

## **Opinion on a notification for prior checking received from the Data Protection Officer of the Court of Justice concerning the "Financial Irregularities Panel"**

Brussels, 17 October 2007 (Case 2007-433)

### **1. Proceedings**

Notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001, concerning the case "Financial Irregularities Panel", was given by the Data Protection Officer (hereafter: DPO) of the Court of Justice on 25 June 2007.

Questions were put to the DPO by e-mail on 19 July 2007 and replies received on 8 August 2007. The draft opinion was sent to the DPO on 8 October 2007 for comments, which were received by the EDPS on 16 October 2007.

### **2. Examination of the case**

#### **2.1. Facts**

In accordance with the Financial Regulation<sup>1</sup> and the detailed rules for its implementation<sup>2</sup>, a Financial Irregularities Panel (hereafter: the Panel) was established at the Court of Justice by a decision of the Administrative Committee dated 28 March 2007<sup>3</sup>.

The Administrative Committee's decision mainly lays down specifications regarding the Panel's competences and modes of functioning. The decision lays down provisions concerning referral to the Panel and its proceedings, as well as the scope and consequences of its decisions. For other matters, reference is made to the Financial Regulation and the detailed rules for its implementation.

The processing operation is designed to enable the Financial Irregularities Panel to give an opinion evaluating whether a financial irregularity has occurred, and if so, how serious it is and what role was played by the persons involved in the events on which its opinion is sought and, where appropriate, what its consequences might be (in particular whether the irregularity could make the official or other servant liable to disciplinary action and/or payment of compensation).

The Panel consists of three members of the Court (Article 8 of the Court's internal Financial Regulation) and one outside personality within the meaning of Article 75(2) of

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<sup>1</sup> Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, Articles 60(6) and 66(4). OJ L 248, 16.9.2002.

<sup>2</sup> 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, Articles 74 and 75(2). OJ L 357, 31.12.2002.

<sup>3</sup> Administrative Committee decision of 28 March 2007 laying down detailed rules for the functioning of the Financial Irregularities Panel.

the implementing rules. The members are appointed by decision of the competent authority of the Court. The members were appointed by decision of the General Meeting on 24 October 2006 and the outside personality by decision of the Administrative Committee on 18 February 2004.

Article 2 of the decision also provides for the involvement of a registrar and an internal auditor in the procedure: *"As soon as a matter is referred to the Panel, its Chairperson shall send the case file in his/her possession to the members of the Panel, the internal auditor and the Registrar."*

Procedure for referral to the Panel: The Financial Regulation authorises the referral of cases to the Panel. The procedure is laid down in Article 1 of the Administrative Committee's decision:

Any evidence likely to fall within its competence may be referred to the Panel by:

- The President of the Court.
- Any official or other servant involved in the financial management and control of transactions who, having received an instruction from his/her superior which he/she considers irregular or contrary to the principles of sound financial management, has informed the Registrar of the Court thereof in writing, in his/her capacity as authorising officer by delegation, but the latter has failed to take action. In this case, the matter may only be referred to the Panel after three weeks have elapsed since the date on which the information was communicated to the Registrar.

Should the Panel take the view that it is not sufficiently well informed about the alleged acts or about the circumstances in which they were committed, it may ask any authority or service of the Court to supply it with the requisite documents and information. It may also ask to hear any official or other servant of the Court. It has access to any document of an administrative nature in the possession of the Court (Article 4 of the decision).

As regards the handling of the case, as soon as it has been referred to the Panel, the Chairperson sends the case file in his/her possession to the members of the Panel, the internal auditor and the Registrar of the Court. If the matter has been referred to the Panel by an official or other servant, the Chairperson informs the latter that the case file has been sent to the abovementioned persons (Article 2 of the decision). In addition, the Panel may not deliver an opinion imputing a financial irregularity to an official or other servant without having first invited the person concerned to submit his/her comments (Article 6 of the decision).

