



JOAQUIN BAYO DELGADO
ASSISTANT SUPERVISOR

Mr Philippe RENAUDIÈRE
Data Protection Officer
European Commission
BRU BERL 08/180
B - 1049 BRUSSELS

Brussels, 13 July 2007
JBD/ktd D(2007)1119 C 2007-0358

Dear Mr Renaudière,

After having reviewed the notification on "Telephone and Fax, infrastructure, network and system of the Commission" (your reference: DPO 101, EDPS case ref.: 2007-358) we have concluded that the case is **not subject to prior checking by the EDPS**.

The processing was submitted under Articles 27(1) and 27(2)(b) of the Regulation (EC) No 45/2001 (the "Regulation").

As it was already pointed out by the EDPS in a previous case¹, in this context prior check shall only be carried out **under Article 27(1)** if there is a breach of confidentiality of communication. In this aspect one has to keep in mind that it is not the processing itself as described in your notification, but the administrative enquiries or disciplinary procedures initiated following the misuse of the ICT tools that may imply breach of confidentiality of the communications. Consequently, only these procedures fall under the scope of the prior check for breach of confidentiality. These procedures have already been prior checked by the EDPS².

As regards the other possible legal base, processing operations are subject to prior checking under Article 27(2)(b) of the Regulation if they are intended to evaluate personal aspects relating to the data subject. This is, however, not the case in this instance since the processing aims solely at making available telephone and fax equipment and managing of the telephone and fax infrastructure, network and system. It must be highlighted from the notification that the purpose of evaluating personal aspects is not amongst the purposes of the processing. It does not imply the evaluation of personal aspects but rather of technical aspects.

¹ "Telephony" of the European Economic and Social Committee and the Committee of the Regions (EDPS case number: 2006-508)

² Opinion on the notification for prior checking relating to internal administrative inquiries and disciplinary procedures within the European Commission (EDPS case number: 2004-187)

On the basis of the above considerations we have decided to close the case. However, if you believe that there are other factors justifying prior checking of the notified processing, we are prepared to review our position.

Without prejudice to the above mentioned arguments, in our analysis of the case the retention periods applied raise concerns in the light of the provisions of the Regulation. It is mentioned in the notification that data concerning calls of the current month plus the 6 six previous months are kept. Furthermore, data are saved during one year in the Data Centre to allow the good management of the telephone network (including production of statistics, invoices verification, consumption follow-up, consultation of the history for technical reasons, inquiries). In addition, data are saved for 5 years for technical reasons and to comply with the Financial Regulations, to allow compile statistics and the follow-up of long term use of the systems. According to the notification, the 5 year retention period is justified by financial rules³.

At this point, the EDPS would like to remind of the retention periods for traffic and billing data as provided for by the Regulation. Article 37(2) of the Regulation stipulates that traffic data, as indicated in a list agreed by the EDPS, may be processed for the purpose of budget and traffic management, including the verification of authorised use of the telecommunications systems. However, they must be erased or made anonymous as soon as possible and in any case no longer 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. This provision therefore recognises that traffic and billing data may be kept and processed for the purposes of traffic and billing management including the verification of the authorised use, for up to six months. If the period of six months lapses without the institution of proceedings, the traffic data must be erased or rendered anonymous. If proceedings have been commenced within that period, then such proceedings will interrupt the prescriptive period until the end of the proceedings and further until the end of the prescriptive period allowed for any appeal or the conclusion of the appeal proceedings as the case may be.

Article 20 of the Regulation also provides that the application of Article 37(1) may be restricted where such a restriction constitutes a necessary measure notably to safeguard the prevention, investigation, detection and prosecution of criminal offences; an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters; the protection of the data subject or of the rights and freedoms of others. This provision therefore allows the conservation of traffic and billing data for other purposes than traffic and billing management in certain limited cases. The EDPS has interpreted Article 20 in the light of the *ratio legis*, and notably also allows for exceptions to the strict conservation periods in the frame of disciplinary investigations. The data may therefore be kept for longer than these 6 months on the basis of Article 20 of the Regulation in the frame of a disciplinary investigation. This is not, however, the object of the present prior check.

The principle as concerns conservation of traffic and billing data is therefore of immediate erasure or conservation for a period of six months at the latest for billing and traffic management unless:

- there is a pending legal claim involving such data;
- a disciplinary investigation justifies the conservation of such data under Article 20;

³ Article 65 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities

- the data are kept in an anonymous form for statistical purposes.

Due attention has also to be paid to the new last paragraph of Article 49 of the Implementing Rules of the Financial Regulation⁴ which states: 'Personal data contained in supporting documents shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes. In any event, as concerns the conservation of traffic data, Article 37(2) of Regulation (EC) No 45/2001 shall apply.'

Finally it must be noted that Article 37(2) makes a reference to a list agreed by the EDPS. The EDPS will decide on the list of traffic data included in the notification later on.

We would appreciate if you could inform the controller of these considerations regarding the retention periods and come back to us on the steps taken in order to ensure full compliance with the Regulation.

Yours sincerely,

Joaquín BAYO DELGADO

⁴ Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 amending Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 111 of 28.4.2007)