



## **Opinion on the notification for prior checking received from the Data Protection Officer ("DPO") of the European Training Foundation ("ETF") regarding ETF's time recording system**

Brussels, 21 June 2007 (Case 2007-209)

### **1. Proceedings**

On 27 March 2007, ETF's DPO informed the European Data Protection Supervisor ("EDPS") via e-mail about ETF's data processing operations related to its time recording system, enclosing a copy of the notification complete with all its attachments ("**Notification**"). No hard-copy followed by regular mail. On 11 April 2007 the EDPS requested further information from ETF. ETF replied on 26 April 2007. A further information request was sent to ETF on 29 May 2007. ETF responded on 7 June 2007. Finally, the procedure was further suspended for 4 days between 14 June and 18 June 2007 which was used by ETF to comment on the draft EDPS Opinion.

### **2. Examination of the matter**

#### **2.1. The facts**

**2.1.1. The European Training Foundation.** The European Training Foundation ("ETF") is an agency of the European Union established in Turin, Italy, in 1994. ETF assists its 25 partner countries in developing high quality systems for human resources development. ETF role is to share expertise and advice on policies in education and training across regions and cultures. Working on behalf of the European Union, the ETF helps its partner countries to develop people's skills and knowledge to promote better living conditions, active citizenship and democratic societies that respect human rights and cultural diversity.

**2.1.2. Scope of the notification and overview of the time recording system.** The Notification concerns ETF's electronic time recording system. The time recording exercise requires staff members to account for the use of their time spent at work by entering the hours worked and the activity carried out during those hours in a time-keeping database. Non-working time such as vacation or sick leave is not accounted for.

The system is operated under the management of ETF's Planning Monitoring and Evaluation Unit ("PMEU"). It is designed to enhance ETF's capacity to plan, monitor, and account for the deployment of its human resources against strategic and operational planned objectives.

**2.1.3. Participants.** Participation in the time recording exercise is mandatory. All ETF staff participate, including temporary agents, contractual agents, local agents and national experts. External consultants, interimaire and stagiaires are, however, not participating in the exercise.

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**2.1.4. Database and data entries.** ETF uses an electronic time recording database (Lotus notes database) for time keeping purposes. The processing operation is entirely automated. Staff members enter data into the database themselves. The computer database is a self-standing database not linked to any other external database.

Time is recorded for each calendar month. Staff members can record their time entries anytime before the monthly deadline set for data entry. The following data are input into the system: (i) activity (selected by browsing on a pre-defined list), (ii) start time, (ii) end time, and (iii) breaks.

When entering their time ETF staff members are not required to describe what they specifically did or accomplished, it is sufficient if they select from the predefined list what activity best describes the work they carried out.<sup>1</sup>

Currently there are approximately 90 different pre-defined categories in use. The categories are organized under four "Pillars" and six main "Activities".

Pillar one includes all activities that support education and training reform. It is subdivided into the following five main Activities: (1) "contributing to IPA" (Instrument for Pre-Accession), (2) "contributing to ENPI" (European Neighbourhood Policy Instrument), (3) "contributing to Central Asia", (4) "Innovation and Learning", and (5) "Tempus". To illustrate, the database may include entries such as "IPA 07-03 Social inclusions" under Activity 1, or "ENPI Country work" under Activity 2.

Pillar two includes all activities related to corporate communications (Activity 6). Pillar three includes all activities relating to "organizational learning: strengthening knowledge and systems" (Activity 7). Pillar four includes all complementary activities (Activity 8). To illustrate, the database may include entries such as "Website" under Activity 6, "SKS-07-01 External Audit" under Activity 7 or "performance appraisal, including peer review" under Activity 8.

### **2.1.5. Purpose and use of the database**

**Purpose of the database.** The time-recording database is intended to provide ETF management with information about how much time was spent on the accomplishment of the various tasks and projects by the various individuals and teams. Management then is able to compare this with how much time was planned for the accomplishment of each task. This enables management to monitor overall planning assumptions for specific projects and tasks, adjust planning assumptions during the year when necessary, and improve following year planning assumption and capacity on the basis of lessons learnt by experience.

The processing is not intended to evaluate staff members based on how efficiently they accomplished tasks, or how much time they spent at the office dealing with specific matters.

With that said, as will be described below, project leaders, regional coordinators, and heads of units or services each have access to individual data recorded by staff members working under their supervision. They are expected to use such data as one input to inform

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<sup>1</sup> When commenting on the draft EDPS Opinion, ETF noted that the ETF time recording system includes a "details" field option which can be used by ETF staff to help tracking what they were actually doing under a specific category on a specific day. The content of this facility is not part of any time reporting and is, therefore, for the sole use of the end user. Neither it is mandatory to complete this entry.

management of specific projects. This may individually affect staff members. For example, a project leader who finds out that a team member assigned to the project failed to achieve the planned targets will undoubtedly wish to enquire what caused such failure and what can be done about it. It is, thus, inherent in the system that the personal aspects of staff members are evaluated at least in case where there is a significant discrepancy between targets and performance.

**Monthly reports.** The database is used to generate four different types of aggregate monthly reports. Each report shows the monthly cumulative time spent by staff members on specific categories as well as planned objectives for the entire year. There is currently no breakdown of planning objectives for each month.