The Panel must give reasons for its opinions, which must be signed by the Chairperson and members of the Panel. Opinions are sent to the President and the Registrar of the Court, the internal auditor and, where appropriate, to the official or other servant who referred the matter. The Administrative Committee's decision on the functioning of the Panel does not specify when the opinion should be sent to the person referring the matter. It is up to the Panel to assess the circumstances in which it is or is not justified to communicate its opinions to the latter. In any event, the person who referred the matter has the right to be informed that the case file has been sent to the Appointing Authority/AECE (Article 75(1) of the Regulation laying down detailed rules for the implementation of the Financial Regulation and Article 2 of the decision of the Administrative Committee), but he/she does not have the right to be sent the Panel's opinion. It is thus assumed that the Panel will only send its opinion to the person referring the matter where doing so poses no risk of being prejudicial to the interests of any

person. The Panel must weigh the advisability of sending its opinion to the person referring the matter in the light of the specific facts of the case and the position of the various persons concerned, having regard to the general principles of law, to the procedural rights of the protagonists and to the rights and interests of all concerned.

In addition, pursuant to the second subparagraph of Article 75(1) of the Regulation on the implementing rules, should the Panel's analysis suggest that the case referred to it is a matter for the Anti-Fraud Office (OLAF), it returns or sends the case file, depending on who referred the matter, to the President of the Court. It informs OLAF and the Registrar of the Court. Where the matter was referred to the Panel by an official or other servant, the latter is also informed (Article 5 of the decision).

The data subjects are the persons involved in a case showing indications of financial irregularity, persons who have brought evidence indicating financial irregularity to the attention of the Panel, and witnesses.

#### Rights of the data subject

An information notice under Articles 11 and 12 of the Regulation will be published on the Intranet and will state the identity of the controller, the purpose for which the data are intended, the categories of data processed, the recipients or categories of recipients of the data, the existence of a right of access to the data and a right to rectification of the data, the legal basis for the intended processing of the data, the retention periods of the data and the right to have recourse at any time to the European Data Protection Supervisor. In addition, the notice will contain the provisions of Articles 13 and 14 of the Regulation.

It is also provided, in accordance with Article 6 of the decision of the Administrative Committee of 28 March 2007, that the Panel may not deliver an opinion imputing a financial irregularity to an official or other servant without having first invited the person concerned to submit his/her comments.

Lastly, the Panel may decide to restrict the rights of the data subject insofar as is necessary in accordance with Article 20 of Regulation (EC) No 45/2001.

#### The recipients of the data are:

- In every case, the members of the Panel (three members of the Court and one outside personality), the Registrar and the internal auditor (Article 2 of the decision of the Administrative Committee of 28 March 2007).
- In the case of a systemic problem, the authorising officer (e.g. members taking part in the General Meeting of the Court: Judges, Advocates General and Registrar of the Court), the authorising officer by delegation (Registrar of the Court), the authorising officer by subdelegation concerned and the internal auditor (Article 66(4) of the Financial Regulation).
- Where the Panel considers that the case falls within the sphere of competence of the European Anti-Fraud Office (OLAF), it sends the case file to the Appointing Authority/Authority empowered to conclude contracts of employment (AA/AECE), and informs OLAF that it has done so. The data are then sent to OLAF at the latter's request or on the initiative of the AA/AECE.
- Opinions are sent to the President and Registrar of the Court, the internal auditor and, where appropriate, the official or other servant who referred the matter.

- In addition, the data may be communicated to other recipients in particular cases:
  - ⇒ the Court of Justice (Court), the Court of First Instance (CFI) and/or the Civil Service Tribunal (CST), or to a national judge, along with the advocates and agents of the parties, in the case of litigation;
  - ⇒ the Panel of the Court, of the CFI or of the CST responsible for examining complaints, the Presidency and the Registrar of the court concerned, and the legal adviser on administrative matters, in the case of a complaint submitted pursuant to Article 90(2) of the Staff Regulations;
  - ⇒ the Court of Auditors when performing its duties under Article 248 of the EC Treaty;
  - ⇒ the European Parliament when performing its duties under Article 276 of the EC Treaty;
  - ⇒ the President and the Registrar of the Court, together with the officials assisting them, when carrying out the responsibilities assigned to them by Article 23 of the Rules of Procedure of the Court;
  - ⇒ the European Data Protection Supervisor, in accordance with Article 47(2) of Regulation (EC) No 45/2001;
  - ⇒ the Data Protection Officer of the institution, in accordance with paragraph 4 of the Annex to Regulation (EC) No 45/2001;
  - ⇒ the European Ombudsman, where a complaint is made to him/her under Article 195 of the EC Treaty.

