



Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Central Bank regarding the data processed by the Social Counsellor

Brussels, 6 December 2007 (Case 2007-489)

1. Procedure

On 27 June 2007, the Data Protection Officer (**DPO**) of the European Central Bank (**ECB**) consulted the European Data Protection Supervisor (**EDPS**) on the roles of the different actors involved in the processing of personal data by the Social Counsellor (Case 2007-471). In its reply dated of 26 July 2007, the EDPS stated that he considers the ECB to be the controller of the processing operation in question. The final version of the notification for prior checking was submitted on 26 July 2007.

On 24 August 2007, the EDPS sent a request for additional information to the ECB DPO. The reply provided on 18 September 2007 was accompanied by the following two documents:

- Consultancy agreement dated of 1st August 2007 (prolongation of the renewed Consultancy agreement dated of 13/14 June 2005), including the Terms of Reference;
- Dignity at Work "Guidelines" dated of 19 September 2006, including "Principles of Mediation" (Annex 2).

With respect to the new information provided in the DPO's reply, the EDPS sent another information request on 26 September 2007. The reply provided on 22 October 2007 was accompanied by a Privacy statement that has been recently posted on the ECB Social Counsellor Intranet website.

The draft opinion was sent to the ECB DPO for comments on 23 November 2007 and these were received on 30 November 2007.

2. Facts

2.1. Context

The Social Counsellor is an external consultant who offers professional counselling services aiming at resolution of work-related problems at the ECB. In fact, the Counsellor provides services of an independent and impartial adviser and mediator in order to address employment-related and private problems having impact on the work situation. The ultimate aim is to provide assistance in resolving such problems and as a result to improve the overall working environment at the ECB.

Controller: All processing of personal data by the Social Counsellor within the above mentioned remit takes place on behalf of the ECB. The designated controller for this

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processing operation is the Head of the "Human Resources Policies and Staff Relation Division" of the DG "Human Resources, Budget and Organisation" at the ECB.

Other subjects that may be involved: After a prior written consent of the ECB, the Social Counsellor may make use of sub-contractors and employees (point 1.3 of the Consultancy agreement). In addition, limited secretarial support is provided to the Social Counsellor by the ECB (point 3 of the Consultancy agreement).

2.2. Activities of the ECB Social Counsellor

In the Terms of reference available on the ECB Intranet, the duties and responsibilities of the Social Counsellor are specified as follows:

- provide counselling to ECB staff members on individual request on matters such as work-related stress, bullying/mobbing (psychological harassment), sexual harassment, conflicts/problems/ harassment based on gender, nationality, disability (physical ability), age, religion, language, ethnic background, race, education and profession, sexual orientation, family status, etc.,
- mediate in interpersonal conflicts,
- explore, in situations of tension between members of staff or between management and staff members, the possibilities of reaching mutually acceptable solutions,
- help to avoid escalation of problems between various individuals and groups,
- recognise recurring problems and organisational pathologies,
- promote awareness of good practice / problem areas (coach individuals, e.g. on behavioural patterns, social competence, etc.; propose/publish brochures, info sheets; propose/organise conferences, lectures),
- make use of and possibly develop an external network with peers in others organisations to discuss relevant experience and practices,
- issue an annual report on his/her activities,
- co-operate and liaise with an ECB internal network,
- co-operate and liaise with the Medical Adviser and, with the express consent of the data subject, exchange information with the Medical Adviser.

In no circumstances does the role of the Social Counsellor include decision-making or arbitration powers.

The meetings with the Social Counsellor are confidential and will not be reported to anybody unless a staff member concerned asks for it.

Mediation: The role of the Social Counsellor in the mediation process is described in the Annex 2 to Dignity at Work "Guidelines" in the following manner:

- The role of the mediator is to facilitate communication between the complainant and the alleged wrongdoer in order to promote reconciliation and help the parties to reach an agreed solution.
- The role is not to judge the situation, but to support the involved parties, as an impartial person, to let them find their own solution in a safe environment.
- The mediator should agree with the parties upfront who is to be involved in the mediation.
- Confidentiality should be emphasised to all those involved.
- If the fact of an ongoing mediation is already known to DG Human Resources, Budget and Organisation or the management, the mediator will only report whether a satisfactory outcome was achieved or not.

