



Opinion on a notification for prior checking received from the Data Protection Officer of the European Commission on the "Determination by the Financial Irregularities Panel (FIP) of the existence and possible consequences of financial irregularities at the European Commission"

Brussels, 15 March 2006 (Case 2005-407)

Procedure

On 20 July 2004 the European Data Protection Supervisor (EDPS) sent a letter to Data Protection Officers (DPOs) asking them to help establish an inventory of the data-processing operations that might be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) No 45/2001. The EDPS requested notification of all processing operations subject to prior checking, including those that commenced before the Supervisor was appointed, for which checking could clearly not be regarded as prior, but which would be subject to "*ex post*" checking.

On the basis of the lists received from Data Protection Officers (DPOs), the EDPS identified a number of priority areas, namely data processing operations relating to disciplinary, staff evaluation and medical matters. On 10 November 2005 the EDPS wrote to all DPOs asking them to update their inventories. The European Commission's acting DPO submitting a list of cases requiring such "*ex post*" prior checking, including one relating to the Financial Irregularities Panel (FIP) and the determination of the existence and possible consequences of financial irregularities, since it involved information connected with the evaluation of personal aspects relating to the data subjects, including their ability, efficiency and conduct (Article 27(2)(b) of Regulation No 45/2001).

By e-mail dated 20 December 2005 the Data Protection Officer (DPO) of the European Commission sent a notification under Article 27(3) of Regulation (EC) No 45/2001 with regard to the determination of the existence and possible consequences of financial irregularities - Financial Irregularities Panel (FIP).

On 15 February 2005 a number of questions were put to the DPO by e-mail, to which answers were received on 6 March 2006. Further points were raised on 9 March 2006 and answered on 14 March 2006.

1. Facts of the case

The Financial Irregularities Panel (hereinafter "the Panel") is a specialised body set by a Commission Decision of 9 July 2003 (hereinafter the "Commission Decision")¹ to look into financial irregularities. It is a permanent body consisting of a chairman and three members assisted by a secretary. The chairman and members are appointed for a two-year period,

¹ C(2003) 2247/3.

which is renewable.¹ It should be noted that the Panel is a recent entity, which has had limited administrative experience.

Without prejudice to the powers of the European Anti-Fraud Office (OLAF), the Panel is competent in respect of any infringement of a provision of the Financial Regulation or of a provision relating to financial management or the checking of operations resulting from an act or omission of an official or other servant.²

The Panel's role is twofold: it both receives information referred by Commission staff acting under Article 60(6) of the Council Regulation on the Financial Regulation applicable to the general budget of the European Communities³, and gives opinions on matters referred to it by the Appointing Authority or by the Authority empowered to conclude contracts of employment (AECE) in the event of financial irregularities.

In the first case, i.e. when the Panel is directly informed of a matter by a member of staff, it transmits the file to the Appointing Authority or, where appropriate, to the AECE, and informs the member of staff accordingly. In the second case, i.e. when a case is referred to it by the Appointing Authority or the AECE, the Panel delivers an opinion evaluating whether financial irregularities have occurred, how serious they are and their possible consequences. Should the Panel's analysis suggest that the case referred to it is a matter for OLAF, it returns the case-file to the Appointing Authority or to the AECE without delay and informs OLAF at once.

The data subjects are both Commission staff members who send information to the Panel under Article 60 of the Council Financial Regulation and the staff members involved in a possible financial irregularity.

The data collected concern possible infringements of provisions relating to financial management or the checking of operations resulting from an act or omission of an official or other servant. In the case of a Commission staff member acting under Article 60 of the Council's Financial Regulation, the data subject is asked to give his forename, surname and the department in which he works. Where the Panel is consulted by the Appointing Authority or the AECE, it is able to obtain all the necessary background information for its opinion as to whether or not an irregularity has occurred which may make the official or servant liable to disciplinary action and payment of compensation. The Panel uses only the data collected by other departments and it does not itself establish new sets of personal data.

The Panel's office is in the OLAF building, thus ensuring that it is specially protected and that access to it is severely restricted. All sensitive documents are kept in the Panel's office, which is locked. All information is sent to the Panel secretariat. The chairman⁴ is required to provide each member of the Panel with all the information and documentation pertaining to each case; he or she asks them if they prefer to receive copies or to consult the documents in the Panel's office. Panel members and secretariat staff are aware of their duty to comply with

¹ Article 6 of the Commission Decision.

² Article 74 of the Commission Regulation of 23 December 2002 laying down detailed rules for the implementation of the Council Regulation on the Financial Regulation.

³ OJ L 248, 16.9.2002.