The data collected relate to the identification data of the persons referred to in the documents setting out evidence, the date of referral and any data relating to the evidence pointing to financial irregularity. These data may reveal suspicions of financial irregularities and aim to assess the behaviour of officials/other servants or other persons.

#### Procedures for automated/manual processing

Processing procedures are semi-automated. This relates to:

- the referral:
  - ⇒ drawn up by the AA/AECE using word processing software and saved by the AA/AECE on an electronic medium;
  - ⇒ drawn up by an official/other servant on paper;
- the dossiers, comprising electronic/paper documents (evidence likely to be scanned and saved on an electronic medium);
- the opinions of the Panel, established using a word processor and stored in electronic format.
- the minutes of meetings, drawn up and saved in the same way.

The retention period for the data is six years as from the last procedural act (the procedure covering all acts having to do with the case submitted to the Panel, including acts subsequent to the AA/AECE's decision delivered after the Panel's opinion).

The period of six years as from the last procedural act corresponds to the period during which non-contractual liability of the Community can be incurred pursuant to Article 288 of the EC Treaty, namely five years as from the occurrence of the event giving rise to it (Article 46 of the Statute of the Court of Justice). The last event which could give rise to it being the last

procedural act done by the Panel or by a Community body further to the Panel's intervention (AA/AECE, disciplinary authority, OLAF etc), it is as from this latter act that the time limit begins to run.

Given, firstly, that this time limit can be interrupted (see Article 46 of the Statute of the Court of Justice), and secondly, that a reasonable time must be left to the departments involved to delete the data when it is no longer necessary to retain them, the five-year time limit is increased by an appropriate period to take account of these two causes of the time limit being lengthened. The period to be added has been estimated at one year. This period is a minimum that cannot reasonably be shortened. It is for this reason that the retention period for the data is six years as from the last procedural act.

With regard to the deadlines for blocking and erasure (upon legitimate request by the data subject), the period is fixed at three months, for both blocking and erasure.

Lastly, the notification provides that it is up to the Panel to lay down security rules. In the meantime, paper files will be shut in locked cupboards and automated files will be stored on media (hard disk of a protected server) accessible only to authorised persons by means of a password.

Under Article 3 of the decision of the Administrative Committee, the proceedings and deliberations of the Panel are secret. Article 255 of the EC Treaty and Regulation No 1049/2001 regarding public access to documents<sup>4</sup> do not apply to the Court of Justice. Article 287 of the EC Treaty determines the status of documents. According to the nature of the information they contain, they may be covered by professional secrecy.

The note to staff also emphasises that the Panel's documents and proceedings are confidential and therefore recommends sending referrals to the secretariat enclosed in two envelopes, with the inner envelope marked "confidential".

## **2.2. Legal aspects**

### **2.2.1. Prior checking**

Regulation (EC) No 45/2001 applies to the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law (Article 3(1)). This case involves the processing of data by the Panel established by a European institution, namely the Court of Justice, and a processing operation in the context of first-pillar activities, which consequently falls within the scope of Community law.

Regulation (EC) No 45/2001 applies "*to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system*". The processing operation in question here falls within the scope of Regulation (EC) No 45/2001 since it involves the processing of personal data which form part of a filing system or are intended to form part of a filing system (Article 3(2) of the Regulation).