The reports are as follows:

- (1) A report showing total time spent collectively by all ETF staff on each category. This report contains the highest level overview of the use of ETF staff time. For example, the April 2007 report may contain that during the month of April, a total of 80 hours were spent on category A (against a planned estimate of 270 for the whole year), a total of 30 hours on category B (against a planned estimate of 400 for the year), and so forth, with respect to each of the categories that the system accounts for.
- (2) Separate reports per category, with breakdown by staff members. These reports show the total time each staff member spent on a given category. For example, a report on category B may contain that within ETF, during the month of April, a total of 30 working hours were spent on category B (against a planned estimate of 400 for the year). Of these, staff member A spent 14 hours, staff member B 10 hours, staff member C 3 hours and staff members D and E each spent 1.5 hours (against their individual annual estimates of 150, 100, 100, 25, and 25 hours for the whole year).
- (3) Separate reports for each unit and department showing total time spent collectively by all unit/department staff on each category. These are aggregate reports similar to type (1) reports, except that each report covers the hours spent by the staff of only one department or unit. For example, the April 2007 report for unit X may contain that during the month of April, a total of 5 hours were spent on category A (against a planned estimate of 60 for the whole year), a total of 28 hours on category B (against a planned estimate of 300 for the whole year), and so forth, with respect to each category relevant for the unit or department.
- (4) Separate reports for each staff member showing monthly time spent by that staff member on each category. These are individual reports that are covering the work of one staff member each. For example, a report on the work of staff member A may contain that during the month of April, the staff member spent a total of 160 hours on Activity 1 (against a planned estimate of 1500 for the whole year) and no time on any of the other Activities. Of the 160 hours, a total of 80 hours were spent on category A (against a planned estimate of 700 for the whole year), a total of 30 hours on category B (against a planned estimate of 400 for the year), and so forth, with respect to each of the categories under Activity 1. This report is available only to the staff member himself or herself. The report can be generated on-line and the staff member may print it for his or her personal use. These reports, however, are not accessible to management.

**Further processing.** ETF explained to the EDPS that aggregate data contained in type (1) reports are further processed "to show corporate high level aggregate data related to the Activity Based Budget (ABB) and Work Programme "pillars" and "activities" for the ETF quarterly Progress reports and Annual Activity report". These high-level quarterly Progress reports and Annual Activity reports containing aggregate data only are accessible to all ETF staff.

**Individual data in the various reports.** It is important to note that of the four monthly reports, only type (2) and type (4) reports contain individual data in a systematic manner. With that said, it cannot be excluded that in cases where only one staff member is assigned to work on a specific category, he/she becomes indirectly personally identifiable in type (1) or (3) reports as well. This situation, however, is rare. In fact, ETF noted that in the 2006 pilot the average number of contributing staff members to a category or project was 9.

#### **2.1.6. Recipients of the data**

**Staff members.** Each staff member has access to his/her own entries in the database. Until "submission" of the data, staff members can correct or complete their entries for the current month. Submission should normally take place during the first days of the following calendar month. Once submitted, data are accessible as read-only. Staff members can also access their data in an aggregate form, and generate their own monthly and yearly reports (type 4 reports), as described in Section 2.1.5 above. As also noted there, staff members also have access to high-level quarterly Progress reports and Annual Activity reports containing aggregate data.

**PMEU.** The documents submitted to the EDPS during the prior checking procedure suggested that the head of the PMEU as well as his assistant both have full access to the data, including full access to individual entries.

**Technician.** A technician has full access to the database, strictly for purposes of technical maintenance and trouble shooting. Access of the technician to the database is automatically logged into the system. Information is retained for a variable number of days depending on the number of entries. The technician also signed a declaration of confidentiality and security.

**Access by management to individual entries.** Management cannot browse individual timekeeping records, for example, to see how much time a particular staff member spent on a particular day on a particular task or project. Although project leaders, regional coordinators, line managers, and heads of units or services have electronic access to the database, their access rights are limited to type (1), (2), and (3) reports (and possible further aggregate reports) as will be explained immediately below.

**Access by management to monthly reports.** The four types of reports are generated automatically and are available for review on-line by the persons who are the designated recipients of such reports, as described below.

As explained above, only type (2) and type (4) reports contain individual data in a systematic manner. Type (4) reports are only available to the data subject himself or herself. Type (2) reports are provided to project leaders, regional coordinators, and heads of units or services and are showing time recorded by staff on projects/work under their responsibilities.

Line managers are not provided type (2) reports. They only have access to aggregate data related to colleagues under their responsibilities (type (1) and type (3) reports). Line managers, however, often "wear two hats": in their capacity as line managers they do not

access type (2) reports; however, in their capacity as project leaders, regional coordinators, or heads of units or services, they nevertheless receive certain type (2) reports. These reports, as a matter of fact, and considering the size of the organization and its management structure, include individual data regarding most of the staff members working under their supervision.