⁴ Under Article 7 of the Commission Decision the chairman is appointed by the Commission Member responsible for Personnel and Administration in agreement with the President of the Commission and the Commission Member responsible for the Budget and is chosen from among former members of the Court of Auditors or Court of Justice or former officials who have held at least the rank of Director-General in a Community Institution other than the Commission. The person chosen must have a specific qualification and extensive professional experience in financial matters and practical experience of working in the Community Institutions.

the data protection legislation and the Commission's security rules so that the files are properly protected. In any event, the chairman and members of the Panel must receive all the information communicated in the notification of a case. These are: the forenames and surnames of the officials concerned and the departments in which they work, and the facts on which the Panel's opinion has been sought. The documents relating to a specific case are sent to the chairman of the Panel by registered mail, and to Panel members in a double envelope or by mail with advice of delivery.

Article 11 of the Commission Decision stipulates that "the Panel shall be competent to consider only events occurring after 1 January 2003"; to date it has received only two notifications. These consist of files and Excel tables. The individual case-files (the notifications) are stored in hard copy, and documents and opinions are stored in electronic form. The Panel's opinions are currently kept in a locked metal cupboard. All Panel members have equal rights of access to the data, ensuring that they can take part in the Panel's work and voting, which are confidential. The Panel receives copies of the notified information; sensitive documents are not sent by e-mail.

Under Article 4 of the Commission Decision and Article 5 of the Panel's Rules of Procedure, if in cases referred to it by the Appointing Authority the Panel considers that it is not sufficiently well informed about what has occurred or the attendant circumstances, it may ask the IDOC (Investigation and Disciplinary Office of the European Commission) or OLAF (European Anti-Fraud Office) (in cases on which OLAF has reported) to provide the information needed. If in such cases, new facts relating to an official or other servant emerge, the Panel asks him/her to submit comments either orally or in writing. If the Panel finds that an official or other servant has committed an irregularity, it asks him/her to submit comments.

On completing its proceedings, the Panel issues a reasoned expert opinion as required by the Appointing Authority, or the AECE, on whether or not an irregularity has occurred which may render an official or other servant liable to disciplinary proceedings and the payment of compensation. The Panel's opinions and recommendations are addressed to the Appointing Authority of the staff members concerned and are transmitted by the Panel's secretary to the staff members directly concerned. It should be noted that such opinions and recommendations are not binding on the Appointing Authority and that, in giving its opinion, the Panel does not advise on disciplinary action¹. Where its proceedings have also detected systemic problems, the Panel adopts a report with recommendations within 20 working days of adopting its opinion; the report is sent to the College, the Internal Audit Service and the authorising officer by delegation concerned, provided that the latter is not the person involved.

The data pertaining to the case may be stored for five years. However, the Panel is to review this data-retention period at a forthcoming meeting. A period of five years is considered necessary in order for the budgetary authority and the Court of Auditors to obtain relevant information if necessary and, by the same token, for an official concerned to bring an appeal.

Data subjects are kept informed of all data communicated to the Panel in connection with its tasks. Where a case is referred to the Panel by the Appointing Authority, data subjects are informed of the IDOC and/or OLAF reports adopted on the basis of earlier IDOC and/or OLAF administrative enquiries. A mission statement and general information on the Panel's responsibilities have been published on DG-Administration's Intranet site and the DG Budget website (BUDGEWEB). General information on Articles 11 and 12 of Regulation

¹ Article 5 of the Commission Decision.

No 45/2001 for general staff distribution is also to be prepared and will be published shortly on the Administrative Notices page.

2. Legal aspects

1. Prior checking

Regulation 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)). The processing operation under consideration is carried out by the Commission Panel (i.e. a body established by that Community institution) and within the framework of first pillar activities; it is therefore within the scope of Community law.

Regulation 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 under consideration falls within the scope of Regulation (EC) No 45/2001 in that 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(1) of Regulation No 45/2001 makes "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" subject to prior checking by the European Data Protection Supervisor.

Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks, such as the "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)). The case in hand concerns the processing of personal data to evaluate personal aspects relating to the data subject (notably his or her conduct), but also personal data relating to suspected offences (Article 27(2)(a)). This case therefore falls within the scope of the prior checking procedure.

The DPO's notification was received on 20 December 2005. This opinion must therefore be delivered within two months of that date, as laid down in Article 27(4) of the Regulation.

A number of questions were asked by e-mail on 15 February 2006. In accordance with Article 27(4) of Regulation (EC) No 45/2001, the two-month period within which the European Data Protection Supervisor must deliver his opinion was suspended while replies to those questions were obtained. The replies were given by e-mail on 6 March 2006, but the suspension was renewed on 9 March 2006 as certain points needed to be clarified. Replies were received on 14 March 2006; there were thus a total of 14 days of suspension. The European Data Protection Supervisor will deliver his opinion no later than 20 March 2006 (18 March is not a working day).

2. Legal basis and lawfulness of processing

The legal basis for the data processing operation under consideration is Articles 60 and 66 of the Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities Financial

Regulation. Additional legal bases are Article 1 of the Commission Decision of 9 July 2003 and Article 47(4) of Commission Regulation No 2343/2002 of 23 December 2002.

Thus, 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."*

In addition, Article 66(4) stipulates that *"Each institution shall set up a specialised financial irregularities panel which shall function independently and determine whether a financial irregularity has occurred and what the consequences, if any, should be. On the basis of the opinion of this panel, the institution shall decide whether to initiate proceedings entailing liability to disciplinary action or to payment of compensation. If the panel detects systemic problems, it shall send a report with recommendations to the authorising officer and to the authorising officer by delegation, provided the latter is not the person involved, as well as to the internal auditor."*

Similarly, Article 1 of the Commission Decision states that *"A specialised Financial Irregularities Panel is hereby instituted for the purposes of determining the existence and consequences of financial irregularities in cases referred to it by the Commission and members of staff of the Commission pursuant to Articles 60(6) and 66(4) of the Financial Regulation."*

Lastly, under Article 47(4) of Commission Regulation No 2343/2002 of 23 December 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 *"The panel set up by the Commission to determine whether a financial irregularity has occurred and what the consequences, if any, should be, in accordance with Article 66(4) of the general Financial Regulation, may exercise the same powers in respect of the Community body as it does in respect of Commission departments, if the management board so decides"*. In the event of a future decision to extend the Panel's remit, a step which would imply considerable change, the EDPS should be informed and a prior checking exercise carried out in that specific case, on account of its implications for data protection.

Alongside the legal basis, the lawfulness of the processing operation, as defined in Article 5 of Regulation (EC) No 45/2001, must also be considered. Article 5(a) stipulates that personal data may be processed only if *"processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities (...) or in the legitimate exercise of official authority vested in the Community institution"*.

The procedures for determining the existence of financial irregularities which involve the collection and processing of personal data relating to acts or omissions on the part of officials or other servants come under the legitimate exercise of official authority vested in the institution. The legal basis deriving from the Financial Regulation, the Commission Decision and the Commission Regulation supports the lawfulness of the processing operation.

3. Data quality

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 Regulation No 45/2001). In the case under consideration, there are no systematic rules as to the type of data which may be included in a case-file on financial irregularities. The nature of such data is largely dependent on the specific case. It is nonetheless important that the data collected should be relevant and adequate in relation to the Panel's task.

Data must also be *"processed fairly and lawfully"* (Article 4(1)(a)). The lawfulness of the processing operation has been discussed in section 2 of this opinion. Whether or not the processing is fair is linked to the information which must be given to the data subject (see section 7 below).

Lastly, pursuant to Article 4(1)(d) of the Regulation personal data must be *"accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified"*. The system itself ensures that the data are accurate and kept updated. The data subject is ensured a right of access and a right to have data rectified so that the case-file may be as comprehensive as possible. These rights are a second means of ensuring data quality. Rights of access and rectification are dealt with in section 6 below.

The European Data Protection Supervisor recommends that the Panel act as a data quality filter in future processing operations, in order to ensure that the information collected is indeed adequate, relevant and not excessive, as laid down in Article 4 of the Regulation.

4. Data retention

Article 4(1)(e) of Regulation (EC) No 45/2001 sets out 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"*.

A five-year data retention period seems appropriate, as do the grounds for requiring it. The notification received by the EDPS states, however, that the five-year period is to be discussed "at a forthcoming meeting of the FIP". Should this be the case, the EDPS would stress that if in the future it is decided that the data-retention period needs to be modified, it must on no account exceed five years unless justified reasons are provided.

The retention of the data for statistical, historical or scientific reasons would appear to be ruled out. However, if the Panel should consider it useful to keep a trace of some data, so as to be able to compile statistics in this field or to ensure the overall consistency of its opinions, the EDPS recommends that the data be stored in anonymous form, in accordance with Article 4(1)(e) of the Regulation.

5. The transfer of data

The processing operation should also be examined in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is the transfer of personal data between Community institutions or bodies or within them *"if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

The case in point concerns transfers within the Commission, and the AA in particular, or the AECE, and in the case of systemic problems, to the College, the Audit Service and the authorising officer by delegation concerned, provided that the latter is not the person involved.