Article 27 of Regulation (EC) No 45/2001 makes subject to prior checking by the EDPS all processing operations likely to present specific risks to the rights and freedoms of data

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<sup>4</sup> OJ L 145, 31.5.2001, p. 43.

subjects. Article 27(2) contains a list of processing operations that are likely to present such risks, such as "processing of data relating to health and to *suspected* offences, offences, criminal convictions or security measures" (Article 27(2)(a)) or "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and *conduct*" (Article 27(2)(b)). Both these provisions apply in this case, which involves both personal data processed with a view to evaluating personal aspects of data subjects (their conduct, in particular) and personal data processed in the event of suspected offences. This case consequently falls within the scope of the prior checking procedure.

Although the Court has not yet introduced the processing of personal data as such, the decision of the Administrative Committee describing the procedure was adopted on 28 March 2007. For practical reasons, it would have been preferable to notify the processing operation to the EDPS for prior checking before the adoption of that decision so as to incorporate any recommendations issued by the EDPS. In the case in question, fortunately, this does not have any real consequences, as the decision is in accordance with Regulation (EC) No 45/2001.

The official notification was received on 25 June 2007. A request for information was sent by e-mail on 19 July 2007. In compliance with Article 27(4) of Regulation (EC) No 45/2001, the two-month period within which the EDPS has to deliver his opinion was suspended. Replies were sent by e-mail on 8 August 2007. A period of seven days was granted in order to enable the DPO to comment on the EDPS's draft opinion. Comments were received on 16 October 2007. Consequently, the EDPS will deliver his opinion by 18 October 2007 (26 August + 12 days' suspension + 8 days for comments).

### **2.2.2. Lawfulness of processing**

The lawfulness of processing must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which stipulates that the processing can only be carried out if it 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 in the legitimate exercise of official authority vested in the Community institution*".

The procedures for determining whether financial irregularities have occurred, which involve collecting and processing personal data relating to actions or omissions by officials or other servants, come within the framework of legitimate exercise of official authority vested in the institution.

The legal basis for the processing of data consists of Article 60(6) and Article 66(4) of the Financial Regulation and Articles 74 and 75(5) of the rules for its implementation, and Article 8 of the internal Financial Regulation of the Court of Justice, the provisions of which were endorsed by the decision of the Administrative Committee of the Court of 27 March 2007 laying down detailed rules for the functioning of the Financial Irregularities Panel.

In particular, under Article 60(6) of the Financial Regulation "*Any member of staff involved in the financial management and control of transactions who considers that a decision he/she is required by his/her superior to apply or to agree to is irregular or contrary to the principles of sound financial management or the professional rules he/she is required to observe shall inform the authorising officer by delegation in writing and, if the latter fails to take action, the Panel referred to in Article 66(4). In the event of any illegal activity, fraud or corruption which may harm the interests of the Community, he/she shall inform the authorities and bodies designated by the applicable legislation.*"

The EDPS wishes to emphasise that the legal analysis should also take account of the amendments made to the Financial Regulation and the rules for its implementation, since the entry into force of the Bureau decision, affecting the articles which form the legal basis of the processing operation.

As regards the Financial Regulation, the first subparagraph of Article 66(4), since the amendment of the Financial Regulation by Council Regulation (EC, Euratom) No 1995/2006<sup>5</sup> of 13 December 2006, stipulates that: *"Each institution shall set up a specialised financial irregularities panel or participate in a joint panel established by several institutions. The panels shall function independently and determine whether a financial irregularity has occurred and what the consequences, if any, should be."*

Amendments have also been made to the implementing rules<sup>6</sup>. A new third subparagraph has been introduced in Article 75(1), authorising any financial actor to submit a case to the Financial Irregularities Panel if it considers that a financial irregularity has occurred and has reasons to believe that it will incur any liability. The purpose of this new subparagraph is to enable financial actors to defend themselves against any unjustified allegation by obtaining a decision from the Financial Irregularities Panel.

The amendments do not alter the legal basis of the processing operation and it is therefore legitimate for the Court to establish a Financial Irregularities Panel. The legal basis is consequently valid.

