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Re: Performance of compliance checks concerning insider trading rules of the ECB

Dear Mr. Benisch,

After an initial consultation with the EDPS (case 2006-0346), the case was sent by the ECB's DPO to the EDPS for prior checking under Article 27(2)(a) of Regulation (EC) 45/2001 ("the Regulation") and Article 27(2)(b).

The performance of compliance check regarding insider trading rules obviously involves the processing of personal data of the individuals concerned, but after the analysis of the notification and its annexes and, precisely, the information received on 2 February 2007 at the request of the EDPS, the conclusion reached is that the processing operation in its own right does not qualify for prior checking, on the basis of the following facts and reasons:

I. General rules, actors and main data processing scheme in the performance of compliance checks concerning insider trading rules

The general rules:

The Executive Board of the European Central Bank (ECB) adopted a set of internal controls preventing the abuse of sensitive financial market information (Insider Trading Rules). Insider trading rules refers to Articles 1.2.8-1.2.14 of the Staff Rules and Rules for Short-term Employment. Those rules prohibit certain conduct and activities of the members of staff, such as they are prohibited from using, whether directly or indirectly via third parties (e.g. spouses, parents, colleagues), inside information to which they have access, irrespective of whether such information is used in any kind of private financial transaction conducted at their own risk and for their own account, or at the risk and for account of third parties (Article 1.2.9 of

the ECB Staff Rules¹ and similarly the ECB Rules for Short-term Employment). The categories of members of staff are listed². The list is updated. The members of the Executive Board of the ECB have undertaken to adhere to the rules on insider trading and private financial behaviour applicable to the staff by signing a declaration to that effect.

The ECB's External Auditor has been allocated the task of reviewing the staff members' private financial activities in the context of compliance with insider trading rules (Articles 1.2.14 - 1.2.16 of the ECB Staff Rules and Rules for Short-term Employment).

The Staff Rules and the Rules for Short-term Employment specify the list of information (such as a list of bank accounts, including custody accounts; a list of any powers of attorney) that the concerned staff members should put in a sealed envelope with the Directorate Human Resources, Budget and Organisation (DG-H), who passes those information to the ECB's External Auditor at the latter's request. In accordance with Article 1.2.14 paragraph 4 of the ECB Staff Rules and Rules for Short-term Employment each year a sample of concerned staff members selected by the ECB's External Auditor are requested to provide further detailed information (such as any sale or purchase of assets or rights conducted by the member of staff at his/her own risk and for his/her own account). That information is provided in sealed envelopes via DG-H to the ECB's External Auditor.

Article 1.2.15 of the Staff Rules and Rules for Short-term Employment makes it possible that if the External Auditor has reasonable grounds to believe that insider trading rules are not respected, he/she can ask in a reasoned request further information from a member of staff. In case of such suspicion, the activities of the External Auditor should be carried out under a separate assignment for assessment and processing.

General conclusions report by the External Auditor:

The ECB's External Auditor produces one report as a result of its compliance checks in accordance with Articles 1.2.14 and 1.2.15 of the ECB Staff Rules and Rules for Short-term Employment. These are general conclusions, and the information received from members of staff by the External Auditor remains confidential. The general conclusions should not indicate the names of individual staff members, i.e. neither staff members nor Executive Board members can be identified as a result.

These general conclusions are submitted to the Director Internal Audit and the ECB may submit such general conclusions to the European Court of Auditors.

Part V. D of the Amended Contract for Independent External Auditing of the ECB for the period of 2003-2007 (20 July 2004) specifically states that: "*The scope and nature of the present contract for the review of private financial activities is not deemed to identify any crime or fraud. As an exception thereof, the Auditor shall also be entitled under the general auditing standards to report to the ECB any information related to serious crime or to fraud*".

¹ European Central Bank - Staff Rules. Provisionally adopted 1 July 1998. Last amended on 1 January 2006.

² Annex I and II of the ECB Staff Rules and Annex I and II of the Staff Rules for Short Term Employment. Article 1.2.18 of the Staff Rules and Rules for Short Term Employment stipulates that the obligations of members of staff provided for in Articles 1.2.14 to 1.2.15 shall continue to apply beyond the termination of their employment with the ECB for six months following such termination.

Cases of non-compliance report:

In accordance with Article 1.2.16 of the Staff Rules and Rules for Short-term Employment, the External Auditor can produce a report. A report prepared by the ECB's External Auditor, including the information therein supplied by the members of staff concerned, may be used in a disciplinary procedure as set out on Part 8 of the Conditions of Employment for the Staff of the ECB and, to the extent required by applicable law, in any prosecution by external authorities regarding alleged violations of national criminal laws.

The ECB's External Auditor should report any cases of non-compliance with the insider trading rules to the ECB's Directorate Internal Audit (D-IA) for the further investigation of a specific case. This report of the External Auditor, as said above, contains the information received from the members of staff concerned.

In those cases, D-IA investigate further compliance with the insider trading rules within the framework implemented by the Audit Charter (Administrative Circular 05/2003). If the submitted facts justify an internal inquiry procedure, D-IA conducts an investigation in the form of a formal administrative inquiry in compliance with the provisions of the Administrative Circular 01/2006 on internal administrative inquiries.

At the end of the investigation, D-IA produces a report to the Executive Board setting out the facts and circumstances of the case and the existence or absence of sufficient evidence of alleged non-compliance with the insider trading rules. Articles 43 and 44 of the ECB's Conditions of Employment for Staff of the ECB and Article 34 and 35 of Annex I Conditions of Short-term Employment lay down the disciplinary measures against members of staff who fail in their duties to the ECB.

Non-compliance with the obligation of staff members to provide information:

The list of names of staff members is maintained and administered by the ECB's Directorate Human Resources, Budget and Organisation (DG-H). During its checks, the ECB's External Auditor may inform DG-H of individual cases of insufficient cooperation and possible non-compliance with the obligation of staff members to provide information. This allows DG-H to take any necessary administrative steps vis-a-vis the staff member in order to restore full cooperation.

II. No grounds for prior checking:

As to the Article 27(2)(a) of the Regulation, processing of data related to (suspected) offences:

A) *The examination of private information by the External Auditor does not fall under Article 27(2)(a) because that procedure does not aim to detect any crimes or fraud. If suspicion of any crime/fraud occurs the External Auditor is obliged to transfer further the information to the respective authorities for further investigation. When such investigations are conducted by a Community body/institution, the EDPS always scrutinise the procedure. This was the case with the internal investigations by OLAF³, which the EDPS has already prior checked because it presents the specific risk to the rights and freedoms of the data subjects.*

³ Opinion of 23 June 2006 on a notification for prior checking on OLAF internal investigations (Case 2005-418)

B) In case the External Auditor sends the report (with all submitted personal information) to Directorate Internal Audit for further investigating a specific case of non-compliance with the insider trading rules, D-IA conducts its investigation in the form of an administrative inquiry⁴. Administrative inquiries at the ECB are conducted to clarify facts. This exercise may be followed by a disciplinary procedure. As it poses specific risks to the rights and freedoms of the individuals, the EDPS has already prior checked that procedure and followed up the implementation of his recommendations, and concluded that the ECB took all the recommended measures.⁵ Administrative inquiries may be followed by a disciplinary procedure, which clearly present specific risks to the rights and freedoms of data subjects. This is why the EDPS has prior checked disciplinary cases at the ECB⁶ and follows up the implementation of his recommendations.

As to Article 27(2)(b) of the Regulation, processing operation intended to evaluate personal aspects relating to the data subject:

A) The External Auditor draws only general conclusions as to compliance with insider trading rules, without mentioning the names of the individuals. Undeniably, reaching the final general conclusions require as a prior step an assessment of private financial activities of the data subjects, but since the main purpose is not to prepare an individualised evaluation, the processing operation by the External Auditor does not fall under Article 27(2)(b) of the Regulation.

B) The above mentioned procedures, i.e. an administrative inquiry, a disciplinary procedure or an internal investigation by OLAF, aim at evaluating the conduct of data subjects and for that reason were subjected to a prior checking analysis by the EDPS. This situation also includes those cases where an administrative inquiry or a disciplinary procedure is necessitated as an administrative step vis-à-vis the members of staff who fail to comply with the obligation to provide the information requested for the compliance checks.

In conclusion, the processing operations necessary in the context of the performance of compliance checks concerning insider trading rules of the ECB either do not fall under the need of prior checking by the EDPS (External Auditor phase) or they are an instance of processing operations already prior checked (D-IA or OLAF phases).

I would be thankful if you could forward these considerations to the controller.

Thank you for your cooperation,

Yours sincerely,

Joaquín BAYO DELGADO

⁴ The fact of being the D-IA responsible for the administrative inquire does not change the nature of the procedure, i.e. it does not mean it is a purely "auditing" procedure. See decision on the IAS of the Commission: http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Priorchecks/Letters/2006/06-10-31_Letter_IAS_EN.pdf

⁵ Opinion of 22 December 2005 on a notification for prior checking on Internal Administrative Inquiries (Case 2005-290)

⁶ Opinion of 8 March 2006 on a notification for prior checking on "Disciplinary cases (including related administrative reviews of complaints and grievances, Ombudsman and Court cases)" (Case 2004-270)