Indeed, it is specifically stated in the documentation provided by ETF that the line manager, "in line with his/her responsibility, monitors monthly time recording aggregate reports of colleagues to verify that data are in line with individual (*emphasis added by the EDPS*), unit or departmental objectives. To this aim he/she shall consult with Project Leader/Regional Coordinator/Head of Unit or Service when necessary."<sup>2</sup> Based on the foregoing, line managers appear to have access, directly, or indirectly, to a significant amount of individual data, and are able to monitor whether individuals under their supervision carry out their work according to plans. In fact, this monitoring is part of their responsibilities and the very reason why they have access to this data in the first place.

**Confidentiality and internal use.** ETF emphasized that staff working with the data are statutory staff subject to confidentiality obligations as described in the Staff Regulations. In addition, the head of PMEU and his assistant also signed a "declaration of confidentiality". If any service provider will be called to intervene in support of the process (which is not the case at present), it will be bound by explicit contractual declarations of confidentiality. The current framework contract for provision of internal software development services contains such explicit contractual declarations of confidentiality. ETF also noted that no transfer of data is foreseen to third parties. The content of the database is for internal use only.

**2.1.7. Information provided to data subjects.** ETF explained that data subjects are informed about the operational objectives and the use of the time recording database via the ETF intranet. All participating staff also receives training.

A dedicated section is available on the ETF intranet portal, which is accessible to all staff and contains the following documents: (i) Director's Decision to introduce time-recording procedure in ETF, (ii) appointment and declarations of confidentiality of the head of the PMEU as well as his assistant, (iii) the description of the time recording procedure, and (iv) a set of Frequently Asked Questions. In addition, a set of practical guidelines are under development, to be used as a supporting document to dedicated training sessions to staff.

Of the above documents, the Director's Decision and the description of the procedure both contain several provisions regarding data protection. The Director's Decision, in particular, (i) identifies the controller, (ii) explains the purpose of the processing operation, (iii) identifies the recipients of the data, (iv) makes clear the mandatory nature of the processing, (v) sets forth the rights of access and rectification, and (vi) establishes the time limits for storing the data. The Decision also provides that the processing operation will be submitted to prior checking by the EDPS. Finally, the document describing the time-recording procedure also includes repeated references to compliance with data protection rules, and provides further information on the functioning of the system, its use, and the recipients of data.

**2.1.8. Access rights of data subjects.** ETF staff members have access to all data they entered themselves into the database. They do not have access to type (1), (2) and (3) reports generated for use by management. However, they are able to generate a report about their own activities for their own personal use (type 4 reports). As noted in Section 2.1.5 above, staff members also have access to the quarterly Progress reports and Annual Activity reports.

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<sup>2</sup> See page 4, item 5.1(6) of the document describing the time recording procedure, which was submitted to the EDPS along with the Notification and which is also posted on the ETF intranet.

As explained in Section 2.1.6 above, staff members have only read-only access to their data once the monthly deadline is passed. Nevertheless, there is a feature in the database which allows later corrections, should either the staff member or management notice an error. The correction will be entered in the time recording system by the staff member himself/herself. The system tracks the last modification date of any entry.

**2.1.9. Conservation period.** ETF initially planned to keep the data for a period of one year. However, it noted in its Notification that for concerns regarding compliance with ETF's Financial Regulation and its Implementing Rules<sup>3</sup>, it would now consider keeping the data for five years. ETF requested the opinion of the EDPS in this respect.

ETF explained to the EDPS that Article 38(6) of ETF's Financial Regulation provides that “the authorising officer shall conserve the supporting documents relating to operations carried out for a period of five years from the date of the decision granting discharge in respect of implementation of the budget.” Article 24 of the Implementing Rules of ETF's Financial Regulation further provides that “the management systems and procedures concerning the keeping of original supporting documents shall provide for: ..... (d) such documents to be kept for at least five years from the date on which the European Parliament grants discharge for the budgetary year to which the documents relate.”

In addition, Article 40 of ETF's Financial Regulation requires that: “The Authorising Officer shall report to the Governing Board on the performance of his/her duties in the form of an annual activity report, together with financial and management information. This report shall indicate the results of his/her operations by reference to the objectives set, the risks associated with these operations, the use made of the resources provided and the way the internal control system functions.” The term “resources” relates to the use made of financial and human resources.

ETF's concern is that time recording data can be considered as supporting document related to the use of human resources and budget, and therefore, may fall under the requirements of the above provisions.

**2.1.10. Security.** All data are stored in a protected area of the ETF servers. The database is built with the Lotus notes software. Data are not accessible without a username and password allocated on a need-to-know basis, as described above in Section 2.1.6.

**2.1.11. Deployment of the time recording exercise, pilot phase.** The time recording exercise is an institutional policy established following regular ETF practices for the elaboration of internal policies. The Director's decision regarding its establishment (ETF/06/DEC/011) was formally adopted and communicated to all ETF staff on 21 March 2006 after consultation with the ETF Staff Committee.

A first small-scale pilot project started in October-December 2005 and a second pilot phase including all staff from the PMEU was implemented during 2006 until May 2007 using a different, simpler time-tracking instrument (Time core solo).

