

CONSULTATION ON PROCESSING OF PERSONAL DATA IN FRAME OF PANDEMIC PROCEDURE AT ECB (2009-456)

On 7 July 2009, the EDPS received a consultation¹ from the Data Protection Officer (DPO) at European Central Bank (ECB) on the processing of personal data in the frame of the ECB pandemic plan. Most of the procedure is centred on the medical services, so it is covered by the handling of medical data as prior-checked by the EDPS in case 2006-240/241. However, the pandemic would also require informing local management that a specific person is under the suspicion of being infected so that the relevant members of the team can be warned. A possible consequence may be that the whole team is asked to go for a quick test and/or stay home for the incubation period (5 to 7 days). The DPO underlines that it seems difficult if not impossible to implement such measures purely via the Medical Services (which are in the ECB one or two doctors for a few hours, as well as one nurse), in particular if more cases occur. This is why the procedure foresees involving the local manager to the indicated degree. The DPO therefore raises the issue as to whether Article 5.a of Regulation (EC) 45/2001 (hereinafter "the Regulation") could be used as legal basis.

Article 5.a of the Regulation specifies that personal data may be processed only "*if necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body or in a third party to whom the data are disclosed*". The EDPS considers that, in the absence of any national legal obligation, this provision can serve as legal basis for the processing of the data in the frame of the pandemic procedure, but that as this is exceptional it would be desirable that there be a formal decision taken by the direction of ECB on which any communication to management can be based. A special crisis procedure could indeed be established so as to guarantee the protection of the rights and freedoms of the persons concerned, and in particular their right to privacy. This procedure could notably be based on WHO recommendations which have no legal binding value, but that could serve as the basis for any internal decision on this topic.

Furthermore, the EDPS would like to underline that as the processing concerns health related data, the processing of such data is prohibited unless exceptions can be found in compliance with Article 10 of the Regulation. Article 10.2.b notably provides that such a prohibition can be lifted if the processing is necessary for the purposes of "*complying with the specific rights and obligations of the controller in the field of employment law*", insofar as it is agreed upon by the EDPS subject to adequate safeguards. Based on the obligation for employers to comply with obligations on health and safety at work, the processing of health related data could be based on Article 10.2. Furthermore, to the extent that Article 10.2.b would not apply, Article 10.4 provides that such data may be processed for reasons of "*substantial public interest*" either on the basis of provisions laid down by the Treaty or an act adopted on the basis

¹ Article 46(d) of Regulation (EC) 45/2001.

thereof, or if necessary, by decision of the EDPS. The EDPS considers that in the present case substantial public interests could indeed justify the processing of health data in the frame of this procedure. In any case the EDPS considers that adequate safeguards must be put into place to protect the interests of the data subjects. These safeguards should notably include provisions whereby the data may not be used for any other purposes, they may not be transferred to any third parties, adequate time limits must be established for the conservation of the data and the data protection rights of the data subjects must be ensured.

17 July 2009