The mediator cannot get involved in a formal internal administrative inquiry procedure should this arise following the informal mediation¹.

Informal conflict resolution: The Social Counsellor is being recommended to be contacted in case when an informal resolution of an "inappropriate behaviour" incident(s)² is being sought (Table 3 of the Dignity at Work "Guidelines" entitled "Seek the support of the Social Counsellor")³.

2.3. Confidentiality obligations imposed on the Social Counsellor

Statutory obligation imposed on recognised social worker: According to the additional information provided on 22 October 2007, the Social Counsellor is covered by the professional confidentiality on the basis of §203 (1) No. 5 German Penal Code (**StGB**). This provision states the following: "*Whoever, without authorisation, discloses a secret of another, in particular a secret which belongs to the realm of personal privacy or a business or trade secret, which was confided to, or otherwise made know to him in his capacity as a state recognised social worker, shall be punished with imprisonment for not more than one year or a fine*".

(The provision of §203 (1) No. 3 StGB establishes the same obligation as regards lawyers which is to be combined with the attorney privilege laid down in § 43a (2) Federal Attorney's Act (**BRAO**)).

Confidentiality clause laid down in the Consultancy agreement: According to point 9 of the Consultancy agreement submitted on 18 September 2007, "*the Consultant shall not divulge to unauthorised persons nor use for his own purposes any information relating to the Services or the ECB, except with the prior written consent of the ECB. The Consultant shall require its employees, and sub-contractors, if any, to maintain secrecy to the same extent.*"

2.4. Data subjects

Mainly ECB employees, rarely agency staff (contract agents) or other consultants

2.5. Data processed

The data processed are provided by the person seeking assistance of the Social Counsellor and consist of information about working or personal situation necessary to discuss or solve their problem. Regularly, the name and the job function / position of the person concerned are being collected and stored by the Counsellor.

¹ The ECB internal administrative inquiries were already subjected to prior checking (EDPS opinion of 22 December 2005 in case **2005-209**), as well as the ECB disciplinary procedures (EDPS opinion of 8 March 2006 in case **2004-270**).

² In Annex 1 to the Dignity at Work "Guidelines", the following examples of inappropriate behaviour are being given:

- offensive or inappropriate jokes related to gender, race, etc;
- offensive language in words and volume;
- visual displays of offensive material on posters, via e-mail, etc;
- intimidating, aggressive or humiliating behaviours;
- unwelcome physical contact;
- assault.

³ The other aspects of the Dignity at Work related to the informal resolution process (involving the local management and the HR Business Partner) might be subject to a separate prior checking in line with Article 27 of the Regulation.

In addition, depending on the circumstances of the concrete case, the following information may be processed by the Counsellor: health-related data (but not medical certificates), information about nationality, family status, age, qualification, ethnical origin, religious beliefs, sex life, as well as data relating to (alleged) criminal offences (see point 6 of the "Dignity at Work" Guidelines").

In cases of reported interpersonal conflicts, data relating to other staff members involved may be processed as well.

The Counsellor files consist of copies of relevant documents provided by the persons concerned and e-mails necessary for dealing with the problems, as well as minutes written "just for his/her own memory".

2.6. Information to the data subjects

According to the additional information provided on 22 October 2007, the following privacy statement was placed on the ECB Social Counsellor's Intranet webpage:

"The personal data processed by the ECB Social Counsellor is accessible by data subjects in line with Regulation (EC) 45/2001 on the protection of personal data by Community institutions and bodies and on the free movement of such data. The time-limit for storing relevant data is 12 months upon closure of the file. The data can be accessed by data subjects according to modalities aimed at respecting the rights of individuals concerned. For all queries related to those data the ECB Social Counsellor is the contact point. Data subjects have the right to have recourse to the European Data Protection Supervisor."

2.7. Data retention

According to the privacy statement recently placed on the Intranet (submitted in the DPO reply of 22 October 2007), the time limit for storing relevant data is 12 months upon closure of the file.

The statistical data needed for the annual report are used in an absolute anonymous way.

2.8. Data transfers

Confidentiality: As indicated above, pursuant to §203 (1) No. 5 StGB, as well as point 9 of the Consultancy agreement, the Counsellor is subjected to an obligation of professional secrecy and confidentiality with respect to the personal data processed within the services provided on behalf of the ECB. This implies that - in principle - all data processed shall stay with the Counsellor, unless the person concerned is requesting otherwise.

Consent of the data subject: In agreement with the person concerned, the Counsellor may inform designated members of the staff of the Directorate General Human Resources, Budget and Organisation or the management of the business unit concerned that conflict situation with a particular person have been reported and need to be addressed.

At the request of the person concerned, personal data may be transferred to the Medical and Ethics Advisors with the aim to find an appropriate solution (the transfers to the Medical Advisor occur in less than five percent of the cases).

At the explicit request of the person concerned, the Counsellor may contact external specialist on the person's behalf in order to ensure an appropriate professional follow-up. (In regular cases, the external specialists are being contacted by the persons concerned who have received the contact details from the Counsellor).

In principle, the consent of the person seeking the Counsellor's assistance is needed for disclosure of his/her identity and related facts within the "Dignity at Work" procedure, such as in cases of awareness about criminal offences committed by such person or in case of his/her extreme distress (point 6 of the Dignity at Work "Guidelines"⁴). The recipient of such data may be the Director General "Human Resources, Budget and Organisation", the ECB Medical Service, as well as the police or an external medical professional.

2.9. Rights of the data subjects

As indicated in the privacy statement (submitted on 22 October 2007), the personal data processed by the Counsellor are "*accessible in line with Regulation 45/2001*" and "*can be accessed according to modalities aimed at respecting the rights of individuals concerned*". In addition, it is indicated that "*the contact point for all queries concerning those data*" shall be the Social Counsellor.

According to the information submitted on 18 September 2007, as regards the exercise of the data subject's rights (access, rectification, blocking, erasure and objection), the Social Counsellor follows the **ECB Data Protection Implementing Rules**⁵. Thus, in principle, the Counsellor has to grant access to all documents contained in its files within three months of receipt of the request; no request for access to the Counsellor's minutes has been submitted insofar.

In addition, the applicability of the ECB Data Protection Implementing Rules means that all the data subject's rights can be restricted only after a prior consultation of the DPO "*on the grounds, and in accordance with the conditions, set out in Article 20 of Regulation (EC) No 45/2001*".

2.10. Security measures

(...)

3. Legal aspects

3.1. Prior checking

Applicability of the Regulation: As indicated above, within the provision of the consultancy services, the Social Counsellor collects, stores, uses, transmits and eventually erases personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). All these processing activities are performed on behalf of the European

⁴ "*The parties involved in the process may in certain circumstances reasonably disclose facts and identity of the complainant if necessary for further action. Such circumstances, for example, could be when they have been made aware of an incident that can be classified as a criminal offence, such as assault, or when they believe that the complainant is under extreme distress and their health and well-being is being severely affected as a result of the alleged incident(s). In such circumstances, the complainant should be made aware that the disclosure of facts and identity is determined to be the appropriate course of action. Disclosure in such circumstances will involve the Director General Human Resources, Budget and Organisation.*"

⁵ Decision 2007/279/EC adopting implementing rules concerning data protection at the European Central Bank of 17 April 2007

Central Bank (cf. in detail point 3.9) in the exercise of activities falling within the scope of Community law (Article 3 (1) of the Regulation). All the processing operations are manual, but the Counsellor keeps structured files (Article 3 (2) of the Regulation) consisting of copies of documents provided by the staff members concerned, e-mails exchanged and own minutes. Therefore, the Regulation (EC) 45/2001 is applicable.

Grounds for prior checking: Article 27 (1) of Regulation (EC) No 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.

As indicated above, the present case may concern "*processing of data relating to health and to suspected offences, offences, criminal conviction or security measures*" (Article 27 (2) (a) of the Regulation) and "*processing operations intended to evaluate personal aspects relating to the data subject*" (Article 27 (2) (b) of the Regulation). The persons concerned may ask for assistance in health related matters, as well as in situations of inappropriate behaviour, such as harassment or assault. In addition, the counselling involves evaluation of personal aspects of the person concerned, such as evaluation of his social competences. Therefore, the processing of the personal data by the Social Counsellor shall be subject to prior checking.

Ex-post prior checking: 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.

Deadlines: The present notification was received on 26 July 2007. According to Article 27 (4) of the Regulation, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 51 days (44 + 7) plus August. Consequently, the present opinion must be delivered no later than 17 December 2007 (16 December being Sunday).

3.2. Lawfulness of the processing

The lawfulness of the processing operations performed by the ECB Social Counsellor must be examined in light of Article 5 of Regulation 45/2001.

Performance of a public interest task: Pursuant to Article 5 (a) of the Regulation, the processing is lawful if it is "*necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the EC or other legal instrument adopted on a basis thereof or in the legitimate exercise of official authority vested in the Community institution or body*". According to Recital 27 of the Regulation, such processing includes "*the processing of personal data necessary for the management and functioning of those institutions and bodies*".

The legal basis for the processing in question can be found in the following provisions:

- Article 9 (c) of the ECB Conditions of Employment for Staff, as well as Article 15 of the ECB Conditions of Short-Term Employment stating that "*the ECB shall apply the general principles of the EC law*" and that "*in interpreting the rights and obligations under the present Conditions of Employment, due regard shall be shown for the authoritative principles of the regulations, rules and case law which apply to the staff of EC*

institutions". The "access to measures of social nature adopted by the institution" is guaranteed in Article 1e (e) of the Staff Regulations (read together with Article 10 and 79 (4) of the Conditions of Employment of Other Servants of the EC).

- Article 4 (a) of the ECB Conditions of Employment for Staff, as well as Article 4 of the ECB Conditions of Short-Term Employment stating that "*the members of staff, as well as the short-term employees shall conduct themselves in a manner befitting their position and the character of the ECB as a Community body, also by complying with the principle of dignity at work*".
- Article 2.1 of the ECB Code of Conduct⁶ stating that "*sexual harassment or psychological or physical bullying of any kind whatsoever will not be tolerated by the ECB*". This provision was implemented in the ECB Dignity at Work "Guidelines" dated of 19 September 2006⁷.

The processing of personal data on behalf of the ECB for the purpose of solving employment-related problems and the overall improvement of the working environment at the ECB is necessary for the performance of the managerial tasks of the employer in accordance with the ECB Conditions of Employment for Staff, the ECB Conditions of Short Employment, the ECB Code of Conduct, as well as the ECB Dignity at Work "Guidelines".

Consent of the data subject: As much as data processed by the Social Counsellor are provided by the data subjects, Article 5 (d) of the Regulation is applicable as well. According to this provision, the processing of personal data is lawful if "*the data subject has unambiguously given his or her consent*".

The data subject's consent is defined in Article 2 (f) of the Regulation pursuant to which it is "*any freely given specific and informed indication of his wishes by which the data subjects signifies his agreement to personal data relating to him being processed.*" The consent is therefore based on information provided in line with Articles 11 and 12 of the Regulation (that are discussed in point 3.8).

In the view of the above, the EDPS considers the processing in question as being lawful.

3.3. Processing of special categories of data

Pursuant to Article 10 (1) of the Regulation, "*the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and of data concerning health or sex life is prohibited*" unless in specific predefined circumstances.

Obligation of the controller acting as employer: Article 10 (2) (b) of the Regulation allows for processing of the above mentioned categories of data in case the processing is "*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 EC or other legal instruments adopted on the basis thereof*". As explained above, the purpose of the processing in question is the compliance with obligations of the ECB acting as employers in accordance with the ECB Conditions of Employment for Staff, the ECB Conditions of Short Employment, the ECB Code of Conduct, as well as the ECB Dignity at Work "Guidelines".

⁶ Code of Conduct of the European Central Bank in accordance with Article 11.3 of the Rules of Procedure of the European Central Bank (2001/C 76/11), OJ C 76/12 of 8 March 2001

⁷ adopted by the Director General Human Resources, Budget and Organisation ((06) 589b CSR SJ/bk EQUAL)

Consent of the data subject: Article 10 (2) (a) of the Regulation allows for processing of the above mentioned categories of data in case *"the data subject has given his express consent to the processing"*. As indicated above, this provision is applicable inasmuch the data are provided voluntarily by the respective data subject. In any case, the consent is based on information provided in line with Articles 11 and 12 of the Regulation (discussed in point 3.8).

Processing of data relating to offences: Pursuant to Article 10 (5) of the Regulation, *"processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof, or if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards"*. In the present case, the processing of this special category of data is authorised on a basis of the ECB Dignity at Work "Guidelines" adopted on a basis of Article 2.1 of the ECB Code of Conduct.

In the view of the above, the EDPS considers that all special categories of data are processed in compliance with Article 10 of the Regulation.

3.4. Data Quality

Adequacy, relevance and proportionality: According to Article 4 (1) (c) of the Regulation, personal data must be *"adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed"*.

The data processed within the counselling activities can be quite extensive (ranging from health related data to information about family situation) which makes it difficult to assess the compliance with the principles of adequacy, relevance and proportionality. Therefore, the EDPS recommends that all persons that could be involved in the counselling activities (including the Social Counsellor's employees and sub-contractors, as well as the ECB secretary) are being informed of their obligation to observe the principles set out in Article 4 (1) (c) of the Regulation.

Accuracy: Article 4 (1) (d) of the Regulation provides that personal data must be *"accurate and, where necessary, kept up to date"* and *"every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified"*. As indicated above, the data processed are provided by the person seeking assistance of the Social Counsellor and the concerned persons can make use of their rights of access and rectification to ensure the accuracy of their personal data stored in the Social Counsellor's file (cf. point 3.7). Therefore, the EDPS considers that Article 4 (1) (d) of the Regulation is being complied with.

Fairness and lawfulness: Article 4 (1) (a) of the Regulation also provides that personal data must be *"processed fairly and lawfully"*. Lawfulness has already been discussed (see point 3.2) and fairness will be dealt with in relation to information provided to data subjects (see point 3.8).

3.5. Data retention

Article 4 (1)(e) of the Regulation states that personal data must be *"kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed"*. In addition, *"the personal data which are to be stored for longer periods for statistical purposes should be kept*

either in anonymous form only, or if that is not possible, only with the identity of the data subject encrypted" and "shall not be used for any other purpose".

As indicated above, the data are being kept for 12 months upon the closure of the file and all statistical data are used in an anonymous way only. The EDPS considers that Article 4 (1) (e) of the Regulation is being fully complied with.

3.6. Transfer of data

Articles 7, 8 and 9 of Regulation (EC) No 45/2001 set out certain obligations that apply when the processed data are being transferred to third parties. The rules differ depending on whether the transfer is made to or within a Community institution or body (based on Article 7), to recipients subject to Directive 95/46/EC (based on Article 8), or to other types of recipients (based on Article 9).

As indicated above, the personal data contained in the Social Counsellor's file may be transferred to the following recipients:

- designated members of staff of the Directorate General Human Resources, Budget and Organisation;
- management of the business unit concerned;
- Ethics Advisor;
- Medical Advisor / Medical Service;
- external specialists (doctor, psychiatrists, lawyer etc.);
- the police (in case the Social Counsellor has been made aware of an incident that can be classified as a criminal offence, such as assault, in terms of point 6 Dignity at Work "Guidelines");
- sub-contractors used by the Social Counsellor in line with points 1.3 and 9 of the Consultancy agreement.

Intra-institutional transfers: The transfers within the ECB shall be examined in light of Article 7 of the Regulation 45/2001. This Article provides that *"personal data can be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient"* (paragraph 1) and that *"the recipient can process the data only for the purposes for which they were transmitted"* (paragraph 3).

The EDPS notes that the ECB internal transfers fall within the legitimate performance of the tasks covered by the competence of the respective recipient. In fact, the (informal and formal) resolution of inter-personal conflict between the staff members lies within the competence of the management of the concerned unit, as well as the designated persons in the DG "Human Resources, Budget and Organisation". The in-house professional follow-up in certain work related cases dealing with (inappropriate) professional conduct and health-related issues clearly comes within the respective competences of the Ethics and Medical Advisors / Service.

Nevertheless, in order to ensure full compliance with Article 7 of the Regulation, the EDPS recommends that before any such transfer, the necessity of the transmission of the respective data is being examined on a case-by-case basis. In addition, all recipients shall be reminded of their obligation to process the data only for the purpose for which they were actually transmitted.

Transfer to recipients subject to Directive 95/46/EC: The transfers to the German police, as well as to the external specialists and the Social Counsellor's sub-contractors established in Germany shall be examined in light of Article 8 of the Regulation. This Article allows for transfers to recipients subject to (the national law adopted for the implementation of) Directive 95/46/EC⁸ provided that *"the recipient establishes that the data are necessary for the performance of a task carried out in a public interest or subject to the exercise of public authority"* (point a) or *"the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced"* (point b).

As regards the possible transfer of data relating the criminal offences to the police, the EDPS is of the opinion that such a transfer may lawfully occur on the basis of Article 8 (a) of the Regulation. In fact, the investigation and prosecution of offences clearly represents performance of a task carried out in the public interest.

As regards transfer of personal data other than data relating to offences to external specialists (doctor, psychiatrists, lawyers etc.), as well as to the Social Counsellor's sub-contractors, the EDPS notes that the purpose of these transfers is to establish a helping relationship for the person concerned so that there is no reason to assume that the data subject's legitimate interests may be prejudiced.

In order to ensure the full compliance with Article 8 of the Regulation, the EDPS recommends that the necessity of the transmission of all respective data is being examined on a case-by-case basis. With respect to the professional secrecy and confidentiality obligations imposed on the Social Counsellor, the necessity of data transfers to the police and to the external specialists shall be examined by the sender (and not by the recipients).

Transfers to recipients not subject to Directive 95/46/EC: The data transfers to external specialists, as well as the Social Counsellor's sub-contractors not subjected to any national measure transposing Directive 95/46/EC shall be examined in light of Article 9 of the Regulation. In principle, transfers to such recipients may occur only *"if an adequate level of protection is ensured in the country of the recipient or within the recipient international organisation and the data are transferred solely to allow tasks covered by the competence of the controller to be carried out"* (paragraph 1), unless *"the data subject has given his unambiguous consent to the proposed transfer"* (paragraph 6 (1) (a)) or *"the transfer is necessary in order to protect the vital interests of the data subject"*.

3.7. Rights of access and rectification

Article 13 of the Regulation establishes a right of access upon request by the data subject. Article 14 of the Regulation provides the data subject with *"the right to rectify inaccurate or incomplete data"*.

As indicated in the privacy statement posted recently on the ECB Social Counsellor's Intranet webpage, personal data processed by the Social Counsellor are *"accessible in line with Regulation 45/2001"* and *"can be accessed according to modalities aimed at respecting the*

⁸ Federal Data Protection Act (Bundesdatenschutzgesetz) adopted 18 May 2001 and published in the Bundesgesetzblatt I Nr. 23/2001, page 904 on 22 May; Data Protection Act of Hesse (Hessisches Datenschutzgesetz) of 7 January 1999 and as to the police, § 13 of Public Security and Public Order Act of Hesse (Hessisches Gesetz über die öffentliche Sicherheit und Ordnung) of 26 June 1990 in a version from 14 January 2005

rights of individuals concerned". In addition, it is indicated that *"the contact point for all queries concerning those data"* shall be the Social Counsellor.

The EDPS welcomes the fact that the persons concerned have rights of access to all documents contained in the Social Counsellor's file, including her own minutes.

As to the right of rectification, the EDPS notes that all factual data processed by the Social Counsellor are provided by the respective data subjects. This implies that the data subject can easily submit other data to the Social Counsellor in order to rectify the previously submitted inaccurate or incomplete factual data.

As regards data of a subjective nature contained in the Social Counsellor's minutes (such as evaluation of the behaviour or social competences of the person concerned), the EDPS is of the opinion that the person concerned should be given a possibility to express his or her point of view in order to ensure the completeness of the file.

Restrictions: The rights of access and rectification may be restricted in terms of Article 20 (1) of the Regulation, in particular *"where such a restriction constitutes a necessary measure to safeguard the prevention, investigation, detection and prosecution of criminal offences"* (point a) and/or *"the protection of the data subject or the rights and freedoms of others"* (point c). In such a case, *"the data subject must be informed of the principal reasons on which the application of the restriction is based of and of his right to have a recourse to the EDPS"* (Article 20 (3) of the Regulation), unless such information would deprive the imposed restriction of its effect (Article 20 (5) of the Regulation).

In line with Article 10 of the ECB Data Protection Implementing Rules, any restriction of the rights of access and rectification can take place only after a prior consultation of the DPO *"on the grounds, and in accordance with the conditions, set out in Article 20, the Regulation (EC) No 45/2001"*.

The EDPS welcomes the fact that the eventual refusal of access or rectification of one's own personal data will be determined on a case-by-case basis in accordance with Article 20 of the Regulation. Special attention has to be paid in case of "third party" requests with respect to data disclosed by another staff member (such as in harassment cases).

3.8. Information to the data subject

In order to ensure transparency and fairness of the processing of personal data, Articles 11 and 12 of Regulation 45/2001 provide for certain information to be supplied to the data subjects. The provision of Article 11 is applicable in case *"the data have been obtained from the data subject"*, the provision of Article 12 in case the data have been obtained from another source. In the present case, the ECB staff member seeking assistance of the Social Counsellor provides data concerning his own person, as well as data related to other persons. In addition, certain (evaluation) data are provided by the Social Counsellor. Consequently, both Articles 11 and 12 of the Regulation are applicable.

The Privacy statement: The privacy statement placed recently on the ECB Social Counsellor's Intranet webpage provides for the following information:

- existence of the right of access, including information where to lodge such request (with the processor);
- time limits for the storing of the processed data,
- right to have recourse to the EDPS.

The privacy statement may refer to the right of rectification ("all queries related to the personal data processed by the Social Counsellor") as well. Some information about the purpose of processing may be found on the same webpage under the Heading "Social Counsellor" (provision of independent and impartial counselling and mediation service in cases of conflict at work). In addition, it is specified that meetings with the Social Counsellor are treated with strict confidentiality and with utmost discretion.

In order to ensure the full compliance with Articles 11 and 12 of the Regulation, the EDPS recommends that the following information is included into the privacy statement:

- exact identity of the controller (Head of Human Resources and Staff Relation Division, Directorate General Human Resources, Budget and Organisation),
- purpose of the processing operation (as referred to in the Terms of Reference above),
- recipients of the data in case transfers (designated members of staff of the Directorate General Human Resources, Budget and Organisation; management of the business unit concerned, Ethics Advisor, Medical Advisor / service; police, external specialist and the Social Counsellor's sub-contractors);
- existence of the right of rectification, including modalities of its exercise;
- legal basis of the processing operation (taking into account EDPS comments made in point 3.2).
- any other useful information, as for example the confidentiality of the Social Counsellor's files

Only then an informed consent for the purpose of Articles 5 (d) and 10 (2) (a) of the Regulation can be assumed.

Exceptions: According to Article 12 (2) of the Regulation, the obligation to inform data subject is not applicable in case *"the provision of such information would involve a disproportionate effort"*. This provision may be applicable in private problems related counselling where the person seeking assistance of the Social Counsellor provides personal data of third persons, such as his/her family members. In such a case, the EDPS recommends that the third person is being informed about his/her rights in terms of Article 12 of the Regulation by the person seeking assistance of the Social Counsellor. To this aim, the respective ECB Internet web page should be indicated as well. In other cases involving third persons' data, the applicability of Article 20 (1) (c) of the Regulation could be considered.

Other means of communication: The revised privacy notice should be also placed on the ECB Internet web page. Furthermore, the EDPS would like to suggest that the revised privacy notice is being posted in the Social Counsellor's waiting room, as well as included in the Social Counsellor's emails exchanged with the persons concerned. The information contained in the revised privacy notice may also be provided at the first meeting with the Social Counsellor.