### **2.2.3. Quality of data**

Personal data must be *"adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed"* (Article 4(1)(c) of the Regulation). In the case in point, there is no systematic rule for the type of data which can appear in a case file concerning financial irregularities (for example, "any data relating to the evidence pointing to financial irregularity" may be included). Such data largely depend on the case involved. However, it is important that the data collected are relevant and adequate for the purpose of the referral to the Panel.

Moreover, the data must be *"processed fairly and lawfully"* (Article 4(1)(a)). The lawfulness of the processing had already been examined in point 2.2.2 of this opinion. As for the fairness, this is linked to the information which must be supplied to the data subject (see point 2.2.7 below).

Finally, under Article 4(1)(d) of the Regulation, personal data must also be *"accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified."*

In accordance with Article 4 of the decision of the Administrative Committee, the Panel may ask any authority or service of the Court to supply it with the requisite documents and information. It may also ask to hear any official or other servant of the Court. In addition,

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<sup>5</sup> Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 amending Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 390, 30.12.2006, pp. 1-26.

<sup>6</sup> Commission Regulation (EC, Euratom) amending Commission 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, C(2007) 1862 final.

Article 6 provides that the Panel may not deliver an opinion imputing a financial irregularity to an official or other servant without having first invited the person concerned to submit his/her comments.

The contradictory nature of the procedure put in place is in itself the best guarantee of the quality of the data processed and of the information on which the Panel bases its opinion. For the sake of completeness, the EDPS considers that under the system it must be possible to ensure that all the elements which have been validly presented are included.

Consequently, it must be ensured that information which is validly obtained and collected should be contained in the case file. The data subject's rights of access and rectification must therefore also be safeguarded so as to make the case file as complete as possible. They constitute the second possibility for guaranteeing the quality of data. See point 2.2.6 regarding the two rights of access and rectification.

The EDPS recommends that it be ensured that the data collected are relevant and adequate for the purpose of the referral to the Panel. As the EDPS has already pointed out in other prior checking operations concerning Financial Irregularities Panels<sup>7</sup>, he recommends that the Panel act as a filter for the quality of the data for forthcoming processing operations so that it will be guaranteed that the information collected is adequate, relevant and not excessive, in accordance with the provisions of Article 4 of the Regulation.

#### **2.2.4. Conservation of data**

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

According to the notification, this period is six years as from the last procedural act (the procedure covering all acts having to do with the case submitted to the Panel, including acts subsequent to the AA/AECE's decision delivered after the Panel's opinion). The EDPS regards this period as reasonable, taking account of the explanation given in the evidence.

The prospect of data being kept for statistical, historical or scientific reasons seems to be excluded. Nevertheless, if the Panel finds it useful to keep a record of certain data, in order to draw up statistics in this area or to ensure consistency of opinions, the EDPS recommends that data be kept in a form which makes them anonymous, in accordance with Article 4(1)(e) of the Regulation.

#### **2.2.5. Transfer of data**

Processing must also be viewed in the light of Article 7(1) of Regulation (EC) No 45/2001. Processing as referred to in Article 7(1) concerns transfers of personal data within or to other Community institutions or bodies "*if necessary for the legitimate performance of tasks covered by the competence of the recipient*".

We are dealing with a transfer to other Community bodies, in particular to the European Anti-Fraud Office (OLAF), the Appointing Authority (AA) or the authority empowered to conclude contracts of employment (AECE) and, in the case of systemic problems, to the authorising officer (e.g. members taking part in the General Meeting of the Court: Judges,

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<sup>7</sup> Case 2007-0139 – European Parliament Financial Irregularities Panel.



Advocates General and Registrar of the Court), the authorising officer by delegation (Registrar of the Court), the authorising officer by subdelegation concerned and the internal auditor (Article 66(4) of the Financial Regulation).

In its relations with OLAF, there has not yet been a case within OLAF's remit. However, where the Panel considers that the case falls within the competence of the European Anti-Fraud Office (OLAF), it shall send the case file to the Appointing Authority / Authority empowered to conclude contracts of employment (AA/AECE), and informs OLAF that it has done so. The data are then sent to OLAF at the latter's request or on the initiative of the AA/AECE.

It therefore has to be ensured that the conditions of Article 7(1) are complied with. This is the case since the data collected are necessary for the processing to take place and, in addition, the data are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*". On the subject of these transfers, it should be remembered that only relevant data must be transferred. This transfer is therefore legitimate to the extent that the purpose is covered by the competences of the recipients. Article 7(1) is complied with.

### **2.2.6. Right of access and rectification**

In accordance with Article 13 of Regulation (EC) No 45/2001 concerning right of access, data subjects have the right to obtain confirmation as to whether or not data relating to them are being processed; 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, and communication in an intelligible form of the data undergoing processing and of any available information as to their source.

Article 14 of Regulation (EC) No 45/2001 gives the data subject right of rectification. Just as the data subject has right of access, he/she can also have his/her personal data modified if necessary.

An information notice available on the Intranet and quoting in full Articles 13 and 14 of Regulation (EC) No 45/2001 will be published on the Intranet.

In addition, Article 75(1), fourth indent, of the implementing rules provides that where the Panel is directly informed by a member of staff in accordance with Article 60(6) of the Financial Regulation it shall not only transmit the file to the Appointing Authority or to the AECE as appropriate, but shall also inform the member of staff by whom it was informed. Article 2 of the decision of the Administrative Committee provides for the member of staff to be informed. However, while the person who referred to matter has the right to be informed that the case file has been sent to the AA/AECE in compliance with the two abovementioned Articles, he/she does not have the right to be sent the Panel's opinion. It may thus be assumed that the Panel will only send its opinion to the person referring the matter where doing so poses no risk of being prejudicial to the interests of any person. The Panel must weigh the advisability of sending its opinion to the person referring the matter in the light of the specific facts of the case and the position of the various persons concerned, having regard to the general principles of law, to the procedural rights of the protagonists and to the rights and interests of all concerned.

The European Data Protection Supervisor considers that Articles 13 and 14 of the Regulation are complied with, given that the Panel may not deliver an opinion imputing a financial irregularity to an official or other servant without having first invited the person concerned to

submit his/her comments (Article 6 of the decision of the Administrative Committee). In the context of an objective right of rectification, this therefore covers the possibility for data subjects to put forward their point of view and to have it added to the case file.

However, it is also important to note that the Panel acts as an advisory and not as an investigating body. These two rights (access and rectification) may not therefore be restricted under Article 20(1)(a) of the Regulation, which provides in particular that such a restriction constitutes a necessary measure to safeguard the prevention, investigation, detection and prosecution of criminal offences<sup>8</sup>.

In the application of Article 20(1)(a), a distinction should therefore be made between two situations in connection with the Panel's activities:

- Article 20(1)(a) of Regulation (EC) No 45/2001 does not apply to the Panel, which is an advisory body, when no other circumstances have to be taken into consideration. This means that when the Panel gives its opinion outside the confines of an OLAF investigation, the rights of the data subjects cannot be restricted by the abovementioned article. The scope of Article 20(1)(a) has been extended to OLAF and to administrative and disciplinary inquiry procedures. However, the EPDS considers that its scope should not be further enlarged. Where the Panel gathers information in order to produce an opinion, it is not acting in the framework of an inquiry within the meaning of Article 20(1)(a) of Regulation (EC) No 45/2001. The latter pertains to the competence of OLAF and to administrative and disciplinary inquiry procedures.
- On the contrary, in instances where the Panel considers that a case comes within OLAF's remit, as referred to in Article 75 of the rules implementing the Financial Regulation, it sends the case file without delay to the President of the Court and informs OLAF and the Registrar of the Court. This means that there may be exceptions to the right of access and rectification because it might affect OLAF's future investigations. This interpretation is consistent with the restriction provided for in Article 20(1)(a), not because of the fact that the Panel is conducting an investigation but because OLAF is doing so and because it is up to it to decide whether or not to maintain this restriction.