Building on the experience and lessons learned from the pilots, a new Lotus notes time recording system was developed during January-March 2007 after further consultation with the Staff Committee. The pilot of the Lotus notes system started in April 2007 with the staff

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<sup>3</sup> Both documents were adopted by the ETF Governing Board on 15 January 2003 in Turin, Italy.

of the PMEU and volunteering staff from the other services of the organisation (Operations, External Communication Unit and Administration Department). Training sessions to the system for all ETF teams were organised at the end of May 2007 and since 1 June all ETF temporary agents, contract agents, local agents, and national experts started using the system. Currently only type (4) reports are available to end users through on line views. Type (1), (2), (3) reports will be released only once the EDPS prior checking procedure will have been completed.

## **2.2. Legal aspects**

### **2.2.1. Prior checking**

**Applicability of the Regulation.** Pursuant to its Article 3(1), the Regulation applies to the processing of personal data by 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. Personal data is defined as any information relating to an identified or identifiable natural person. Article 3(2) further provides that the Regulation applies, among others, to the processing of personal data wholly or partly by automatic means.

ETF is a Community body, and the time-recording exercise forms part of the management of its own internal activities, and therefore, it is within the scope of Community law. There is also no doubt that the data collected during the time-recording exercise constitute personal data. Finally, the fact that the data are collected through a large-scale IT database means that the processing is carried out by automatic means. The Regulation, therefore, applies.

**Grounds for prior checking.** Article 27(1) of the Regulation 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) contains a list of processing operations that are likely to present such risks. This list specifically includes, under paragraph (b), processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency, or conduct.

ETF notified the time-recording exercise under Article 27(2)(b) on grounds that the data may be used to evaluate personal aspects of data subjects even though the database is not intended to be used for performance appraisals.

Indeed, as explained in Sections 2.1.5 and 2.1.6, project leaders, regional coordinators, and heads of units or services all have access to type (2) reports relating to staff working for them. Therefore, they will know exactly how many hours the different team members worked on the projects or tasks under their supervision.

Although the stated purpose of the exercise is to "monitor overall planning assumptions for specific projects and tasks", it is unlikely that a project leader who finds out that a team member assigned to the project failed to achieve the planned targets would not enquire what caused such failure and what can be done about it. It is, thus, inherent in the system that the personal aspects of staff members will, to some extent, and at least in some cases, be evaluated. Indeed, there would presumably be no need for type (2) reports containing individual data if this was not expected to happen.

The time recording exercise, thus, involves at least some processing operations intended to evaluate personal aspects relating to the data subject, and therefore, requires prior checking by the EDPS.

**Timing of the Notification and due date for the EDPS Opinion.** The Notification was received on 27 March 2007. According to Article 27(4) of the Regulation this Opinion must be delivered within a period of two months. The procedure was suspended for a total of 28 days. Thus, the Opinion must be rendered no later than 25 June 2007.

The processing operations had started before the EDPS was notified. Full deployment of the time-recording exercise was preceded by a first pilot phase in 2005 and a second pilot in 2006. The procedure was fully deployed as notified in May 2007.

The EDPS emphasizes that since prior checking is designed to address situations that are likely to present risks, the opinion of the EDPS should be requested and given prior to the start of the processing operation. Therefore, notifications should be submitted at the planning stage, in such time that considering the time available for the EDPS to issue his Opinion, as well as the eventual time needed for ETF to fulfil any requests for information, the case could be brought to an end before the processing operations begin. Timely notifications may also help prevent controllers investing efforts and resources in setting up processing operations which will subsequently need to be significantly modified to comply with data protection rules.

With that said, taking into account that the system is still under revision, and, importantly, that ETF decided to wait with the release of the first type (1), (2), (3) reports pending prior checking by the EDPS, the EDPS does not view the delay as an insurmountable problem in the current case, provided that all recommendations that EDPS makes in this Opinion will be fully taken into account.

### **2.2.2. Lawfulness and proportionality of the processing**

**Introduction.** Article 5(a) of the Regulation provides that personal data may be processed if "processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties ... or other legal instrument adopted on the basis thereof".

The first issue under Article 5(a) is to determine whether the processing is instituted to serve a specific public interest task provided for in a Treaty provision or another legal instrument adopted on the basis of the Treaties. The second issue is to determine whether the processing operation is indeed necessary for the performance of such a task. When analysing this second issue, Article 4(1)(c) of the Regulation must also be taken into account, which requires that data must not be "excessive in relation to the purposes for which they are collected and/or further processed."

To address the first issue in the present case, Recital 27 of the Regulation needs to be taken into account, which specifies that "processing of personal data for performance of tasks carried out in the public interest includes the processing necessary for the management and functioning of those institutions and bodies". Taken together, thus, the issue in the present case is whether the processing is necessary for the management and functioning of ETF.

Management of budget, including planning, monitoring and evaluating the efficient deployment of human resources is necessary in any Community body including ETF to ensure the proper management and functioning of the organization. To fulfil these tasks, it is also within the discretion of ETF management to utilize a time recording system. As explained in Section 2.1.11 above, the time recording exercise is an institutional policy established following regular ETF practices for the elaboration of internal policies. The



Director's decision regarding its establishment (ETF/06/DEC/011) was formally adopted and communicated to all ETF staff on 21 March 2006 and provides a specific legal basis for the processing operation.

Based on the foregoing, and the facts as presented to him by ETF, the EDPS does not question the legal basis, proportionality and lawfulness of the notified processing operation.

### **2.2.3. Data Quality**

**2.2.3.1. Adequacy, relevance, and proportionality.** According to Article 4(1)(c) of the Regulation personal data must be "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed."

Requiring recording the hours on a daily basis appears to be proportionate. Indeed, if the staff members were not to be required to give a daily breakdown, this could lead to less accurate recording.

As to the need to indicate start and end times, when commenting on the draft EDPS Opinion, ETF noted that the option of inputting total daily hours spent on a given project rather than designating start and end times and breaks was considered by ETF when designing the Lotus notes time recording system and it was initially offered to end users. The option was assessed by end users who piloted the system in 2006 and rejected on the basis of their experience and the actual use made of the system. The option was considered as less user-friendly than the live record of real timing including breaks because it required a "double" imputing from their side (manual conversion of real starting and end time of activities into total hours to be inputted into the system). The EDPS can accept this compromise between user friendliness of the system and data quality, without prejudice of the recommendations under Section 2.2.3.3 below.

As for the various pre-defined categories included in the database, there is no entry which appears to be *prima facie* inadequate, irrelevant, or disproportionate, considering the purposes of the processing and the mission of ETF. The EDPS, however, notes that during this prior checking procedure he did not scrutinize separately and in detail all categories and subcategories of data to be entered in the database. The EDPS, in the absence of categories that would have appeared *prima facie* irrelevant, inadequate, or disproportionate, accepted that ETF management relied on its own know-how and feedback from the Staff Committee when deciding which categories to include or omit from the database. The EDPS encourages continuous further refinement of the categories as ETF gains more experience with the use of the database.

**2.2.3.2. Fairness and lawfulness.** Article 4(1)(a) of the Regulation requires that data must be processed fairly and lawfully. The issue of lawfulness was analysed above (see Section 2.2.2). The issue of fairness is closely related to what information is provided to data subjects (see Section 2.2.5 below).

**2.2.3.3. Accuracy.** According to Article (4)(1)(d) of the Regulation, 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, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified."

**Inaccuracies in the time-keeping system used by ETF.** Certain subjectivity is inherent in any type of time-recording system. Time spent on different types of projects in an office

environment with little or no direct supervision is particularly difficult to measure objectively, and it is often the case that - if left to their own devices - two different staff members doing the exact same thing put their time down differently. As it is shown below, the ETF time-recording system lacks certain built-in mechanisms that ensure the accuracy of the time recorded.

That is why it is very important (i) to be aware of the inherent limitations on the accuracy of the database, and (ii) to take measures to limit, to the extent possible, the subjectivity involved in the time-recording process. In particular, on one hand, management must recognize that the number of hours recorded do not automatically inform management whether the time was efficiently used, and, on the other hand, management must take measures so that time entries for similar work carried out by different persons would be comparable and more consistent across the organization.

The main problems with the accuracy of ETF's time-recording database arise out of the following features of the time-keeping exercise designed by ETF:

- First, ETF staff members are not required to keep a record of what they have actually been doing, or what they have accomplished. They merely need to indicate how much time they spent on a predefined category of activity. This means that unless the staff member voluntarily records such information, and allows access to the management to it, management will not be able to verify in a few weeks time whether or not a staff member efficiently used his time.
- Second, unlike in similar time-keeping systems used in the private sector, the time records will not be used for billing purposes, and thus, they will not be subject to the systematic scrutiny of clients. This means that there will be no external pressure on staff members to account for efficiently spent time only.<sup>4</sup>
- Third, the data are not used for either determining bonuses or for performance appraisal of staff. Therefore, staff members are not faced with a double pressure to accurately record their time: not too high so that their work would be considered inefficient when compared to the work product they produced and not too low so that they would not receive their bonuses, which depend on their hours.
- Fourth, time entries are required to be made on a monthly basis only. This is an invitation for staff members to leave it to the last minute to complete their records and rely on their fading memories only.
- Fifth, the aggregate reports (other than type (2) reports) do not differentiate between hours spent on a particular category by a senior member of the staff, or a junior member. This adds to the difficulties in using hours to measure accomplishment of actual work done.<sup>5</sup>

These differences mean that ETF staff members are able to significantly understate or overstate the work they carry out for specific projects. In addition, efficient and inefficient

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<sup>4</sup> When commenting on the draft EDPS Opinion, ETF noted that although the system has not been designed for billing purposes, the organisation has some "accountability" pressure for the use of its human resources to which time recording aims at providing informative data.

<sup>5</sup> When commenting on the draft EDPS Opinion, ETF noted that "ETF staff have been associated with average category's costing and data are already available in the system if this type of aggregated reporting will be needed to better understand costs of accomplishment of tasks."

work, as well as work by senior and junior staff members are recorded with equal value. As a result of these problems, the time-recording database may contain inaccurate data, which do not fully reflect the individual time spent on individual projects by staff members. Neither are the data consistent across the organization. Finally, they do not inform management of whether the time recorded was actually spent efficiently, and whether, within each category, work was carried out by junior or senior members of staff, and thus, how much actual added value ultimately an hour of work represents.

