

Opinion on the notification for prior checking received from the Data Protection Officer of the Council of the European Union concerning the ‘Specialised Financial Irregularities Panel’ case

Brussels, 26 September 2012 (Case 2012-0533)

1. Procedure

On 21 January 2009, the Data Protection Officer (the **DPO**) of the General Secretariat of the Council of the European Union (the **Council**) had notified the European Data Protection Supervisor (the **EDPS**) of processing concerning the ‘Determination of the existence of financial irregularities and their possible consequences – Financial Irregularities Panel (FIP)’ in accordance with Article 24(1)(e) of Regulation (EC) No 45/2001 (Case 2009-0060).

The prior checking procedure was suspended on 23 February 2009 on the basis of Article 27(4) of Regulation (EC) No 45/2001. Meanwhile, a further Decision of the Secretary-General of the Council No 20/2010 on the establishment within the General Secretariat of the Council of a specialised financial irregularities panel was adopted. That Decision repeals and replaces Decision No 174/2003 of the Deputy Secretary-General, which in part formed the legal basis on which the initial notification was based.

The Council submitted to its DPO a modified notification taking into account that new decision. On 20 June 2012 the DPO therefore notified the EDPS of the modification of the data processing in accordance with Article 24(1)(e) of Regulation (EC) No 45/2001. The name of the processing was changed in line with Decision No 20/2010.

The EDPS considered that modification as a new notification of processing subject to prior checking, basing its decision on the fact that no opinion had yet been adopted concerning that processing. Case 2009-0060 was therefore removed from the register of the EDPS and replaced by Case 2012-0533.

The notification includes the notification form and annexes:

- statement on the information provided for in Articles 11 and 12 of Regulation (EC) No 45/2001;
- Decision No 20/2010 of the Secretary-General of the Council of the EU.

The draft opinion was sent to the DPO on 19 September 2012 for comments. Those comments were received on 26 September 2012.

2. Examination of the case

2.1. The facts

The mission of the Financial Irregularities Panel is to examine any financial irregularity which may arise in the activities of the Council and its General Secretariat and issue opinions in which it determines whether or not there is a financial irregularity and the possible consequences of that irregularity.

The Financial Irregularities Panel therefore has a dual role:

- it is the point of receipt of all information submitted by a member of staff acting under Article 60 of the Financial Regulation;¹
- it issues opinions after a case has been referred to it by the Secretary-General of the Council or by an authorising officer by delegation pursuant to Article 75(1) of the detailed rules for the implementation of the Financial Regulation.² When a case is referred to the President of the Panel, he must inform all members and organise a meeting to discover [*sic*]

In the event that the Panel is informed under Article 60, the case is forwarded to the Secretary-General and the person who informed the Panel is notified. The Panel may give an opinion in particular on the need to investigate the causes of the irregularity in all or part of an act or omission of an official or other servant of the European Union. Under no circumstances does it give an opinion on the potential consequences for that official or other servant.

The data processing is mainly manual, and may be carried out on paper or through conventional office applications. The files are stored in a locked cabinet in the office of the President of the Panel and in a password-protected electronic file accessible only by the President of the Panel and his secretariat.

The Panel was established within the General Secretariat of the Council by the Secretary-General's Decision of 3 February 2010.³

The Decision of the Secretary-General lays down the rules applicable to the establishment of the Panel and its composition. It also seeks to determine its competences and its operation. Finally, the Decision on the Panel sets out aspects relating to the referral of cases and to its work as well as to the scope and consequences of its decisions.

The data subjects of any data processing by the Panel are officials and other servants:

- involved in a case showing evidence of financial irregularity;
- having brought to the attention of the Panel facts constituting evidence of financial irregularity, and also witnesses.

¹ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, Articles 60(6) and 66(4), OJ 2002 L 248 of 16.9.2002.

² Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 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, Articles 74 and 75(2), OJ 2002 L 357 of 31.12.2002.

³ Decision No 20/2010 of the Secretary-General of the Council of 3 February 2010 on the establishment within the General Secretariat of the Council of a panel specialising in financial irregularities.

The data processed are data concerning possible infringements relating to financial management and to the supervision of transactions which result from an act or omission of an official or other servant. All information enabling the Panel to issue an opinion seeking to determine whether or not there is an irregularity liable to entail, where appropriate, the disciplinary or financial liability of the official or other servant. In particular, the President and members of the Panel have unfettered access, in the context of their mission, to the premises, documents and computer systems of the GSC. The Panel ensures that the data collected are relevant, adequate and not excessive in relation to the purpose assigned to the Panel.