Care should therefore be taken to ensure that the conditions of Article 7(1) are met, that being the case since the data collected are necessary for carrying out the processing and, furthermore, are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*". For these transfers it should be noted that only relevant data must be transferred. This transfer is therefore lawful insofar as the purpose is covered by the competences of the recipients. The conditions of Article 7(1) are met.

6. Right of access and of rectification

Pursuant to Article 13 of Regulation (EC) No 45/2001 on the right of access, data subjects have the right to obtain confirmation as to whether or not data related to him or her 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 allows the data subject a right to rectification. In addition to being given access to their personal data, data subjects may also have them amended if necessary.

The European Data Protection Supervisor considers that Articles 13 and 14 of the Regulation are complied with, since the Panel invites data subjects to submit their comments as soon as an irregularity is established or if new facts come to light.

However, it should be noted that the Panel acts as an advisory body and not as an investigative body; the rights of access and of rectification therefore cannot be restricted by virtue of Article 20 of the Regulation, which provides, in particular, that such restriction constitutes a necessary measure for the prevention, investigation, detection and prosecution of criminal offences, or to ensure the protection of the data subject. Only a restriction based on protecting the rights and freedoms of others could be considered.

7. Information to be given to data subjects

Regulation (EC) No 45/2001 provides that the data subject must be informed when his or her personal data are processed and lists a number of items of information that must be given. For the case in hand two groups of data subject are concerned, and Articles 11 and 12 must therefore be applied.

In particular, the provisions of Article 11 of Regulation (EC) No 45/2001 (*Information to be supplied where the data have been obtained from the data subject*) are applicable to persons who submit information to the Panel under Article 60(6) of the Council's Financial Regulation. Hence, the provisions set out under (a) the identity of the controller, (b) the purposes of the processing operation, (c) the recipients or categories of recipients of the data, (d) whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply and (e) *the existence of the right of access to, and the right to rectify, the data concerning him or her* should be covered in an internal note informing all Commission staff and, where appropriate, a statement communicated to data subjects

pursuant to Article 11. It is important to note that the provisions of Article 11 are also applicable to persons involved in a case of financial irregularity should they exercise their right to make comments.

The same holds true for the provisions of Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) which are applicable to persons involved in a case of financial irregularity. The provisions concerned are those under (a) the identity of the controller, (b) the purposes of the processing operation, (c) the categories of data concerned, (d) the recipients or categories of recipients and (e) *the existence of the right of access to, and the right to rectify, the data concerning him or her.*

Furthermore, it is also worth mentioning paragraph (f) of both these Articles, which refers to non-compulsory information (*the legal basis of the processing operation, the time-limits for storing the data, the right to have recourse at any time to the European Data Protection Supervisor*), to ensure that the processing operation is perfectly transparent.

The European Data Protection Supervisor recommends that as part of a forthcoming general information staff note, all the information contained in Articles 11 and 12 of Regulation (EC) No 45/2001 should be set out in an internal note or statement addressed to Commission staff. The following should be indicated: the controller; the purposes of the processing operation; the persons to whom the information might be sent; the existence of the right of access; the legal basis of the operation; the length of time for which data concerning the data subject can be stored and the right to have recourse at any time to the European Data Protection Supervisor.

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 must, in particular, prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and prevent all other unlawful forms of processing.

For the case in hand, it is noted that the Panel discussions and proceedings are confidential and that information may be disclosed only to the parties concerned.

The European Data Protection Supervisor considers that the security measures adopted are appropriate with respect to Article 22 of the Regulation.

Conclusion

The proposed processing operation, as described, does not appear to infringe the provisions of Regulation (EC) No 45/2001, subject to the comments made above. This implies, in particular, that the Panel should:

- notify the EDPS for prior checking if in future it were to decide to expand the range of its competences;
- act as a data quality filter in future processing, in order to ensure that the information collected is adequate, relevant and not excessive, in accordance with Article 4 of the Regulation;

- not retain data beyond the five years currently provided for, unless justified reasons are provided;
- render anonymous any data to be kept for historical, scientific or statistical purposes;
- send a note or statement to Commission staff and, where appropriate, a statement to data subjects, setting out all the information contained in Articles 11 and 12 of Regulation (EC) No 45/2001, indicating the controller, the purposes of the processing operation, the persons to whom information might be sent, the existence of the right of access, the legal basis of the operation, the length of time for which data concerning the data subject can be retained and the right to have recourse at any time to the European Data Protection Supervisor.

Done at Brussels, 15 March 2006

Joaquín BAYO DELGADO
Assistant European Data Protection Supervisor