**Purpose limitation.** Depending on what use the data gathered during the time-recording exercise will be put, different levels of inaccuracies and inconsistencies can be tolerated. From the data protection perspective, it is especially important to ensure a high level of accuracy for data whose use may directly and individually affect the data subject.

While the data in the database can give some direction to management as to overall use of staff time, the data may not be sufficiently reliable to be used to conclusively inform the decision-making of ETF management in cases which individually affect staff members. For this reason, use of the data for purposes that may individually affect data subjects must be strictly limited.

As explained in Section 2.1.6, line managers may have access to individual data of their staff. This is most likely to occur if line managers are responsible for monitoring one or more of the projects for which the staff member works, and thus, have direct access to type (2) reports. Data may also become available to line managers indirectly, during discussions with project leaders, regional coordinators, or heads of units/services who have access to type (2) reports. In such cases, line managers may be tempted to use the data also for performance evaluation or other purposes that may individually affect data subjects, such as allocation of tasks, contract renewals, or internal mobility.

Some of these uses may be legitimate, and in fact, unavoidable once individual data are made available to management. In particular, the data may be used for decision-making that will individually affect data subjects when such decision-making directly affects the performance of a particular project. Even in this case, however, in any event, the inherent subjectivity and unreliability of the data must also be taken into account, and therefore, the hours recorded should be used only as one factor in the decision-making. In addition, staff members must also be heard and be given the opportunity to put forward their positions.

For example, it may be appropriate for a project manager whose team is struggling with accomplishment of a project, to request team members to explain why they failed to deliver results despite putting down a lot of time on that particular project. As a result, it may turn out that certain team members were responsible for the extra time, as they lacked the required specific expertise, and had to spend a disproportionate amount of time on background reading, which they assigned to the project. In this case, a manager may decide, for example, that he or she will adjust planning estimates, re-distribute tasks, or arrange for training of the struggling team members.

An example of a different, impermissible use of the data would be for the project leader to make an assumption or a judgment on the efficiency or diligence of a particular team member compared to another, based on how much time each put down for the project, and then report those results to the line manager in connection with the annual appraisals.

An added problem comes from the fact that even if certain uses of the data (e.g., use of data for performance evaluation) are specifically prohibited, line managers still have access to the

data for other purposes (project management and monitoring). Therefore, as a matter of fact, considering the availability of the data, it is likely that they will be influenced by them in all cases. Such unlawful spill-over use of the data may have a significant impact on the career of staff members. Using data protection terms, this means that the principle of purpose limitation provided for in Article 4(1)(b) of the Regulation is difficult to guarantee.

Due to these problems, ETF should ensure, at the minimum, that the limitations of the reliability of the data are recognized by the users of such data. This should mean that data included in the database should only be used as one of several, only informative, rather than decisive, factors to be considered in any decision-making process that may individually affect data subjects. In addition, due to the inherent unreliability of data, the use of the database should not lead to dismissal, exclusion from contract renewals, promotion, or training opportunities, exclusion when tasks are allocated or team leaders and managers are selected, or to other similar prejudices to staff members. This does not mean that staff members who are unable to account for a productive use of their time cannot be dismissed or excluded when tasks are distributed. However, these decisions must be made based on information other than data in the database.

Considering the inadvertent spill-over and the risks of using data for unlawful purposes, compliance with the principle of purpose limitation will be a difficult task, to which the attention of all managers must be specifically drawn to.

**Recommendations to improve data quality.** In any event, the EDPS also makes certain recommendations to improve data quality:

- To help ensure consistency across the organization, ETF should introduce clear benchmarks for data entry. For example, should staff members account for all their time spent at the office? Should they bill "background reading" or "brainstorming with a colleague over a coffee break" to a specific project? Should a 9 am though 1 pm entry on a specific project be interrupted by four separate ten minutes telephone conversations on two other matters? Should time be recorded as 9 am though 1 pm even if the staff member actually arrived ten minutes past 9 am, and left 15 minutes past 1 pm? Should "selecting and reserving hotel for mission abroad" be entered as "other corporate administrative" or should be put down to a project? These are just some of the issues that two different staff members may assess differently, in the absence of further guidance. The set of Frequently Asked Questions may be a good form for publicising these practical recommendations. Training of staff members is also essential.
- Staff members should be encouraged to complete their time entries on a daily basis, and be required to do so at the latest on a weekly, rather than on a monthly basis. Exceptions, if necessary, could be built into the system.
- The current design of the system, which requires entering end and start times (with possible indications of "breaks") encourages omitting interruptions, such as telephone calls, and thus, these are likely to be less accurately recorded. The more matters a staff member works on simultaneously, and the more frequent the interruptions are, the bigger this problem may become. Whereas the majority of staff members working on just one or two files on any given day with few interruption may find the current system preferable to a system whereby they would only enter cumulative time, others, particularly those whose work gets interrupted more frequently, may find themselves having to record all interruptions twice: first, as a break, second, as a separate time entry for the work carried out during the interruption. If technically feasible, it should be considered whether the

system could address this concern. For example, instead of entering "breaks" when work on another matter is carried out during the "break", staff members could simply enter a separate time entry for the work carried out during the break. If the system were set up with a built-in correction mechanism, the interruption could automatically be deducted from the overall time in the bigger timeframe. For example, recording a 10.30 am through 11 am telephone conversation would automatically be recorded as a break from 9 am through 1 pm work on a separate project, without staff members having to enter the time twice.

**2.2.4 Recipients of the data.** The EDPS welcomes ETF's efforts to restrict access to individual data. In particular, the EDPS welcomes that management cannot browse individual data-entries. The EDPS particularly welcomes that management can only view data in the database in the form of only three predefined reports (or further reports based on them, which contain no individual data) and that use of type (2) reports containing individual data are strictly limited on a need-to-know basis to project leaders, regional coordinators, and heads of units/services under whose responsibility the projects fall.

In addition, the EDPS recommends that ETF reconsiders whether the head of the PMEU as well as his assistant should both have full access to the data, considering that all four reports are generated automatically, further reports can be generated without access to individual data, and no other use of individual data is foreseen. It is presumably sufficient if their access is limited to type (1), (2) and (3) reports. Indeed, during the prior checking procedure ETF explained that under the previous 2006 pilot phase full access to time recording data was granted to three assistants of the PMEU. This was necessary because reports were not generated automatically by the system but they required export and processing of significant amount of data in excel format. ETF expressed agreement with the EDPS recommendation that full access by PMEU assistants and the head of the PMEU will not be necessary with the full deployment of the 2007 Lotus notes time recording system where reports will be automated by the system, and reports will be accessible on line, without the same persons having to access individual data.

**Recipients outside ETF.** The EDPS welcomes that the use of data is strictly limited to the internal use of ETF.

**2.2.5. Information provided to data subjects.** Article 11 of the Regulation requires that certain information be given to data subjects in order to ensure the transparency of the processing of personal data.

**Timing and format of the data protection notice.** Article 11 provides that when the data are obtained from the data subject, the information must be given at the time of collection.

The EDPS welcomes ETF's good practice of making available a series of documents related to the time-recording exercise on the ETF intranet. The EDPS also welcomes ETF's practice of carrying out informational sessions for staff members.

**Content of the data protection notice.** Article 11 of the Regulation provides a detailed list of information that needs to be provided to data subjects. In essence, the controller must inform data subjects about who processes the data and for what purposes. The information must also specify the recipients of data, must specify whether replies are obligatory or voluntary and must alert the data subjects to the existence of the right of access and rectification. Further information, including the legal basis of processing, the time limits for storing the data, and

the right of recourse to the EDPS must also be provided if necessary to guarantee fair processing. This may depend on the circumstances of the case.

Finally, Article 11 allows certain exceptions from the notification requirement. Considering that (i) none of the Article 11 exceptions apply to the facts of the case and that (ii) all items listed in Article 11 (including the legal basis of processing, time-limits for storing the data, and the right of recourse to the EDPS) are necessary to guarantee fair processing, the EDPS is of the opinion that all items listed under Article 11 must be provided in the data protection notice.

As explained in Section 2.1.7, the documents made available to ETF staff on the intranet, in particular, the Director's Decision and the description of the procedures provide considerable information on data protection. The EDPS welcomes ETF's good practice to incorporate data protection notice into the language of the Decision and makes such notice available on the intranet. This will allow data subjects to embark upon the exercise with the reassurance that their data will be processed fairly and lawfully.

Nearly all items are included in the Director's Decision. The EDPS recommends the addition of the single missing item: reference to the possibility of the right of recourse, at any time, to the EDPS.

In addition, the communication of the purposes of the exercise should be improved and should include strict limitation of the use of the database at the individual level, to decisions that may directly affect planning of activities, as discussed in Section 2.2.3.3.

In particular, ETF should clearly state that the database cannot be used for purposes of performance appraisal, promotion, or assessing contract renewal, and that the use of the database should not lead to dismissal, exclusion from contract renewals, promotion, or training opportunities, exclusion when tasks are allocated or team leaders and managers are selected, or to other similar prejudices to staff members. This does not mean that staff members who are unable to account for a productive use of their time cannot be dismissed or excluded when tasks are distributed. However, these decisions must be made based on information other than data in the database.

At the same time, it must also be clarified that the data may be used by project leaders, regional coordinators, and heads of units or services for purposes that directly relate to the management of a specific project or task, as described in Section 2.2.3.3. For the sake of full disclosure, the information provided to data subjects must also be revised (perhaps by revising the text of the description of the procedure) to clearly explain what data line managers have access, and for what purposes they can use such data, as described in Sections 2.1.5, 2.1.6 and 2.2.3.3.

**2.2.6. Right of access and rectification.** According to Article 13(c) of the Regulation, the data subjects have the right to obtain from the controller, without constraint, communication in an intelligible form of the data undergoing the processing and any available information as to their source. In this respect, the EDPS welcomes ETF's practice that read-only access to their data is provided to staff members at all times, even after the lapse of the monthly deadline for data entry. Further, the EDPS also welcomes ETF's practice that staff members can generate their own individual reports for their own purposes.

Article 14 of the Regulation provides the data subject with a right to rectify inaccurate or incomplete data. In this respect, the EDPS welcomes ETF's practice that any errors (mistaken

entries) can be corrected in the database without delay, if noticed either by the data subject or by the recipients of the type (2) reports.

**2.2.7. Conservation of data.** The general principle in the Regulation is that personal data may 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 (Article (4)(1)(e) of the Regulation). The EDPS has the following specific recommendations in this respect:

First, all data relating to a staff member whose employment relationship with ETF comes to an end should be immediately deleted, or, if the data are considered useful for management, historical, scientific, or statistical purposes, should be rendered anonymous. In this respect, ETF must take into account that merely deleting names does not necessarily render data anonymous. For example, staff members could be identified indirectly, by reference to their job functions and the dates during which they carried out those functions.

Second, there appears to be no need for viewing the development of any particular employee's hours over the course of time. Therefore, the EDPS recommends that all data in the database would be deleted at least once a year, as it was originally envisaged in the Director's decision. If ETF wishes to preserve any data about prior years' data to help management develop strategies, or for historical, scientific, or statistical purposes, the data must be aggregated and kept only in anonymous form.

Third, the EDPS recommends that ETF reconsiders whether it is necessary to keep any data related to the time recording exercise for purposes of compliance with the provisions of ETF's Financial Regulation for a period of five years. During such analysis, ETF should consider that the time-recording exercise is not a mandatory but an optional exercise and that ETF, under its Financial Regulation, would have been perfectly entitled not to carry out a time-recording exercise at all in the first place.

In any event, should ETF wish to keep certain data for future audits of its financial and management activities, the EDPS would not question, for purposes of this prior checking procedure, a practice whereby ETF kept the aggregate reports (type (1) and (3) reports) for a five-year period as referred to in the ETF Financial Regulation. Although these reports may include some indirectly identifiable personal data, considering the indirect nature of identifiability, as well as the non-systematic occurrence of such data, the EDPS would not find a five-year period disproportionate for these reports.

Type (2) records containing personal data and all actual individual time entries made in the database, however, should be deleted as soon as possible after they are no longer used for their stated purposes. For type (2) reports, as well as all actual individual time entries made in the database, the EDPS finds the 1-year period initially suggested by ETF proportionate.

In this respect, the EDPS specifically calls the attention of the ETF to a recently added last paragraph to Article 49 of the Implementing Rules of the general Financial Regulation<sup>6</sup>, which provides the following: "Personal data contained in supporting documents shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes. In any event, as concerns the conservation of traffic data, Article 37(2) of

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<sup>6</sup> Commission Regulation (EC, Euratom) No 2342/2002 of 23/12/2002 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.

Regulation (EC) No 45/2001 shall apply." This recent amendment was adopted following the recommendations provided in paragraphs 33-47 of the "Opinion of the EDPS of 12 December 2006 on proposals for amending the Financial Regulation applicable to the general budget of the European Communities and its Implementing Rules (COM(2006) 213 final and SEC(2006) 866 final), OJ C 94, 28.04.2007, p. 12".

**2.2.8. Security.** According to Articles 22 and 23 of the Regulation, the controller and the processor must implement the 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 unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other forms of unlawful processing.

The EDPS considers that the security measures adopted by ETF are adequate in the light of Article 22 of the Regulation, provided that confidentiality of communications is guaranteed.

## **Conclusion**

There is no reason to believe that there is a breach of the provisions of the Regulation provided that the considerations noted in Sections 2.2.2 through 2.2.8 are fully taken into account. The recommendations of the EDPS include, most importantly, the following<sup>7</sup>:

- **Data Quality and Purpose Limitation:**

- The procedures for the exercise must be revised to ensure a higher level of accuracy, reliability, and consistency of the data.
- Even after such changes are implemented, ETF management must clearly and explicitly recognize the limitations of the reliability of the data to inform decisions that may individually affect data subjects. Therefore, data included in the database should only be used as one of several, only informative, rather than decisive, factors to be considered in the decision-making process.
- For the same reason, the database, on the individual level, can only be used for purposes directly relevant for the management of a specific project. In particular, the database cannot be used for purposes of performance appraisal, promotion, or assessing contract renewal, and the use of the database should not lead to dismissal, exclusion from contract renewals, promotion, or training opportunities, exclusion when tasks are allocated or team leaders and managers are selected, or to other similar prejudices to staff members. This does not mean that staff members who are unable to account for a productive use of their time cannot be dismissed or excluded when tasks are distributed. However, these decisions must be made based on information other than data in the database.

- **Recipients:**

- Access to the database must be clearly limited on a need-to-know basis. In particular, access of the head of unit of the PMEU and his staff must not include access to individual data.

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<sup>7</sup> When commenting on the draft EDPS Opinion, ETF noted that some of these recommendations have already been or will be implemented.



- **Conservation of the data:**
  - Conservation periods must be strictly limited to what is necessary to achieve the purpose of the processing operation. Only aggregate data should be retained for the five-year period provided for in ETF's Financial Regulation.
  
- **Information to data subjects:**
  - The information provided to data subjects must be supplemented with reference to the right of recourse to the EDPS. In addition, communication of the purposes and uses of the database must be improved. The EDPS especially emphasises the importance of clear specification of any limitations on such uses.

Done at Brussels, on 21 June 2007

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