Moreover, in accordance with Article 75(1)(2) of the detailed rules for implementation, should the Panel's analysis suggest that the case referred to it is a matter for OLAF, the President of the Panel must without delay transmit the case-file to the General-Secretary of the Council and at the same time inform OLAF. The Panel ensures, where appropriate, that the right of access is limited and that any evidence that may affect future OLAF investigations is retained (Article 8 of the Decision).

The information to be given to data subjects is provided for by the publication of Decision No 20/2010 of the GS of the Council of the EU of 3 February 2010 on the intranet site of DGA 4. Moreover, potential witnesses, suspects and referees are informed orally or in writing (for example at a meeting) of the confidentiality and nature of processing and the rights available to them, in accordance with Articles 11 to 19 of Regulation (EC) No 45/2001. A statement on the information provided for in Articles 11 and 12 of Regulation (EC) No 45/2001 was provided by the controller. If the information is oral, it is provided at a meeting of the Panel and is set out in the minutes of the meeting.

The storage period. The Panel's opinions and case-files are stored as long as:

- the Budgetary Authority or the Court of Auditors may wish to receive the financial information (five years);
- a data subject may bring legal action.

On that basis, the controller considers that a storage period of five years and three months therefore seems reasonable and sufficient and that if a longer period should subsequently be determined, it would not be implemented without prior discussion of any justification with the EDPS.

Security and confidentiality measures were adopted. Article 7(1) of Decision No 20/2010 establishes that the deliberations and proceedings of the Panel are to be secret. The hearings in the course of the Panel's work are also held *in camera*. Moreover, the information transmitted or obtained in the course of the Panel's work, in whatever form, is subject to professional secrecy, even with regard to the Appointing Authority. The obligation of professional secrecy must be interpreted in the light of Article 17(1) of the Staff Regulations which provides that an official is to refrain from any unauthorised disclosure of information received in the line of duty, unless that information has already been made public or is accessible to the public. Failure to comply with the obligation to carry out the work in a confidential manner could lead to members of the Panel facing disciplinary action within the meaning of Article 86(1) of the Staff Regulations.

Each person participating in the Panel's work is informed of the obligations relating to the protection of personal data at the first meeting. Any person involved in the work is subject to the same rules of confidentiality as the members of the Panel. The President recalls those

rules at each meeting and informs the members and other participants in the deliberations of their obligations under the rules on data protection.

The files are stored in a locked cabinet of the office of the President of the Panel and in a password-protected electronic file accessible only by the President of the Panel and his secretariat.

2.2. Legal aspects

2.2.1. Prior checking

The processing of personal data by a specialised panel for the purpose of examining any financial irregularity which may arise in the activities of the Council and its General Secretariat falls within the scope of Regulation (EC) No 45/2001 ('the Regulation') and is subject to prior checking by the EDPS under Article 27(2)(a) 'processing of data relating to health and to suspected offences, offences, criminal convictions or security measures' and Article 27(2)(b) 'processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct'. In principle, the checking carried out by the European Data Protection Supervisor is prior to implementation of the processing. In this case, the processing carried out started in February 2010 (the date of Decision No 20/2010). Since the notification to the EDPS was subsequent to the initiation of the procedure, the checking is necessarily *ex-post*. While that is unfortunate, this does not detract from the desirability of implementing the recommendations made by the EDPS.

The notification by the DPO of the Council was received on 20 June 2012.

On 19 September 2012, the procedure was suspended pending the DPO's comments. Those comments were received on 26 September 2012. The EDPS will issue its opinion no later than 27 September (20 June + August suspension + 7 days as [*sic*])

2.2.2. The lawfulness of processing

The lawfulness of processing must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001. That Article provides that the processing can be carried out 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 ... institution'.

Procedures for determining the existence of financial irregularities which involve the collection and processing of personal data relating to acts or omissions of officials or other servants fall within the scope of the legitimate exercise of official authority vested in the institution.

The legal basis for the data processing is covered by Article 60(6) and Article 66(4) of the Financial Regulation and Articles 74 and 75 of the detailed rules for its implementation, the provisions of which were endorsed by Decision No 20/2010 of the Secretary-General of the Council of the EU.

The processing of personal data in this case is lawful within the meaning of Article 5(a) of Regulation (EC) No 45/2001, read in conjunction with recital 27 thereof.

2.2.3. Data quality

The 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 the Regulation). In this case, there is no systematic rule regarding the type of data which may appear in a case concerning financial irregularities. Those data are largely dependent on the case in question. However, it is important that the data collected are relevant and adequate to the purpose assigned to the Panel.

Moreover, the data must be ‘processed fairly and lawfully’ (Article 4(1)(a)). The lawfulness of the processing has already been analysed in point 2.2.2 of this Opinion. As for fairness, it is related to the information which must be communicated to the data subject (see point 2.2.7 below).