3.9. Processing data on behalf of controllers

Determination of the controller and the processor: As indicated above, the role of controller and processor involved in the present data processing operation has been already clarified in a preceding consultation (Case 2007-471). The ECB (in this case the Head of the "Human Resources Policies and Staff Relation" Division of the Directorate General "Human Resources, Budget and Organisation") has to be considered as the controller within the meaning of Article 2 (d) of the Regulation 45/2001 since it clearly determines the purpose and the means of the processing, notably the solution of the work-related problems and the

improvement of the working environment at the ECB. The Social Counsellor offering the actual consultancy services has to be considered as a processor processing personal data on behalf of the ECB in line with Article 2 (e) of the Regulation.

Contract concluded between the controller and the processor: Article 23 of the Regulation 45/2001 stipulates that the controller must "*choose a processor providing sufficient guarantees in respect of the technical and organisational security measures required by Article 22 of the Regulation*" (paragraph 1) and that "*the carrying out of a processing operation by way of a processor must be governed by a contract or legal act binding the processor to the controller*" stipulating, in particular, that the processor has also to comply with **obligations of confidentiality and security** as set out in Articles 21 and 22 of the Regulation or in the respective national law transposing Articles 16 and 17 (3) of Directive 95/46/EC (paragraph 2) .

According to Article 21 of the Regulation and/or Article 16 of Directive 95/46/EC, the processor, persons acting under his authority, as well as persons acting under the authority of the controller "*shall not process personal data except on instructions from the controller, unless required to do so by law*" ("confidentiality of processing").

Article 22 of the Regulation and/or Article 17 (3) of Directive 95/46/EC specify that appropriate technical and organisational measures must be adopted by the controller and the processor "*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 shall be taken 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 Consultancy agreement concluded between the ECB and the Social Counsellor on 1st August 2007 includes a specific data protection clause (point 7) and confidentiality clause applicable to the Social Counsellor, his/her employees and subcontractors (point 9). (...)

(...)

In order to ensure the full compliance with Articles 22 and 23 of the Regulation, the EDPS recommends that all persons involved in the processing in question (the Social Counsellor, his/her employees and subcontractors, as well as the ECB secretary provided to assist to the Social Counsellor) are reminded of their confidentiality and security obligations laid down in Articles 21 and 22 of the Regulation and/or 16 and 17 (3) of Directive 95/46/EC.

In addition, the confidentiality clause provided for in the Consultancy agreement shall make reference to the applicable national data protection rules.

4. Conclusion

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

- the Social Counsellor, his/her employees and sub-contractors (if any) shall be informed of their obligation to observe the data quality principles set out in Article 4 (1) (c) of the Regulation;

- the necessity of transfers of data processed by the Social Counsellor shall be examined on a case-by-case basis before any transfer based on Article 7 or 8 of the Regulation occurs;
- the designated members of staff of the Directorate General "Human Resources, Budget and Organisation", the management of the business unit concerned, as well as the Ethics and Medical Advisors shall be reminded of their obligation set out in Article 7 (3) of the Regulation;
- the data subjects shall, in principle, be given a possibility to express their point of view with respect to data of subjective nature contained in the Social Counsellor's minutes in line with Article 14 of the Regulation;
- the privacy statement is being revised in light of Articles 11 and 12 of the Regulation in order to include information about the exact identity of the controller, the purpose of the processing, the recipients, the right of rectification, as well as the legal basis of the processing;
- the revised privacy statement is also being posted on the ECB Internet webpage and in the Social Counsellor's waiting room, as well as included in the Social Counsellor's emails exchanged with the persons concerned;
- information listed in Articles 11 and 12 of the Regulation are also provided at the first meeting with the Social Counsellor;
- the Social Counsellor, his/her employees and subcontractors (if any), as well as the ECB secretary provided to assist to the Social Counsellor shall be reminded of their confidentiality and security obligations laid down in Articles 21 and 22 of the Regulation and/or 16 and 17 (3) of Directive 95/46/EC.;
- the confidentiality clause provided for in the Consultancy agreement shall make reference to the applicable national data protection rules.

Done at Brussels, 6 December 2007

Peter HUSTINX
European Data Protection Supervisor