for by the Administrative circular further support the lawfulness of the processing in accordance with Article 5 of Regulation 45/2001.

2.2.3. Data Quality

Article 4§1 c) provides that "data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed". Furthermore the data must be accurate and kept up to date.

As mentioned in the facts, the procedures of recording of certain calls in DG-M and DG-P imply the collection and processing of personal data either in the recording of the communications themselves or in the supporting documents or in request forms for listening to telephone calls.

The purpose of the processing operation in DG-M is essentially to clarify the terms of a transaction or of any other communication made to market counterparties on behalf of the ECB; to ensure that inside information regarding the European System of Central Banks (ESCB) is safeguarded and to identify violations of professional secrecy or the misuse of inside information. Within DG-P, the data may only be recorded and listened to in order to clarify the terms of a contingency payment in the event of a CoCA (Contingency via Correspondent Accounts) via fax with recorded call-back or to identify fraudulent actions concerning the processing of the above-mentioned payments.

The recording of the communication covers all the data contained in the communication and data surrounding the communication (traffic data) which can be considered as adequate,

necessary and non excessive in relation to the above-mentioned purposes. It is important to underline that the processing only concerns business transaction data and does not cover private calls made by members of staff.

The data requested in the supporting written documents is also considered as relevant and non excessive by the EDPS.

The direct recording of the communications ensures the accuracy of the data contained in the tapes. As for the written documents such as summaries of the call-backs held in the TARGET division which have to be filled in immediately after each call-back or official memoranda concerning listening to recorded telephone conversations; the accuracy of this data must also be guaranteed. This can notably be ensured by granting data subjects a right of rectification (see below, 2.2.7. Right of access and rectification).

The EDPS considers that the requirements of Article 4 of the Regulation on the quality of the data are respected.

2.2.4. 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".

From the outset, it must be pointed out that the principle of confidentiality of communications was inspired by Article 5 of Directive 97/66 which notably provides that Member states must prohibit listening, tapping, storage or other kinds of interception or surveillance of communications, by others than users, without the consent of the users concerned, except when legally authorised in accordance with the general principles of Community law. Directive 97/66 has since been replaced by Directive (EC) 2002/58, but the principle remains the same: providing the parties to the communication have given their consent, there is no breach of the principle of confidentiality of communications. The EDPS believes that Article 36 of Regulation 45/2001 must be interpreted along those same lines.

According to Article 36, 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. In short, any restrictions must be "in accordance with the law" and "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 recording of communications never takes place without the consent of the persons concerned. Indeed staff of the ECB concerned are either fully aware of the procedure and implicitly consent to it (DG-M) or activate the system themselves (DG-P). At the beginning of the call in DG-P, the fact that it is being recorded shall be announced; this announcement shall be repeated once the recording begins. Likewise, the end of the recording shall be both announced and recorded. As concerns the counterparties, the procedure in DG-P announces the recording at the beginning and at the end of the recording. As for the procedure under DG-M, the recording of transactions is common practice in the financial markets. The recording is expressly marked in the master agreements governing the banking and financial transactions, however the ECB would need to ensure that the persons actually involved in the procedure

are aware not only of the recording, but also of the specific provisions of Article 11 (see below, 2.2.8. Information to the data subject).

As concerns the listening to telephone conversations in DG-P and DG-M, according to Article 6 of Administrative Circular 02/2004, only if there are clear suspicions of criminal activity, and/or insider trading in the case of DG-M, the Executive Board may decide not to notify the member of staff concerned. In this case, the restriction to the confidentiality of communications is in line with the general principles of law.

The EDPS would like, however to underline that any criminal investigations must be carried out by the competent national authorities. Criminal investigations remain the competence of the Member States. According to the recitals of the Regulation, the prevention, detection, investigations of criminal offences remains the competence of the Member States in compliance with the Protocol on Privileges and Immunities of the European Communities and with international law (§ 18).

The recording of communications or other supporting documents may also be used as evidence in a disciplinary case within the ECB. In this case, the EDPS refers to the principles and recommendations made in the opinion delivered in the frame of case 2004-0270.