It is nevertheless possible to envisage the application of another restriction based on Article 20, when considering, for example, the safeguarding of the rights and freedoms of others. It is therefore not possible to rule out restrictions on the rights of the data subjects being necessary in the circumstances referred to in Article 20 of Regulation (EC) No 45/2001.

### **2.2.7. Information to be given to data subjects**

Articles 11 and 12 of Regulation (EC) No 45/2001 concern the information to be supplied to the data subject in order to guarantee transparent processing of his/her personal data. These articles list a series of compulsory and optional items of information. The latter are applicable to the extent that, bearing in mind the particular circumstances of the processing involved, they are necessary to guarantee fair processing of the data in respect of the data subject. In the case to hand, some of the data are collected directly from the data subject and some from other persons.

In the present case, the provisions of Article 11 on the information to be given to the data subject (*Information to be supplied where the data have been obtained from the data subject*)

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<sup>8</sup> The EDPS's interpretation also concerns administrative inquiries and disciplinary cases.

are applicable where the data subjects themselves supply information to the Panel pursuant to Article 60(6) of the Financial Regulation.

In addition, the provisions of Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) apply to persons who are involved in a case of financial irregularity.

An information notice under Articles 11 and 12 of the Regulation will be published on the Intranet and will state the identity of the controller, the purpose of the processing for which the data are intended, the categories of data processed, the recipients or categories of recipients of the data, the existence of a right of access to the data and a right to rectification of the data, the legal basis for the intended processing of the data, the time limit for storing the data and the right to have recourse at any time to the European Data Protection Supervisor. This covers virtually all the elements referred to in Article 11 and 12 of the Regulation. Nevertheless, the EDPS recommends that the information notice available on the Intranet also contain a clear reference to Article 11(d) (whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply).

It is important to note that the provisions of Article 11 are also applicable to persons involved in a case of financial irregularity, where they avail themselves of their right to make comments.

The effect of Article 2(g) also needs to be analysed. Article 2(g) of the Regulation states that "however, authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients".

Article 2(g) is an exception to the right of information (Articles 11 and 12) and, as an exemption from the right of information, must be strictly interpreted as covering specific inquiries. This relates typically to authorities receiving personal data in the course of particular investigations and not the authorities conducting these investigations or conducting audits in general. Authorities such as OLAF receiving data in the course of a particular inquiry will come under the exception in Article 2(g) and no information will therefore be given. This means that the Panel will not be under any obligation to tell the data subjects that data have been communicated to OLAF. No case falling within OLAF's remit has occurred hitherto. Should such a case occur, the Panel would inform OLAF thereof, close the file at its level and inform the Appointing Authority. In the proceedings under examination, the data communicated to OLAF come under the exception in Article 2(g).

This does not mean however that institutions/bodies must not mention the fact of a possible transmission of personal data to such authorities by way of general information. Furthermore, this would be without prejudice to OLAF's informing the data subjects, depending on whether or not Article 20 applied.

### **2.2.8. Security**

Article 22 of Regulation (EC) No 45/2001 provides that 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. These security measures are intended 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.

The European Data Protection Supervisor considers that the security measures adopted are appropriate in terms of Article 22 of the Regulation.

### **3. Conclusion**

The proposed processing does not appear to be in breach of the provisions of Regulation (EC) No 45/2001 provided the following comments are taken into account. This means, in particular, that:

- it must be ensured that the data collected are relevant and adequate for the purpose of the referral to the Panel. In addition, the EDPS considers that the system must be such as to ensure that all elements that have been validly submitted are included in the file;
- provision must be made to state that, if processing for historical, statistical or scientific use is envisaged in the future, the Panel will ensure that the data are rendered anonymous in compliance with Article 4(1)(e);
- the EDPS recommends that the information notice available on the Intranet contains a clear reference to Article 11(d) (whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply).

Done at Brussels, 17 October 2007

(signed)

Joaquín BAYO DELGADO  
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