Finally, under Article 4(1)(d) of the Regulation, personal data must also 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’.

Pursuant to Article 6(4) of the Decision of the Secretary-General of the Council, the President, the members and the rapporteur have unfettered access without delay to the premises, documents and computer systems of the General Secretariat of the Council. Officials and employees are required to cooperate fully in providing them with any necessary information or clarifications. Moreover, according to Article 6(5) of the Decision, the Panel may also hear any official or other servant by inviting them to testify, possibly assisted by their advisor.

The adversarial nature of the procedure established in itself constitutes the best guarantee as to the quality of the data processed and the information on the basis of which the Panel formulates its opinion. For the sake of completeness, the EDPS considers that the system must make it possible to ensure that all evidence which has been properly presented is included. Therefore, it goes without saying that information which is properly gathered and collected should be included in the evidence in the case-file. It follows that it is also appropriate to safeguard the data subject’s rights of access and rectification in order to make the case-file as complete as possible. Those rights represent the second opportunity to ensure the quality of the data. With regard to both the right of access and the right to rectify, see point 2.2.6.

The EDPS notes that the Panel ensures that the data collected are relevant and adequate to the purpose assigned to the Panel and ensures that all evidence which is properly presented is included in the case-file.

2.2.4. Data storage

Article 4(1)(e) of Regulation (EC) No 45/2001 lays down 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.’

According to the notification, the Panel’s opinions and case-files are stored as long as:

- the Budgetary Authority or the Court of Auditors may wish to receive the financial information (five years);

- a data subject may bring legal action.

On that basis, the Council therefore submits that a storage period of five years and three months is reasonable and sufficient.

The controller considers that it is appropriate to provide for a period similar to that laid down by Article 49(d) of the detailed rules for the implementation of the Financial Regulation, that is to say at least five years from the date on which the European Parliament grants discharge for the budgetary year in the course of which the Panel delivers its opinion.

The EDPS considers that the proposed storage period seems appropriate, as do the reasons for requiring that period. This is in line with the period laid down by other institutions which have established a financial irregularities panel.

No provision has been made for the possibility of storing the data for statistical, historical or scientific reasons.

2.2.5. Data transfer

Processing should also be examined in the light of Article 7(1) of Regulation (EC) No 45/2001. Processing under Article 7(1) concerns transfers of personal data within or to other Community institutions or bodies 'if ... necessary for the legitimate performance of tasks covered by the competence of the recipient'.

This case concerns a transfer to other EU bodies, in particular OLAF and in the event of systemic problems, to the authorising officer and the authorising officer by delegation concerned (if the latter is not called into question), and to the internal auditor. There may be a transfer, where appropriate, to the Budgetary Authority up until the discharge for the relevant financial year or to the Court of Auditors and to the Court of Justice.

Where the Panel's analysis suggests that the case referred to it is a matter for OLAF, the President of the Panel must without delay return the case-file to the General-Secretary of the Council and at the same time inform OLAF (Article 8 of the Decision).

It is therefore necessary to ensure that the requirements of Article 7(1) are satisfied, which is the case since the data collected are necessary to carry out the processing and also because the data are 'necessary for the legitimate performance of tasks covered by the competence of the recipient'. With regard to those transfers, it should be borne in mind that only the relevant data should be transferred. Such transfer is thus lawful insofar as the purpose is covered by the competences of recipients.

2.2.6. Right of access and rectification

Those rights are referred to in Articles 13 and 14 of the Regulation.

The EDPS considers that Articles 13 and 14 of the Regulation are complied with, since data subjects are invited by the Panel to submit their comments and it can deliver its opinion only after communicating the entire case-file, after hearing the official or other servant concerned and after giving him the opportunity to submit his observations on facts concerning him. Moreover, the opinion of the Panel sets out those observations.

However, the notification provides that any person called to give evidence, to provide information, to intervene or who is himself concerned, may request access to the personal data relating to him and request any corrections, subject to the exceptions provided for by Article 20 of Regulation (EC) No 45/2001 and in accordance with the procedure laid down in Section 5 of Council Decision 2004/644/EC⁴. In the event of referral of the case-file to OLAF, the person(s) called into question will be informed provided that such information is not harmful to the conduct of the investigation.

On those points, the EDPS wishes to emphasise that it is also important to note that the Panel acts as an advisory body and not as an investigative body; those two rights (access and rectification) cannot therefore be restricted under Article 20 of the Regulation, which provides in particular that such restriction constitutes a necessary measure to safeguard the prevention, investigation, detection and prosecution of criminal offences⁵.