2.2.5. Conservation of data

In general, according to Article 4 §1 e) of the Regulation, personal data may be kept in a form which permits identification of data of data subjects for no longer than is necessary for which the data are collected and/or further processed.

Article 37§1 of the Regulation provides for specific rules for the conservation of traffic data. Traffic data which are processed and stored to establish calls and other connections shall be erased or made anonymous upon termination of the call or other connection. Article 20 provides for exemptions to this principle notably if such a restriction constitutes a necessary measure to safeguard "the prevention, investigation, detection and prosecution of criminal offences" or "an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters".

Article 37§2 provides that "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".

The recording of communications on tapes and the transcription of this data on paper in memoranda may contain data which may be qualified as traffic data in the terms of the Regulation. Article 37 therefore applies.

The ECB establishes a period of 3 months for keeping the recorded information on tapes unless the transaction is subject to dispute in which case it may be retained until the dispute has been resolved. The EDPS considers that this conservation period is in line with the provisions of Article 37§1 and 20 of the Regulation provided that the verification of transactions can be considered as falling within the scope of Article 20§1 b): "an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters".

The retention period is six years for paper documents like the protocol listing the participants to the teleconference and some key details of the payments confirmed according to the

TARGET Manual of Procedures. This conservation period complies with Article 4 of the Regulation. If used in the frame of criminal investigations, Article 20 can be used as a basis for exemption to immediate erasure after the termination of the call provided that the verification of transactions can be considered as falling within the scope of Article 20§1 b): "an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters". In the frame of disciplinary procedures, the conservation of the data can also be based on the exemption of Article 20 provided this article is interpreted according to the *ratio legis* of the provision that is to say that it applies in the context of disciplinary procedures² and that the verification of transactions can be considered as falling within the scope of Article 20§1 b): "an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters".

2.2.6. Transfer of data

According to Article 7§1 of Regulation 45/2001, personal data may only be transferred within or between Community institutions or bodies notably "if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient".

In the event of an internal administrative inquiry the data collected during the recording of the communications may be transferred to various persons (notably ECB manager, Executive Board, senior manager). The EDPS considers that the data transferred in frame of an internal administrative inquiry are necessary for the legitimate performance of tasks covered by the competence of the recipient. Article 7 is therefore respected.

In the event of a criminal case, or even a disciplinary case within a national central bank, for example, one cannot exclude transfers to relevant competent national authorities. In principle, Directive 95/46/EC is not aimed at judicial activities and Article 8 of the Regulation does not therefore apply *a priori*. Having said this, many national laws in the Member states have broadened the scope of application of their national law implementing Directive 95/46/EC so as to include public authorities when carrying out their judicial police duties. In these cases, Article 8 of the Regulation is applicable and the transfer may take place only if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority. In all other cases, Article 9 §6 d) applies whereby the transfer is necessary or legally required on important public grounds, or for the establishment, exercise or defence of legal claims.

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, as they are likely to receive data in the framework of a particular investigation of a disciplinary or criminal procedure. All transfer of data must be regarded as taking place "in the framework of an inquiry". Taken in context, Article 2 (g) is to be understood as an exception to the right to information (see Part 2.2.7) rather than as an exception to the application of Articles 7, 8 and 9.

² This has been the approach adopted by the EDPS notably in opinion on Internal administrative inquiries at the ECB (case 2005-290).

2.2.7. 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".

The notification from the DPO of the ECB mentions that all other rights laid down in section 5 of the Regulation can be exercised by the data subjects by addressing themselves to the controller that is to say the Director of General Market Operations or the Head of TARGET Division. However this is not stipulated as a right in the Administrative Circular. The data subject will need to be informed of the existence of these rights and notably that of rectification of the data (see below, Information of the data subject).

As for access to data recorded in DG-M, in all cases, the corresponding party also records communication. The counterparties can therefore claim access to the recording within their own institution. They should also always be given access to the recording within the ECB. This should also be stipulated in the information provided to external data subjects (see below, Information of the data subject).

2.2.8. Information to the data subject

Article 11 of Regulation (EC) 45/2001 specifies that the controller must provide information to the data subject except where he or she already has it. This information covers at least the identity of the controller, the purposes of the processing operation for which the data are intended, the recipients or categories of recipients, whether replies to questions are obligatory or not as well as the possible consequence of a failure to reply and the existence of a right of access to, and right to rectify the data concerning him/her. Further information may also have to be provided such as the legal basis of the processing operation, the time-limits for storing the data and the right to have recourse at any time to the EDPS. When personal data is collected directly from the data subject, the information should be provided at the time of collection of this data.

Personal data contained in recorded communications are collected from the data subject and Article 11 therefore applies. The data subject must be informed at two levels: at a general level about the procedure for recording and listening to conversations in DG-M and DG-P, but also in the event of an actual listening of a communication in which the member of staff is involved.

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".

The EDPS takes good note that general information on the procedures for recording, accessing and listening to telephone conversations in DG-M and DG-P is provided for in the

Administrative Circular 02/2004 of 24 February 2004. All Staff members have to sign a "Proof of information form" in duplicate whereby they acknowledge that they have received and read the Administrative Circular. Furthermore, staff members are informed in specifically organised "induction seminars" about the most important provisions concerning the breach of 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" as well as the code of conduct when they start working at the ECB. The relevant documents are also published on the ECB's intranet site.

As regards the recording of telephone conversations in DG-P, at the beginning of the call the fact that it is being recorded shall be announced; this announcement shall be repeated once the recording begins. Likewise, the end of the recording shall be both announced and recorded. By e-mail of 6 January 2004 the Settlement Managers in the National Central Banks (NCBs) were informed of the procedure to be applied. Furthermore, there was a formal reporting on the implementation to the relevant ESCB Committee (Payment and Settlement Systems Committee - PSSC-) and Administrative Circular 02/2004 was made available to all NCBs. The NCBs will be responsible for making the information contained in the Administrative Circular 02/2004 available to their members of staff.

The EDPS underlines that the information in the Administrative circular has to be updated as it does not mention recording of calls made from Foreign Reserves Desk of the Investment Division. Furthermore, as mentioned above, the data subject must also be informed of the right to rectify data relating to him/her and the right to have recourse to the EDPS.

As for information to counterparties for the recordings in DG-M, the master agreements between banks and financial institutions mention the recording of communications relating to financial transactions. The counterparties are therefore informed of the recording of the information in general. However no information is given to the persons concerned about the processing of the personal data in compliance with Article 11 of the Regulation. This would need to be ensured by the ECB, to the best possible extent. The counterparties will need to make the information available to the persons actually involved in the procedure.

As concerns the actual listening to telephone conversations in DG-P and DG-M in a specific case, the staff member is normally notified of this and takes part in the procedure. Counterparts would also normally need to be informed of the actual listening to telephone conversations in a specific case. According to Article 6 of Administrative Circular 02/2004, only if there are clear suspicions of criminal activity, and/or insider trading in the case of DG-M, the Executive Board may decide not to notify the member of staff concerned and thus not to nominate a member of staff as an independent witness. In this case, the exception to the right of information has to be examined in the light of Article 20 mentioned above.

If there is a clear suspicion of a criminal activity, the exemption to the right of information clearly applies under Article 20§1 sub a): "the prevention, investigation, detection and prosecution of criminal offences". 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 as a measure preliminary to an internal inquiry (detection of an infringement). 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 actual need to withhold this information must be clearly demonstrated ("clear suspicions") and that the withholding of the information can only last for a defined period. As soon as it is no longer harmful to the detection of an infringement, the information must be given to the data subject.

2.2.9. 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.

Conclusion:

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

- The accuracy of data contained in written documents established during the procedure must be guaranteed;
- Information in the Administrative Circular has to be updated so as to mention recording of calls made from Foreign Reserves Desk of the Investment Division;
- Counterparties must be informed to the best possible extent of the specific information as concerns the processing of personal data collected in the recordings by the ECB according to Regulation (EC) 45/2001;
- The data subject must be informed of the right to rectify data relating to him/her and the right to have recourse to the EDPS.

Done at Brussels, 5 May 2006

Peter Hustinx
European Data Protection Supervisor

Follow-up Note

18 December 2006

All acting measures have been taken by the European Central Bank on 15 December 2006.

The European Data Protection Supervisor