Pursuant to Article 20, it is therefore necessary to distinguish between two situations in the context of the Panel's activities:

- Article 20(1)(a) of Regulation (EC) No 45/2001 does not apply to the Panel, which is an advisory body, where no other context need be taken into consideration. This means that when the opinion of the Panel is given outside the context of an investigation by OLAF, the rights of data subjects cannot be restricted by the Article referred to above. However, it is possible to envisage the application of another restriction based on Article 20, for example when considering the protection of the rights and freedoms of others (Article 20(1)(c)). That restriction should be assessed on a case-by-case basis by the Panel.

- On the contrary, where the Panel considers that a case falls within the competence of OLAF, as referred to in Article 75 of the detailed rules for the implementation of the Financial Regulation, it must without delay transmit the case-file to the General-Secretary and immediately inform OLAF. Article 8(1) of the Decision, which provides that 'the Panel must, where appropriate, limit the right of access and retain any evidence that may affect future OLAF investigations', applies only in that context. This therefore means that there may be exceptions to the right of access and rectification, because this could affect future OLAF investigations. That interpretation is consistent with the restriction provided for in Article 20(1)(a), not on account of the fact that the Panel investigates but because OLAF investigates and because it is for the latter to determine whether or not to maintain that restriction.

2.2.7. Information to be given to data subjects

Articles 11 and 12 of Regulation (EC) No 45/2001 concern the information to be supplied to the data subject in order to ensure transparent processing of his personal data. Those articles list a series of compulsory and optional details. The latter are applicable to the extent that, given the particular circumstances of the processing in this case, they are necessary to ensure fair processing in respect of the data subject. In this case, a part of the data is obtained directly from the data subject and another part from other persons.

In this case, the provisions of Article 11 (Information to be supplied where the data have been obtained from the data subject) on the information to be given to the data subject are

⁴ Council Decision of 13 September 2004 adopting implementing rules concerning Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (2004/644/EC).

⁵ The interpretation of the EDPS also concerns administrative investigations and disciplinary cases.

applicable to the extent that the data subjects themselves supply information to the Panel under Article 60(6) of the Financial Regulation. Moreover, the provisions of Article 12 (Information to be supplied where the data have not been obtained from the data subject) are applicable to people who are involved in a case of financial irregularity.

The EDPS has analysed the statement concerning the information provided for in Articles 11 and 12 of Regulation (EC) No 45/2001. That document refers to the various provisions of those articles. However, although it sets out whether replies to the questions are obligatory or voluntary, the statement does not set out the possible consequences of failure to reply referred to in Article 11(1)(d) of the Regulation. Therefore, the EDPS recommends that provision is made to supplement the reference relating to the obligatory nature of the replies to the questions in the statement (point 4 of the statement).

It is important to note that the provisions of Article 11 also apply to persons involved in a case of financial irregularity, where they avail themselves of their right to submit comments. According to the EDPS, that objective would also be achieved if the information was specifically provided at the time of obtaining information from the data subject.

As regards information relating to the storage period, that period is stated as being five years. The EDPS recommends that the controller amend paragraph 6 of the statement to indicate the moment at which the five-year period for storage starts to run.

The impact of Article 2(g) must also be analysed. Article 2(g) of the Regulation provides as follows: ‘however, authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients’.

Article 2(g) is an exception to the right to information (Articles 11 and 12) and, as an exemption to the right to information, must be strictly interpreted as meaning that it covers specific investigations. This typically concerns the authorities receiving personal data in the context of particular investigations and not the authorities which conduct those investigations or audits in general. Authorities such as OLAF receiving data in the context of a particular investigation fall within the exception in Article 2(g) and no information will therefore be given. This means that from the point of view of the Panel, it will not have an obligation to inform data subjects that data is transmitted to OLAF.

Nevertheless, this does not mean that institutions/bodies should not provide information concerning the possible disclosure of personal data to those authorities in the form of general information. Moreover, this is without prejudice to the fact that OLAF may inform data subjects, depending on whether or not Article 20 is applicable.

2.2.8. Security

Article 22 of Regulation (EC) No 45/2001 provides that the controller is to 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. Those 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.

In view of those measures, the European Data Protection Supervisor considers that the security measures adopted are appropriate under Article 22 of the Regulation.

Conclusion

The proposed processing does not appear to entail any infringements of the provisions of Regulation (EC) No 45/2001, provided that in the context of updating the general information to staff, the privacy statement is adjusted in the light of the comments made in this opinion (supplementing the statement by referring to the possible consequences of failure to reply and specifying the moment at which the five-year storage period starts to run).

Done at Brussels, 26 September 2012

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor