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[1] Text with EEA relevance

I

(Resolutions, recommendations, guidelines and opinions)

OPINIONS

EUROPEAN DATA PROTECTION SUPERVISOR

Opinion of the European Data Protection Supervisor on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

(2007/C 91/01)

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty establishing the European Community, and in particular its Article 286,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular its Article 8,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ([1]),

Having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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 ([2]), and in particular its Article 41,

Having regard to the request for an opinion in accordance with Article 28 (2) of Regulation (EC) No 45/2001 received on 15 September 2006 from the Commission;

HAS ADOPTED THE FOLLOWING OPINION:

I. INTRODUCTION

1. The Proposal for a Regulation amending Regulation (EC) No 1073/1999 of the European Parliament and the Council of 25 May 1999 concerning investigations conducted by OLAF ([3]) (hereinafter 'the Proposal') contains revisions to most of the articles of Regulation (EC) No 1073/1999 ([4]). This Regulation sets forth the operational rules to be followed by those involved in OLAF investigations and, as such, it constitutes the legal basis for OLAF's operational activities.

Consultation with the EDPS

2. The Proposal was sent by the Commission to the EDPS on 15 September 2006. The EDPS understands this communication as a request to advise Community institutions and bodies, as foreseen in Article 28(2) of Regulation (EC) No 45/2001 of 18 December 2000 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 (hereinafter Regulation (EC) No 45/2001). In view of the mandatory character of Article 28(2) of Regulation (EC) No 45/2001, the EDPS welcomes the explicit reference to this consultation in the preamble of the Proposal.

([1]) OJ L 281, 23.11.1995, p. 31.
([2]) OJ L 8, 12.1.2001, p. 1.
([3]) OJ L 136, 31.5.1999, p. 1.
([4]) The Proposal amends articles 3,4,5,6,7,8,9,10,11,12,13,14, and 15.

3. The comments made in this Opinion apply *mutatis mutandis* to the Proposal for a Council Regulation amending Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) ([1]).

The Importance of the Proposal and the EDPS Advice

4. The EDPS deems it important to deliver an opinion on this Proposal in the light of its impact on individuals' rights to data protection and privacy. Taking into account that the Proposal sets forth new rules to be followed by OLAF to conduct investigations of alleged illegal activities, it is essential to ensure that in doing so, the data protection and privacy rights of the persons implicated in such investigations, suspected infringers and also staff members and other individuals who provide information to OLAF, are properly guaranteed. This is even more important given the particularly sensitive type of information that OLAF may potentially collect, which includes data relating to suspected offences, offences, criminal convictions, health data as well as information that would serve to exclude individuals from a right, benefit or contract insofar as such information represents a particular risk to the rights and freedoms of the data subjects.

Main Elements of the Proposal and Initial Comments

5. The proposed amendments to Regulation (EC) No 1073/1999 respond to different goals and objectives ([2]). For example, some amendments aim at improving the effectiveness and efficiency of OLAF investigations, for example, to ensure that OLAF's powers of investigation cover economic operators in Member States receiving Community funds. Others intend to facilitate the exchange of information about suspected wrongdoings between OLAF and the various institutions concerned, at both EU and national level. ([3]) Finally, some of the proposed amendments seek to guarantee the rights of the persons implicated in an investigation, including their right to data protection and privacy and make procedural guarantees stronger.

6. The EDPS agrees with the significance of the goals and objectives pursued by the proposed amendments and, to this extent, he welcomes the Proposal. The EDPS particularly values the procedural guarantees afforded to individuals under the Proposal. This is particularly true regarding the possibility of suspected individuals to request an opinion from the Review Adviser as to whether the procedural guarantees were respected during the investigation. The EDPS is also pleased with the amendments that aim to provide more information to whistleblowers and informers. From the perspective of the protection of individuals' rights to the protection of their personal data and privacy, the EDPS considers that on the whole the Proposal contains improvements *vis-à-vis* the current situation. For example, the EDPS welcomes the recognition of the application of several data protection rights during the investigations such as the right of the suspected person to be informed of the investigation and have his/her views known.

7. However, despite the overall positive impression, the EDPS considers that from the point of view of the protection of personal data, the Proposal could be further improved, without jeopardising the objectives that it pursues. In particular, the EDPS is concerned that the Proposal may be deemed as a *lex specialis* regulating the processing of personal data collected in the scope of OLAF investigations, which would take precedent over the application of the general data protection framework contained in Regulation (EC) No 45/2001. This is particularly worrisome considering that the data protection standards contained in the Proposal are lower than those contained in Regulation (EC) No 45/2001, and this without any apparent justification.

8. In order to avoid this outcome, the following section provides an analysis of the Proposal which, on the one hand, describes its shortcomings and, on the other hand, suggests specific ways to address them. Obviously, the scope of this analysis is limited to the provisions having an impact on personal data protection, particularly Article 1, section (5), (6) and (7) pursuant to which Articles 7a, 8 and 8a are added or amended.

([1]) OJ L 136, 31.5.1999, p. 8.
([2]) Some of the problems that the Proposal seeks to solve were raised in the past by the Court of Auditors the European Parliament and OLAF's own evaluation of the Office's activities.
([3]) The Proposal lays down a set of measures to ensure that the information flows in all directions: from OLAF to institutions and Member States and vice-versa.

II. ANALYSIS OF THE PROPOSAL

II.1. Article by Article Examination of the Proposal

II.1.a. *Data Quality Principle*

9. The data quality principle, which is recognised in Article 4 of Regulation (EC) No 45/2001, encompasses various specific aspects. In particular, pursuant to this principle, personal data must be accurate, it must conform to the objective reality and it must also be complete and updated. Second, data must not be excessive and it must be adequate so that there is a link between the information and the purpose for which it is intended to be used. The Proposal incorporates the data quality principle through Article 1, section (1) pursuant to which Article 7a1 is added which requires OLAF to seek evidence for and against the person concerned.

10. The EDPS welcomes the inclusion of the obligation to seek evidence for and against the person concerned because it affects the accuracy and the completeness of the data being processed, thus contributing to the compliance with the principle of data quality, and hence increasing the overall data protection safeguards in the context of OLAF investigations.

II.1.b. *Right of Information*

11. Pursuant to this right, those who collect personal data are required to inform individuals to whom the data refers of the fact that their data are being collected and processed. Individuals are further entitled to be informed of, *inter alia,* the purposes of the processing, the recipients of the data and the specific rights that individuals, as data subjects, are entitled to. The obligation to give information about the processing of one's data is to ensure the fairness of the processing of individual's personal information and is, at the same time, an indispensable safeguard for the rights of individuals. The Proposal recognises this right in Article 1, section (1) pursuant to which Article 7a2, first paragraph is added and Article 1, section (7) pursuant to which Article 8a is added.

12. The EDPS welcomes the inclusion of Articles 7a.2 first paragraph and 8a, insofar as they contribute to the respect for the data protection right of information set forth in Article 11 and 12 of Regulation (EC) No 45/2001, in the specific context of investigations performed by OLAF.

13. In addition to setting forth the right to be informed of the processing of one's personal information, Articles 11 and 12, which apply respectively to the situations where information on an individual is collected directly from that individual or from third parties, lay down the information that must necessarily be given to individuals so that they are in a position to have accurate and full information about the existence of a processing operation that concerns them. This information includes among others the purposes for which the data will be used, potential recipients of the data and the existence of the right of access to the data.

14. Unfortunately neither Article 7a2 first paragraph nor Article 8a contain similar information requirements as Article 11 and 12 of Regulation (EC) No 45/2001, thus failing to specify what information is to be given to individuals in order to ensure the fairness of the processing. The EDPS considers that Articles 7a2 first paragraph and 8a should be consistent with Articles 11 and 12 of Regulation (EC) No 45/2001. To this end, the EDPS suggests including in Articles 7a2 first paragraph and 8a an express reference to the application of Articles 11 and 12 of Regulation (EC) No 45/2001.

15. The EDPS considers that failure to include a reference to Articles 11 and 12 will create an unclear legal situation. Indeed, the Proposal would create a legal framework regulating the right of information in the context of OLAF investigations that would differ from the general framework set forth by Articles 11 and 12 of Regulation (EC) No 45/2001. Unfortunately, such a framework would provide less data protection safeguards than the general one. The EDPS fails to see any reason to justify this unfortunate outcome.

16. Articles 7a2 and 8a second paragraph of the Proposal foresee an exception to their application if giving the information would prejudice the performance of the investigation. Pursuant to the exception, the Director General of OLAF is entitled to defer the fulfilment of the obligation to ask the person implicated to make his views known.

17. The EDPS notes that the possibility of limiting the provision of information *in certain specific cases* is in line with Article 20 of Regulation (EC) No 45/2001 which provides for certain restrictions to this right, including when doing so is necessary to safeguard (i) the prevention and investigation of criminal offences, (ii) economic or financial interest of a Member State or of the European Communities, as well as (iii) the protection of the data subject or of the right and freedoms of others.

18. The EDPS notes that under Article 20 of Regulation (EC) No 45/2001, the limitation to the right of information is accompanied by various data protection safeguards. In particular, Article 20.3 establishes that if a restriction is imposed, the data subject shall be informed of the principal reasons and on his or her right to have recourse to the European Data Protection Supervisor. Providing such information may be deferred if providing the information would harm the investigation.

19. However, in the Proposal the provisions that set forth restrictions to the right of information are not accompanied by the data protection safeguards foreseen in Article 20 of Regulation (EC) No 45/2001. Thus, in the context of OLAF investigations, limitations to the right of information are provided without the safeguards that would apply under the general data protection framework, which the EDPS finds inappropriate. To resolve this situation the EDPS suggests that the limitation to the right of information of Articles 7a2 second paragraph and 8a be linked to the guarantees of Article 20 Regulation (EC) No 45/2001.

II.1.c. *Right of Access*

20. The right of access gives individuals the possibility to learn whether and what type of information relating to them is being processed. The Proposal recognises this right in Article 1, section (1) pursuant to which Articles 7a2, second paragraph and 7a3 are added.

21. The above amendments, *i.e.* Articles 7a2, second paragraph and 7a3 set up the right of the individual suspected of wrongdoing to be informed on all matters concerning him. More specifically, they establish how this right will be exercised in the context of OLAF investigations. Firstly, it will be provided *on completion of an investigation, i.e.* at the end of the investigation. Secondly, it will be provided through a summary of the matters regarding the individual. In addition, access will also be provided through a record of the interview with the suspected individual.

22. The EDPS welcomes the inclusion of Articles 7a2 second paragraph and 7a3 insofar as they specify in the context of OLAF investigations the data protection right of access set forth by Article 13 of Regulation (EC) No 45/2001. However, the EDPS considers that there is room for improvement in the way this right is recognised in the Proposal. The EDPS is concerned that the right of access, as drafted in the Proposal, is inferior to the same right under Regulation (EC) No 45/2001.

23. Under Regulation (EC) No 45/2001 as a matter of general principle, individuals are entitled to exercise the right of access to their personal data, unless one of the specific situations of Article 20 of Regulation (EC) No 45/2001, referred above, justifying a restriction to such right, arise. In such a case, access can be restricted until the circumstances change.

24. The EDPS observes that the Proposal does not recognise the application of the right of access as a matter of general principle. Instead, the Proposal foresees the application of the right of access *in certain procedural stages* and *in respect to certain documents*. To some extent, it can be said that under the Proposal, the right of access has both temporal and material limitations.

25. Indeed under Article 7a2 second paragraph access can be obtained only *on completion of an investigation*, when the individual is given a summary of the matters that concern him/her and when an interview with the individual and OLAF has taken place and a record of an interview has been drafted. Outside these two stages of the procedure, as a general rule, there is no access to personal information. Regarding the material to which access is granted, the EDPS sees that under the Proposal, access is only possible regarding the summary of the matters concerning the individual and the record of the interview *ex* Article 7a2 second paragraph and Article 7a.3 respectively. Access does not apply to any other information that may be held about the individual, such as copies of documents, e-mails, telephone records, etc.

26. The EDPS agrees with the Proposal that access to personal information is relevant in the two procedural steps and regarding the two documents specified by the Proposal and welcomes the Proposal's recognition of such right in these circumstances. However, the EDPS considers that as a matter of general principle, the Proposal should *also* recognise the existence of a right of access beyond the two cases explicitly mentioned by the Proposal.

27. The EDPS is aware that there may be some opposition to the idea of recognising the right of access, as a general rule, in the course of an investigation. However, the EDPS recalls that if in certain investigation cases there is a need to safeguard the confidentiality of the investigation, pursuant to Article 20 of Regulation (EC) No 45/2001, OLAF will be able to defer access. Indeed, OLAF can rely on Article 20 to defer access for example in order to safeguard the prevention and investigation of criminal and other offences. Thus, granting the right of access as a matter of general principle does not prevent *ad hoc* limitations to such rights, when the reasons outlined above occur.

28. In light of the above, and in order to ensure that an effective right of access in the course of an investigation exists which also recognises potential limitations to it, the EDPS suggests adding in the Proposal a clear reference to the individual's right of access to their personal data contained in OLAF's investigation file. In particular, the EDPS considers that a paragraph along the following lines should be inserted between the first and second paragraph of Article 7a.2: '*Any person implicated in an investigation has the right to access personal data related to him/her which are gathered in the course of the investigation. Such right(s) may be subject to the limitations foreseen in Article 20 of* Regulation (EC) No 45/2001'.

29. This paragraph would set forth, as a general principle, the application of the right of access. As a result, not only consistency would be achieved but also individuals concerned by OLAF investigations would not be subject to a less benevolent regime as far as access to personal data is concerned.

II.1.d. *Right of Rectification*

30. The right of access is a *prius* to the right of rectification. Once individuals have had the opportunity to access their data and verify the accuracy and the lawfulness of the processing, the right of rectification enables them to require rectification of any incomplete or inaccurate information.

31. Under the Proposal, the right of rectification is regulated together with the right of access. Both Article 1, section (1) pursuant to which Articles 7a2 second paragraph and 7a3 are added refer to the possibility of the suspected infringer to have his views known.

32. The EDPS notes that, *stricto sensu*, the Proposal does not provide for a right to rectify as such. Instead, the Proposal provides for a right to '*have the views known*' and '*approve or add observations*' (in both instances regarding personal information). The EDPS considers that such privileges are equivalent to the right of rectification and that they are in line with Article 14 of Regulation (EC) No 45/2001 which sets forth the legal framework for the right to rectify inaccurate information. The EDPS considers that in the context of OLAF investigations it is not possible to provide individuals with the possibility to simply 'rectify' the information that they deem as incomplete or inaccurate, obviously because in many cases, ascertaining whether the information is inaccurate will be the subject of the investigation. This is why in this context the right of rectification can be provided, as the Proposal does, by allowing the individual to have his views known and by allowing him to provide comments regarding the personal information at stake.

33. In addition to the above, the EDPS considers that the same comments made above regarding the way the Proposal regulates the right of access, apply *mutatis mutandis* to the right of rectification. Indeed, under the Proposal, the right of rectification has the same shortcomings that were described above regarding the right of access: the Proposal does not recognise the right to rectify as a matter of general principle. Instead, the right of rectification is unduly confined to the summary of the allegations and the report that follows an interview.

34. The EDPS considers that the Proposal should recognise the right of rectification as a general right, not like a partial one. To this end, the EDPS suggests inserting a provision in the proposal recognising the application of the right of rectification. In particular, after the sentence 'Any person implicated in an investigation has at any time the right to access personal data related to him/her gathered in the course of the investigation' the following should be added: '*and to make his views known on whether the personal data are inaccurate or incomplete*' . The EDPS recalls that by applying Article 20 of Regulation (EC) No 45/2001, OLAF may still be able to limit the right of rectification in order to safeguard the prevention, investigation, detection and prosecution of criminal offences.

35. Article 7a2, 3rd paragraph foresees the possibility of excluding the application of the right of access and rectification. As it was mentioned regarding the limitation to the right of information, such limitations should be accompanied by the safeguards that apply in the context of Article 20 of Regulation (EC) No 45/2001. To this end, the EDPS suggests that the limitation of the application of such rights under the Proposal is linked to an express reference to Article 20.

II.1.e. *Exchanges of Personal Information*

36. The Proposal provides for exchanges of personal data within the European Institutions and with Member States authorities. In fact, one of the goals of the Proposal is to enhance the exchange of information among OLAF and authorities at both EU and Member State levels.

37. In this regard, the EDPS would like to stress that these exchanges should be allowed only to the extent that is necessary to the specific case in order to meet the goals pursued by the investigation. Furthermore, in accordance with Article 7 of Regulation (EC) No 45/2001, the EDPS reminds that the recipient of the data shall process them only for the purposes for which they were transmitted.

38. The Proposal does not provide for exchanges of personal data with third countries, or for international cooperation. However, in this context, one may assume that such cooperation may take place. In this regard, the EDPS would like to stress that these exchanges should be allowed only if the third country ensures an adequate level of protection of personal data or if the transfer falls within the scope of one of the derogations laid down by Article 9.6 of Regulation (EC) No 45/2001. Furthermore, the EDPS recalls that the same rules apply regarding the exchanges of information between OLAF and EU institutions and bodies that are not Community bodies such as EUROPOL or EUROJUST. In such cases, the EDPS hopes that appropriate legislation will be passed recognising the adequacy of the data protection framework that governs such institutions, which would facilitate the transfers of information to them ex Article 9.2 of Regulation (EC) No 45/2001. Alternatively, new legislation could be passed deeming their data protection regime as equivalent to that of Community bodies and institutions, ex Article 7 of Regulation (EC) No 45/2001, which would also have the effect of removing the restriction to transfer data to such institutions.

II.1.f. *Compliance with Regulation (EC) No 45/2001*

39. The Proposal has amended Article 8.3 to include an express reference to the application of Regulation (EC) No 45/2001. The EDPS welcomes the amendment of Article 8(3), insofar as it confirms that whenever the Proposal does not specify how the data protection requirements apply in the context of OLAF investigations, the Regulation (EC) No 45/2001 will apply as default.

40. However, the EDPS considers that Article 8.3 on its own, i.e. without the amendments suggested in this Opinion, is not sufficient to ensure a level of protection of personal data at least equal to that provided under Regulation (EC) No 45/2001. Article 8.3 by itself is not enough because it could be understood that it is only relevant whenever the Proposal does not specify how the data protection requirements apply in the context of OLAF investigations. However, when the Proposal does specify how the data protection requirements apply and in doing so lays down a less protective data protection regime, then such unsatisfactory regime could be considered to take precedent over the general data protection embodied in Regulation (EC) No 45/2001. The specific amendments suggested above for concrete references to Regulation 45/2001 aim to avoid such risks of interpretation

III. **ADDITIONAL CONSIDERATIONS**

III.1. **Protection of Whistleblowers**

41. The EDPS fully agrees with the Proposal that for the sake of greater transparency it is necessary to ensure an adequate degree of information for whistleblowers, and welcomes the obligation in the Proposal to provide informers with information as to whether or not to open an investigation.

42. The EDPS recommends the respect for the confidentiality of the identity of whistleblowers during OLAF investigations and in the later stages. To this end, the EDPS is of the view that it would be appropriate for this Proposal to include a new paragraph guaranteeing the confidentiality of whistleblowers. The present guarantees (Commission Communication SEC/2004/151/2) do not seem enough from a legal point of view. The EDPS notes that such provision would be in line with the Opinion of the Article 29 Data Protection Working Party that deals with the application of EU data protection rules to internal whistleblowing schemes ([1]).

IV. **CONCLUSIONS AND RECOMMENDATIONS**

43. The EDPS welcomes this Proposal insofar as it makes more explicit the procedural guarantees of individuals concerned by OLAF investigations, including the protection of personal data of such individuals.

44. From the perspective of the protection of individuals' rights to the protection of their personal data and privacy, the EDPS considers that for the most part the Proposal contains improvements *vis-à-vis* the current legal framework. Examples of improvements include Articles 7a2 first paragraph and 8a as they contribute to the respect of the *right of information* and Articles 7a2 second paragraph and 7a.3 which confirm the application of the partial *right of access and rectification* in the context of OLAF investigations.

45. In addition, the EDPS welcomes the Proposal's recognition that Regulation (EC) No 45/2001 applies to all data processing activities carried out in the context of OLAF investigations, as it will contribute to ensuring a consistent and homogeneous application of the rules regarding the protection of individuals' fundamental rights and freedoms with regard to the processing of personal information.

46. Although the EDPS is appreciative of the amendments aimed at boosting procedural and data protection rights outlined above, he is concerned by the fact that most of the proposed amendments do not reach the minimum data protection standards contained in Regulation (EC) No 45/2001. The EDPS is concerned that if the Proposal could be deemed to take precedent over the application of the general data protection framework contained in Regulation (EC) No 45/2001, this would entail an unacceptable watering down of the data protection standards in the context of OLAF investigations. In the EDPS's opinion this is particularly worrisome in the light of the sensitive nature of the type of data that may be collected in the framework of OLAF investigations. In order to avoid this outcome, the EDPS requests the Community legislator to take into account the following issues and make the related amendments in the Proposal in order to address them:

47. *Shortcomings regarding the right of information in the context of OLAF investigations:*

Providing information to individuals to ensure fair processing constitutes an indispensable safeguard which should not be unduly compromised, as the Proposal does. To avoid it, the Proposal should be amended as follows:

(i) Articles 7a2 first paragraph and 8a should include an explicit reference to Articles 11 and 12 of Regulation (EC) No 45/2001 in order to ensure fair processing.

(ii) The limitation to the right of information of Articles 7a2 first paragraph and 8a second paragraph should be linked to the safeguards of Article 20 Regulation (EC) No 45/2001.

48. *Shortcomings regarding the right of access in the context of OLAF investigations:*

Providing access to personal information so that individuals can learn whether data concerning them is being processed constitutes a basic pillar for the respect of the personal data. To ensure effective access rights, the Proposal should be amended as follows:

(i) A new provision should be added recognising as a general principle the right of access to personal information gathered in the context of OLAF investigations which could be inserted between the first and second paragraph of Article 7a.2. Such a provision could read as follows. Such a provision could read as follows '*Any person implicated in an investigation has the right to access personal data related to him/her which are gathered in the course of the investigation. Such right(s) may be subject to the limitations foreseen in Article 20 of* Regulation (EC) No 45/2001'.

([1]) Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime (00195/06/EN WP 117).

49. *Shortcomings regarding the right of rectification in the context of OLAF investigations:*

The right to rectify inaccurate or incomplete information is a natural consequence of the right of access to personal information, and as such, it constitutes a cornerstone of the protection of the right to personal data. Restrictions to the right of rectification should only be provided to the extent that they are permitted under Regulation (EC) No 45/2001. The Proposal contains additional restrictions that should be avoided as follows:

(i) A provision should be added stating that suspected individuals have a general right to have their views known regarding any piece of information that referred to them, except if an exception ex Article 20 of Regulation (EC) No 45/2001 applies. In particular, after having stated that any person implicated in an investigation has 'at any time the right to access personal data related to him/her gathered in the course of the investigation', it should be added that an individual has the subsequent right '*to make his views known on whether the personal data is inaccurate or incomplete*' .

(ii) The EDPS suggests that the limitation to the right of access and rectification foreseen in Article 7a2, 3rd paragraph be linked to the guarantees of Article 20 Regulation (EC) No 45/2001.

50. In addition to the above, the EDPS is of the view that it would be appropriate for this Proposal to include a new paragraph guaranteeing the confidentiality of whistleblowers.

Done at Brussels on 27 October 2006

Peter HUSTINX

European Data Protection Supervisor

Second opinion of the European Data Protection Supervisor on the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters

(2007/C 91/02)

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty establishing the European Community, and in particular its Article 286,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular its Article 8,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ([1]),

Having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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 ([2]), and in particular its Article 41,

HAS ADOPTED THE FOLLOWING OPINION:

1. On 19 December 2005, the EDPS issued an opinion ([3]) on the Proposal of the Commission for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters. In this opinion, he underlined the importance of the proposal as an effective instrument for the protection of personal data in the area covered by Title VI of the EU-Treaty. Such an instrument should not only respect the principles of data protection as laid down in the Council of Europe Convention No 108 ([4]) and more specifically in directive 95/46/EC, but also provide for an additional set of rules taking into account the specific nature of the area of law enforcement. For the EDPS it is essential that the framework decision covers all processing of police and judicial data, even if they are not transmitted or made available by competent authorities of other Member States. Consistency of the protection of personal data is essential, regardless of where, by whom or for which purpose they are processed. The EDPS has made several proposals to improve the level of protection.

2. On 27 September 2006, the European Parliament adopted a legislative resolution on the Commission proposal. In general terms, the resolution has the same objectives as the opinion of the EDPS: support for the proposal in general and amendments aiming to enhance the level of protection afforded by the Framework Decision.

3. The Commission proposal is currently being discussed within Council. The Council is reportedly ([5]) making progress and is modifying essential elements of the text of the proposal. A serious effort is being made by the Council Presidency to make even more significant progress. It aims at reaching a common approach on the main elements by December 2006.

4. The EDPS welcomes that the Council is giving much attention to this important proposal. However, he is concerned about the direction of the developments. The texts currently being discussed within Council do not incorporate the amendments proposed by the European Parliament, nor the opinions of the EDPS and of the Conference of European Data Protection Authorities. On the contrary, in quite a few cases provisions in the Commission proposal, offering safeguards to the citizens, are deleted or substantially weakened. *As a result, there is a substantial risk that the level of protection will be lower than the level of protection afforded under Directive 95/46/EC or even under the more generally formulated Council of Europe Convention No 108 which is binding on the Member States.*

([1]) OJ L 281, 23.11.1995, p. 31.
([2]) OJ L 8, 12.1.2001, p. 1.
([3]) OJ C 47, 25.2.2006, p. 27.
([4]) Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe, 28 January 1981.
([5]) Formally, there are no public documents available and the EDPS is not directly involved in the work of the Council Working Party. Documents, reflecting the state of play within Council, can be found on the website of Statewatch (www.statewatch.org).

5. The EDPS notes that also the Libe-committee of the European Parliament has recently voiced its concerns regarding the choices of Council on this proposal for a framework decision.

6. It is for these reasons that the EDPS now issues a second opinion. This second opinion focuses on some essential concerns and does not repeat all the points made in the opinion of the EDPS in December 2005, which all remain valid.

General concern

7. In the developing area of freedom, security and justice, the exchange of police and judicial information between the Member States is becoming more and more important. Several legal instruments are proposed or have been adopted in order to facilitate this exchange of information. The EDPS underlines once more that in this context a solid legal framework which protects the data subject is needed to ensure that the fundamental rights of citizens are respected. The present (proposal for a) Framework Decision is directly linked to the proposals facilitating this exchange of information.

8. Although the EDPS recognises the importance of adopting the Framework Decision by Council as soon as possible, he warns that the rapidity of the decision making should not lead to a lowering of the standards of protection. The texts currently discussed within Council raise doubts as to whether the result will be solid enough, so as to give the citizen an effective level of protection. In the present situation, the consequence of the objective of rapidity would appear to be that possibly controversial provisions are deleted or weakened. The lack of time to reach consensus on possibly controversial provisions could result in the quality of the Framework Decision being compromised.

9. Under these circumstances, the EDPS recommends that Council allows more time for the negotiations in order to achieve a result that offers sufficient protection.

Applicability to domestic processing

10. This issue was an essential element of the opinion of December 2005 and was thoroughly discussed afterwards. Common rules on data protection should apply to all data in the area of police and judicial cooperation, and not be limited to cross-border exchanges between Member States. A more limited scope could not afford the appropriate protection, as required by Article 30(1)(b) of the EU-Treaty. This point was underlined on several occasions, also by other stakeholders besides the EDPS.

11. In his opinion of December 2005, the EDPS stated that a limitation to data that are exchanged with other Member States would make the field of application of the framework decision particularly unsure and uncertain, which would be contrary to its essential objective. At the time of collection or processing of personal data it is unknown as to whether those data will later be relevant for exchange with competent authorities in other Member States.

12. For this reason, *a more limited scope is unworkable and would, if introduced, require difficult and precise distinctions within the databases of law enforcement authorities, only leading to additional complexity and costs for those authorities and moreover harming the legal certainty of individuals.*

13. Two examples can be given to illustrate these consequences. In the first place, additional complexity and costs result from the fact that criminal files are in quite a number of cases composed of data originating from different authorities. The consequence of a limited scope would be that parts of such composed files — the parts containing data originating from authorities in other Member States — would be protected under the framework decision and that other parts would not be protected. In the second place, the legal certainty of individuals would be harmed since — in the case of a more limited scope — data originating from third countries, but not exchanged between Member States would not be covered by the Framework Decision. It goes without saying that the processing of those data entails specific risks to the data subject should there, for instance, be no legal obligation to examine the accuracy of those data. A good example would be the use of 'no-fly' lists of third countries for law enforcement purposes in a Member State.

14. The EDPS underlines once more that a high level of data protection is needed in the area of police and judicial cooperation, an area in which the processing of personal data poses, by its very nature, specific risks for the citizen as has *inter alia* been recognised by Article 30(1)(b) of the EU-Treaty. Moreover, large discrepancies between data protection in the first and the third pillar would not only affect the citizens' right to protection of personal data, but would also affect the efficiency of law enforcement and the mutual trust between the Member States.

15. The proposal serves both objectives. It should provide guarantees for the citizen against improper use of his or her personal data. To the affected citizen it is of no importance whether data concerning him or her are processed in the context of an exchange between the Member States or in a purely domestic context. Moreover, it should contribute to the mutual trust between the Member States, as a condition for a successful exchange of information. If common standards are applied to the processing of data this will result in an easier acceptance of data exchanged between the Member States.

16. The EDPS warns that a limitation of the scope of the Framework Decision to data in the context of an exchange would not fully ensure the building of trust between the authorities of the Member States. Moreover, a limited text does not protect the citizen in an appropriate way. Under those circumstances, the Framework Decision would no longer give an adequate guarantee for the citizen against possible misuse of his or her data by public authorities. In the opinion of the EDPS, this 'shield-function' of the legislation is essential, if only to ensure that the European Union respects fundamental rights, in accordance with Article 6 of the EU-Treaty.

17. Finally, there is a strategic argument in favour of a Framework Decision applicable to all processing. As the recent negotiations with the United States for a new agreement on the processing and transfer of airline passenger data ([1]) show, solid EU-legislation protecting the citizen in all EU-internal situations would also strengthen the position of the EU in negotiations with third countries. In the absence of such a solid law, it would be rather difficult to insist upon an adequate level of protection in third countries, as a precondition for the transfer of personal data.

Other concerns

18. *Emphasis on data quality*. Article 4 of the Commission proposal does not only include the main data quality principles of Directive 95/46/EC but also provides for some specific rules. It contains a distinction between different kinds of data subjects (suspects, convicted people, victims, witnesses, etc.). Data related to them should be treated differently, with specific safeguards, especially with regard to non-suspects. It furthermore contains obligations for the Member States to distinguish data according to their degree of accuracy and reliability. This is an important provision since law enforcement authorities also use soft data based on presumptions, not necessarily on facts. The EDPS regards these provisions as essential safeguards, which should not be deleted from the proposal, nor be made optional.

19. *Data processing and purpose limitation*. In the opinion of December 2005, the EDPS analysed the need for better legal provisions on the further use of data that have been collected by an authority for a specific purpose. Presently, the concerns of the EDPS regarding Article 5 relate mainly to his view that, whilst on the one hand (further) processing of data for wider purposes needs to be allowed, on the other hand the law must provide for precise conditions for this processing, in order to protect the data subject. The EDPS warns against solutions that leave the matter fully to the discretion of national law or that do not limit the conditions for further processing in conformity with Directive 95/46/EC and Council of Europe Convention No 108 ([2]). As to the processing of special categories of data: this is dealt with under Directive 95/46/EC and Convention No 108, in a general prohibition with exceptions ([3]). The EDPS is concerned that in the Framework Decision the general prohibition will be deleted and that — by doing so — the exception becomes the rule. Such a solution would not only be inconsistent with Directive 95/46/EC, but would also not be in line with Convention 108.

([1]) Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security (OJ L 298, 27.10.2006, p. 29).

([2]) See: Article 13, in connection with Article 6(1)(b) of Directive 95/46/EC, and Article 9, in connection with Article 5 sub (b) of Convention 108.

([3]) See: Article 8 of Directive 95/46/EC and Article 6 of Convention 108.

20. *Exchange of data with other authorities and private parties.* The Commission proposal contains limitations and specific safeguards for the exchange of information with other authorities besides police and judicial authorities, private parties and authorities of third countries. The EDPS underlines the importance of such specific provisions for the following reasons. In the first place, exchange of information with those 'third parties' entails specific risks (security breaches, further processing for different purposes, etc.). In the second place, involvement of third parties in law enforcement and in the processing of law enforcement information is becoming more commonplace. Directive 2006/24/EC on data retention ([1]), the agreement on PNR-data with the United States and the so called Swift-case ([2]) are good examples. In the third place, the PNR-judgement of the European Court of Justice of 30 May 2006 ([3]) raises serious doubts on the protection of personal data collected by private parties for commercial purposes and later on processed for law enforcement purposes.

21. As to the transfer to and from other — public or private — parties within the EU, it is important that the proposal deals with the matter in a precise way and offers solutions consistent with Directive 95/46/EC. Those solutions must ensure that the consequences of the pillar structure — in particular the uncertainty about the delimitation of both pillars as far as the exchange of personal data between law enforcement authorities and other parties is concerned — will not harm the effectiveness of the protection.

22. As to the transfer of data to and from third countries, the Commission proposal provides for an adequacy decision by the Commission. If this would not be acceptable in Council, the result would be that each Member State will decide about adequacy on its own or, even worse, transfer the data without examining the level of protection in the third country. The absence of a harmonised system for the exchange of personal data with third countries could also:

— harm the trust between the authorities of the Member States, since an authority might be less willing to share information with an authority in another Member State if this Member State could also share this information with authorities of third countries in the absence of clear safeguards.

— provoke U-turns. If the authority of a Member State could not receive information directly from another Member State because of the protection given by the Framework Decision, it could ask for assistance from an authority of a third country.

— enable forum shopping by authorities of third countries: those authorities could ask for information in the Member State with the lowest legal requirements for transfers.

The EDPS considers it essential that mechanisms ensuring common standards and coordinated decisions on adequacy be put in place, also in order to comply with Council of Europe Convention No 108 (in particular its Article 12) ([4]). The text of the Framework Decision should provide for such mechanisms.

23. The EDPS understands that several Member States question the legal basis for the inclusion of a provision on the exchange of personal data with third countries, in cases whereby those data are not received from or made available by the competent authority of another Member State. According to the EDPS, there are no grounds for questioning this legal basis. The examples elaborated in the Opinion of December 2005 as well as the arguments mentioned in the previous paragraph demonstrate the direct link of this exchange with third countries with the police and judicial cooperation under Article 29 of the EU-Treaty. A provision on the exchange of personal data with third countries must be seen as an additional and necessary provision in order to achieve the objectives of Article 29 EU in conjunction with Article 6 EU, in particular a closer cooperation of police forces with respect for fundamental rights.

([1]) Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ L 105, 13.4.2006, p. 54).

([2]) See Opinion 10/2006 of 22 November 2006 of the Article 29 Data Protection Working Party on the processing of personal data by the Society for Worldwide Interbank Financial Telecommunication (SWIFT).

([3]) Judgement in cases C-317/04 and C-318/04.

([4]) See also more precisely: Article 2 of Additional Protocol (ratified by several Member States), which is in line with Articles 25-26 of Directive 95/46/EC.

24. *Data subjects' rights*. The data subject has a right to be informed about the processing of personal data concerning him or her. This right is linked to the principle of fair and lawful processing of personal data which in itself is respected by the Framework Decision and is moreover protected under Council of Europe Convention No 108, in particular its Articles 5(a) and 8. An essential element of this right is that this information should be given by the data controller *ex officio*. Since the data subject normally does not know and can not know that information concerning him or her is being processed, it would be contrary to the nature of this right to require a request from the data subject. Of course this right to be informed is subject to exceptions and it is clear that these exceptions can play an important role in the area of law enforcement since information on criminal investigations could prejudice the investigation itself. However, any solution making the right to information dependent on a request by the data subject would not be acceptable and not be compatible with Council of Europe Convention No 108.

25. The EDPS underlines that *the position of the data protection authorities* should be consistent with the position afforded to them under Directive 95/46/EC. This position is all the more important in this area of police and judicial cooperation. The cooperation between law enforcement authorities in order to effectively combat terrorism and other serious crime requires processing of quite often sensitive personal data and requires exceptions to the rights of the data subjects (see, for instance the previous point, on the right to be informed).

26. The EDPS points in the first place to the need for an effective supervision and inspection by the authorities of the processing of personal data within the scope of this framework decision, especially when personal data are exchanged amongst the Member States in the area of police cooperation. In the second place, the advisory role of the authorities should be ensured, within the national jurisdiction as well as within the institutionalised network of data protection authorities, the Working Party of authorities (under the directive known as the 'Article 29-Working Party'). The input by data protection authorities is needed, in order to enhance the consistency of the protection under this instrument with the protection under Directive 95/46/EC, to ensure compliance with the legal obligations and to fully achieve harmonisation between the Member States, also on a practical level.

27. Article 24 of the Commission proposal contains detailed rules on *security*, comparable to the rules included in the Europol-convention. The EDPS warns against the deletion of these rules from the proposal. A harmonised level of security is an important tool to enhance trust, for the data subject as well as between the authorities of the Member States.

28. In his opinion of December 2005, the EDPS recommended that specific safeguards should be put in place with respect to the *processing of certain specific categories of data*, such as biometric data and DNA-profiles. In the area of law enforcement, the use of these categories of data is becoming more and more important, whereas this use can entail specific risks for the data subject. Common rules are needed. The EDPS regrets that this recommendation has not been taken into consideration by Council, at least not visibly. The EDPS urges the Commission and the Council to adopt a proposal on this matter, whether related to the principle of availability or not.

Conclusion

29. The EDPS recommends that the Council allows more time for the negotiations, so as to achieve a result that offers sufficient protection. Although the EDPS recognises the importance of adopting the Framework Decision by Council in the short term, he warns that the rapidity of the decision making should not lead to a lowering of the standards of protection.

30. Consistency of the protection is essential, independent of where, by whom or for which purpose personal data are processed. The EDPS urges the Council to respect a level of protection that is not lower than the level of protection afforded under Directive 95/46/EC or even under the more generally formulated Council of Europe Convention No 108 which is binding upon the Member States.

31. Common rules on data protection should apply to all data in the area of police and judicial cooperation, and not be limited to cross-border exchanges between Member States. This opinion contains arguments showing that a more limited scope is unworkable which would, if introduced, lead to additional complexity and costs for authorities and harm the legal certainty of individuals.

32. Other concerns of the EDPS are:

— The specific provisions on data quality in the Commission proposal should not be deleted from the proposal, nor be made optional.

— The provisions on the further use of data and on special categories of data should be consistent with Directive 95/46/EC and in line with Council of Europe Convention No 108.

— The specific provisions on exchange of data with other parties besides law enforcement authorities within the EU should not be deleted from the proposal, nor be limited in scope. As to the exchange of data with third countries, *at the very least* mechanisms ensuring common standards and coordinated decisions on adequacy should be put in place, also in order to comply with Council of Europe Convention No 108. The text of the Framework Decision should provide for such mechanisms.

— Solutions making the right to information dependent upon a request by the data subject are not acceptable and not compatible with Council of Europe Convention No 108.

— The position of the data protection authorities should be consistent with the position afforded to them under Directive 95/46/EC.

— The detailed rules on security, comparable to the rules included in the Europol-convention, should not be deleted from the proposal.

— The Commission and the Council should adopt a proposal on processing of specific categories of data, such as biometric data and DNA-profiles, whether related to the principle of availability or not.

Done at Brussels on 29 November 2006

Peter HUSTINX

European Data Protection Supervisor

Opinion of the European Data Protection Supervisor on the Proposal for a Regulation of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (COM(2006)16 final)

(2007/C 91/03)

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty establishing the European Community, and in particular its Article 286,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular its Article 8,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ([1]),

Having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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 ([2]), and in particular its Article 41,

Having regard to the request for an opinion in accordance with Article 28 (2) of Regulation No 45/2001 received on 7 December 2006 from the European Commission;

HAS ADOPTED THE FOLLOWING OPINION:

I. INTRODUCTION

Consultation of the EDPS

1. The proposal for a Regulation of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 of the European Parliament and the Council of 29 April 2004 on the coordination of social security systems ([3]) was sent by the Commission to the EDPS for consultation, in accordance with Article 28(2) of Regulation 45/2001/EC (hereinafter 'the Proposal'). According to the EDPS, the present opinion should be mentioned in the preamble of the Regulation.

2. The formal consultation from the Commission follows the contacts between the EDPS secretariat and the services of the relevant DG of the Commission (DG EMPL), in the framework of the EDPS inventory exercise 2007 ([4]). Indeed, this Proposal is one of those proposals, within DG EMPL portfolio, that present a high interest for the EDPS. Furthermore, the EDPS contributed to a hearing organised by the European Parliament on 23 November 2006, by giving some preliminary remarks on the Proposal. In this context, the EDPS welcomes this consultation and expects to be timely consulted in the future with regard to other Commission proposals relating to the protection of personal data in the social security and employment sectors, in particular those mentioned in his inventory.

([1]) OJ L 281, 23.11.1995, p. 31.
([2]) OJ L 8, 12.1.2001, p. 1.
([3]) OJ L 166, 30.4.2004, p. 1.
([4]) Each year in December, the EDPS publishes an inventory of his priorities for the coming year in the field of consultation.. It lists the most relevant Commission proposals, which may require a formal reaction by the EDPS. Those proposals that are expected to have a strong impact on data protection are given high priority. The EDPS inventory 2007 is available on EDPS website: www.edps.europa.eu

The Proposal in its context

3. The Proposal lays down the procedure for implementing Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems. Indeed, the new rules on coordination in the latter Regulation cannot be applied until the current Proposal, laying down the corresponding implementing measures, has been adopted ([1]). Therefore, the Proposal shall be assessed in conjunction with the basic regulation on which it is based. With regard to this point, it should also be noted that the EDPS has not given his opinion on Regulation 883/2004, since the corresponding Commission proposal was adopted on 12 February 1999 ([2]), before Regulation 45/2001/EC had entered into force.

4. The objective of the Proposal is to modernise and simplify the existing rules, by strengthening cooperation between social security institutions and improving the methods of data exchange between social security institutions.

5. The Proposal has a wide scope, both as to the citizens concerned and the areas covered. On one hand, it covers all EU citizens who are insured under national legislation (therefore, including non-employed persons), provided there are trans-border elements. On the other hand, it applies to a vast range of areas in social security: sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age pensions; survivor's pensions; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; early retirement pensions; family benefits.

6. The EDPS welcomes this Proposal to the extent that it aims at favouring the free movement of citizens and improving the standard of living and conditions of employment of EU citizens moving within the Union.

7. Provisions on exchange of personal data between national administrations competent for social security constitute a major part of the Proposal. Indeed, social security could not exist without the processing of different kinds of personal data, in many cases of a sensitive nature. Furthermore, exchange of personal data relating to social security between different Member States is a natural consequence of a European Union whereby citizens are increasingly making use of their right to freedom of movement.

8. However, it is also essential that this increased exchange of personal data between national administrations of Member States, while providing better conditions for free movement of people, also ensures a high level of protection of personal data, thereby guaranteeing one of the EU fundamental rights. In this context, the EDPS is glad to note that also the European Economic and Social Committee ('EESC'), in its opinion of 26 October 2006 on the Proposal, pointed out the need to ensure adequate protection of personal data, especially in consideration of the sometimes sensitive nature of the data at stake ([3]).

Focus of the opinion

9. The EDPS has been consulted on the proposal for an implementing Regulation. However, as mentioned above, the implementing Regulation cannot be assessed separately from Regulation (EC) No 883/2004, which lays down the basic principle of the coordination of social security systems, also with regard to the protection of personal data. Therefore, the EDPS will take into account in his opinion the framework laid down by the latter Regulation. Nevertheless, the EDPS will focus his advice on those issues for which the legislator of the implementing regulation still has a margin of manoeuvre.

([1]) Currently, the rules are laid down by Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5.7.1971, p. 2, and its implementing regulation, Regulation (EEC) 574/72 of the Council OJ L 74, 27.3.1972, p. 1.

([2]) OJ C 38, 12.2.1999, p. 10.

([3]) Opinion of the European Economic and Social Committee of 26 October 2006 on the Proposal for a Regulation of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ C 324, 30.12.2006, p. 59.

10. Furthermore, the EDPS notes that the Proposal, besides having a broad scope, is also very complex, since it lays down detailed, and sometimes technical, provisions on the different circumstances, mechanisms and limitations in the coordination of social security systems. Therefore, in analysing the Proposal, the EDPS will not deal individually with all the provisions, but will adopt an horizontal approach, by focussing on principles of data protection that are particularly relevant to the Proposal.

11. Under this approach, this opinion aims at ensuring compliance with data protection legislation but also efficiency of the proposed measures, by anticipating and addressing issues that may arise at the time of implementation in national legal systems. In this opinion the EDPS will first define the relevant data protection legal framework and then deal with the application of relevant data protection principles to the Proposal. In the conclusions, the EDPS will highlight his main findings and recommendations.

II. THE RELEVANT DATA PROTECTION LEGAL FRAMEWORK

12. In the context of the Proposal, personal data of insured persons will usually be processed by competent national authorities, and will thus fall within the scope of national laws implementing Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data ('the Directive'). In the more limited number of cases in which personal data of insured persons will be processed by Community institutions, they will be subject to Regulation (EC) No 45/2001 ([1]) on the protection of individuals with regard to the processing of personal data and on the free movement of such data. This would be, for example, the case where personal data relating to EU staff is processed ([2]). Therefore, the current legal framework on data protection provides for a harmonized level of protection throughout the EU.

13. The current Proposal will rely on this harmonised framework. However, national legislations implementing the Directive are not fully uniform and some divergences may still exist between national data protection laws. It is therefore of great importance that the legislator takes this into account, in order to ensure that the proposed measures fully comply with this framework and cope with these possible differences.

14. Furthermore, the increased trans-border exchange of data will call for a better coordination of national provisions on protection of personal data. In this respect, the EDPS welcomes Article 77 of Regulation 883/2004. This provision explicitly states that personal data processed by virtue of the Regulation, as well as its implementing rules, shall be transmitted in accordance with Community provisions on protection of personal data.

15. Article 77 of Regulation 883/2004 also provides guidance on the applicable national data protection law in case of transmissions of data between competent authorities of different Member States, by stating that the communication of personal data from one Member State to another one shall be subject to the data protection legislation of the former, the transmitting Member State. On the contrary, any communication from the receiving Member State, as well as the storage, alteration and destruction of the received data shall be subject to the data protection legislation of the receiving Member State. This provision is in line with the provision on national law applicable laid down by Article 4 of the Directive.

16. In the Proposal, a reference to the Community provisions on the protection of personal data is made in Recital 3 as well as in Article 3(2). While recital 3 broadly states that persons concerned must benefit from all of the guarantees provided by Community provisions on the protection of personal data, Article 3(2) specifically refers to the exercise of the rights to access and rectification of one's own personal data.

([1]) Provisions of Regulation 45/2001 reflect those contained in Directive 95/46, for easiness of the reader this opinion will only refer only to the relevant articles of the latter Directive and not to the analogous provisions of the former Regulation.
([2]) For example, Article 15 of Regulation 883/2004 and Article 18 of the current proposal deal with the case of transfers of personal data relating to auxiliary agents.

17. The EDPS agrees on the need — for a legal instrument implementing enhanced processing and transmissions of personal data — to clearly and explicitly recall the applicable data protection framework. In this perspective, the EDPS recommends that a general reference to the Community provisions on the protection of personal data is not only laid down in the Recitals, but is also explicitly made in its provisions (for example, in Article 3). This general provision would not exclude that other provisions, like those currently laid down in Article 3(2), can further address more specific issues relating to the concrete application of data protection principles in the framework of coordination of social security systems (see further, points 36-38).

III. APPLICATION OF RELEVANT DATA PROTECTION PRINCIPLES

Purpose limitation

18. One of the basic principles of data protection law is that personal data shall only be processed for the purpose for which they were collected or for a compatible purpose (Article 6.1.b of the Directive). The Proposal does not include any general provision on purpose limitation ([1]). However, the general approach of the Proposal is that personal data collected for one of the social security purposes (pension, invalidity benefit, unemployment, etc) will be processed and further transmitted to other Member States' authorities for the same purpose. Therefore, most processing operations laid down by the Proposal will concern personal data processed for the same purpose or a compatible one. This will be also the case of processing of personal data in the framework of the transmission of data for recovery of claims or benefits not due (Article 73).

19. However, in other circumstances, such as in the case of cooperation between tax authorities (Recital 14), social security data might be necessary also for purposes other than social security. In this case, exceptions to the principle of purpose limitation could be justified by virtue of Article 13 of the Directive, in specific circumstances and provided that they are necessary and based on legislative measures, either at national or Community level. In this context, the legislator might consider whether to specifically refer in the Proposal to the conditions under which social security data may be processed for a different purpose.

20. Against this background, the EDPS considers that the Proposal respects the basic data protection provisions on purpose limitation. Furthermore, the EDPS notes that the prohibition to use personal data for purposes other than social security arises from the applicable data protection legislation, which would allow for exceptions to this general principle only under specific and strict conditions.

Proportionality in data processed, competent bodies and storage periods

21. According to data protection principles, personal data shall be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed (Article 6.1.c of the Directive). In the context of social security systems, this means that only a necessary and proportionate set of data shall be transmitted in each circumstance.

22. This principle is correctly enshrined in Article 2.1 of the Proposal, which lays down an obligation for Member States' institutions to share with each other all data necessary for establishing and determining the rights and obligations of insured persons. In this context, the EDPS highlights that the assessment of the necessary sets of personal data may vary slightly according to the kind of benefit at stake. For example, the kind of personal information needed for sickness benefits will be different from information needed for old-age pensions. The information transmitted by Member States' authorities should not go beyond what is necessary for the insured person's rights or obligations at stake in the specific case.

([1]) EESC in its opinion pointed out this issue, regretting the absence of a provision 'which strictly forbids the use of these data for purposes other than social security', like the current Article 84(5)b of Regulation (EEC) No 1408/71. EESC Opinion, point 4.10.2.

23. Proportionality should also apply with regard to the number of competent bodies having access to data as well as to the modalities and length of storage of personal data. Only relevant authorities and institutions shall have access to social security data, and these data shall be stored — in a form that permits identification of the data subject — for no longer than it is necessary for the purpose for which they are processed (Article 6.1.e of the Directive).

24. With regard to the number of authorities and institutions having access to the personal data of insured persons, Article 83 of the Proposal will create a public database, listing the relevant bodies for each Member State. It should be also noted that the Proposal leaves flexibility for Member States to decide whether personal data shall be transmitted through a central point of access in a Member State or directly to the relevant authority or institution (Article 2.3). Furthermore, in each Member State there might be many designated bodies, some of which may operate at a regional level.

25. With regard to the storage period of personal data, the EDPS notes that in the context of social security, the proportionality test may lead to very different results, depending on the area of social security covered. For example, processing of personal data relating to sickness benefits will usually be necessary for a shorter period of time than in the case of pensions, which are benefits likely to be provided for a longer period. Period of storage of personal data would also depend on the kind of body that processes them. For example, in the case of central points of access, this would mean that personal data would be deleted as soon as they have been further transmitted to the competent body. In any case, it should be clear that personal data shall be deleted or anonymized as soon as they are no longer necessary for the purpose for which they were collected or processed.

26. In the light of these considerations, the EDPS highlights that in such a complex system, whereby personal data are processed and further transmitted through an asymmetric network of bodies, special attention should be paid to ensure that personal data are processed by the competent authorities, for a proportionate period of time, and that duplications of databases are avoided. The EDPS believes that the database laid down by Article 83 will help ensuring that necessary personal data are transmitted only to the relevant authorities in each specific case. However, further clarifications on the modalities of transmitting and storing the data could be added to the current Proposal, as the Commission has already done in other proposals ([1]). In this context, the EDPS believes that a certain harmonization of storage periods would not only protect citizens' right to protection of personal data, but would also enhance the efficiency of the coordination between national administrations of different Member States.

Legal grounds for processing personal data

27. The Proposal establishes a variety of mechanisms, according to which personal data relating to insured persons are transferred between competent bodies of different Member States. These exchanges of personal data may be divided in two broad categories: those made on the basis of the request of the concerned person; and those carried out *ex officio*, usually between third parties (competent bodies, employers), without any specific request by the concerned person. In many cases, relevant bodies will process and transmit sensitive data, in particular data relating to health conditions.

28. All these processing activities shall comply with the conditions for processing personal data laid down in the Directive: competent national bodies and employers may process personal data only on the basis of the consent of the person concerned or some other legitimate basis, such as compliance with a legal obligation or performance of a task carried out in the public interest or in the exercise of official authority (Article 7.a, 7.c and 7.e of the Directive). Stricter conditions apply to sensitive data, i.e. personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, health or sex life (Article 8 of the Directive).

([1]) A recent example of these provisions can be found in the Commission Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (COM(2005) 649 final). In particular, Article 46 of this proposal lays down obligations for central national authorities to erase information — that they have received from authorities of other Member States — just after having forwarded it to the competent national body. Furthermore paragraph 3 lays down an explicit prohibition to store information communicated on the basis of the Regulation for a longer period than the one necessary for the purpose of the communication and in no case for longer than 1 year. See also the EDPS opinion on this proposal, OJ C 242, 7.10.2006, points 45-49.

29. Against this background, the EDPS points out that the provisions of the Proposal may well be considered as laying down a legal obligation — pursuant to Article 7.c of the Directive — to process and transmit social security data, insofar as this obligation is specific. Therefore, in those cases where the Proposal lays down a clear obligation to process personal data, the processing operations by competent national bodies and employers could be based on Article 7(c) of the Directive. On the contrary, where this legal obligation is not laid down directly by the Proposal, the processing of personal data shall be based either on a national (non-harmonised) specific legal obligation or on a different legal ground.

30. Article 7.e of the Directive allows processing of personal data when it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed. This would be the case where the relevant body processes data on the basis of its tasks or official authority stemming from a general — national or Community — legal provision rather than on the basis of a specific legal obligation. In this case, the right to object is applicable pursuant to Article 14.a of the Directive.

31. The use of consent as a legal ground, pursuant to Article 7.a of the Directive, has a more limited scope with regard to processing of personal data by public authorities or in employment relationships, since consent can be deemed to be free — pursuant to Article 2.h of the Directive — only if there are viable alternatives for the person concerned.

32. With regard to processing of sensitive data (Article 8 of the Directive), considerations similar to those made in the previous paragraphs shall apply. The EDPS considers that obligations stemming from employment law (Article 8.2.b of the Directive), further exceptions (Article 8.4) or consent (Article 8.2. a) might constitute relevant legal grounds for processing sensitive social security data. In this case, specific safeguards — such as technical compartmentalization measures — might be necessary.

33. In the light of the aforementioned considerations, he EDPS points out that the more this Proposal clearly lays down specific legal obligations for competent bodies and employers to process personal data, the easier and more efficient its implementation in the Member States will be, with regard to compliance with national data protection laws stemming from the Directive. Therefore the EDPS, without entering into the details of the various specific mechanisms laid down by the Proposal, recommends the EU legislator to ensure that each and every proposed mechanism of processing and transmission of personal data is clearly based on a specific legal obligation directly laid down by the Proposal or on other legitimate grounds for processing pursuant to Articles 7 and 8 of the Directive.

Information to insured persons

34. Adequately informing data subjects about the processing of their personal data and about their rights is essential, as laid down in Section IV of Directive 95/46. This is even more important when personal data are processed by many authorities in different Member States and therefore data subjects might run the risk of loosing sight of who is processing their personal data, for which purposes, and how to enforce their rights.

35. With regard to this issue, the EDPS strongly supports a proactive approach: providing data subjects with exhaustive and timely information, with a view to clarifying both the use of the information collected and their rights. In this respect, the EDPS not only endorses the call made by the EESC ([1]) to raise awareness between all potential users of the Regulation, but also calls on the legislator to add an explicit reference in the Proposal to the need to provide concerned persons with specific and adequate information on processing of their personal data. This could be done by amending Article 19 (*Provision of information to insured persons*) in order to ensure that the necessary information is provided to insured persons.

([1]) EESC Opinion, point 1.11.

Data subjects' rights

36. Data subjects' rights are particularly relevant in the context of social security systems, since they allow persons concerned to keep control over their (sensitive) data, to ensure their accuracy and to check the information on the basis of which important decisions are taken and benefits are granted. This is particularly relevant in a trans-border context, where the margin of error in transmitting personal data is likely to be higher by virtue of the necessity of translating the information. It is also worth mentioning that the enhanced accuracy of information resulting from the enforcement of data subjects' rights benefits not only the concerned persons but also relevant social security bodies.

37. The EDPS warmly welcomes Article 3.2 of the Proposal, which states that Member States shall guarantee that the persons concerned have the right to access personal data and the right to rectify them, in accordance with Community provisions on protection of personal data. However, the EDPS suggests supplementing this provision with a broader reference to all data subjects' rights, including the right to object (Article 14 of Directive 95/46) and the safeguards concerning automated individual decisions (Article 15 of Directive 95/46).

38. In addition, the EDPS recommends that the Proposal duly take into account the need to facilitate the effective exercise of data subjects' rights in a trans-border context. Indeed, concerned persons will have to enforce their rights in a situation in which their personal data come from different authorities of two or more countries. Therefore, it would be desirable that in such cases data subjects' rights could also be exercised directly through the relevant authority which receives personal data from other Member States. This would mean that the competent authority which is in direct contact with the insured person would be called upon to act as a one-stop-shop not only with regard to social security benefits, but also with regard to all personal data processed in connection with those benefits. An insured person would then be able to exercise his or her data subjects' rights through the competent authority irrespective of the origin of the data. Therefore, the EDPS invites the legislator to consider this possibility, also in the light of the examples already provided in other Commission proposals ([1]).

Security measures

39. In the Proposal, security in processing of data is of specific relevance in relation to the more widespread use of electronic tools by public administrations of different Member States. Furthermore, the transmission in most cases will involve sensitive data, and as also pointed out by the EESC, is therefore even more important 'to ensure that these data are properly secure and cannot fall into the wrong hands' ([2]).

40. In this regard, the EDPS welcomes Article 4 of the Proposal, which states that the transmission of data between relevant bodies 'shall be carried out by electronic means under a common secure framework that can guarantee the confidentiality and protection of exchanges of data'. However, the EDPS stresses that this 'common secure framework', to be defined by the Administrative Commission for the Coordination of Social Systems ([3]), should duly take into account the recommendations issued by the IDABC programme ([4]) (Interoperable Delivery of European e-Government Services to public Administrations, Businesses and Citizens) relating to Community data protection provisions, and in particular those relating to the security of processing (Article 17 of the Directive). In this perspective, the EDPS also recommends that expert advisers in data protection and security are duly involved in the relevant works of this Administrative Commission

([1]) A recent example can be found in the Commission proposal for a Council Framework Decision on the exchange of information extracted from criminal records between Member States (COM (2005) 690 final). Article 6 of the proposal allows the data subject to exercise the right to access to his or her personal data not only by addressing the authority that controls the data, but also through the authority where he or she is resident. Further examples can be also found in the Schengen Information System.

([2]) EESC Opinion, point 4.10.

([3]) Laid down by Article 76 of Regulation (EC) No 883/2004. Article 4 of the Proposal states that this Administrative Commission shall lay down the format and method of exchanging data.

([4]) http://ec.europa.eu/idabc/en/home

IV. CONCLUSIONS AND RECOMMENDATIONS

41. The EDPS welcomes this proposal to the extent that it aims at favouring the free movement of citizens and improving the standard of living and conditions of employment of EU citizens moving within the Union. Indeed, coordination of social security systems could not exist without the processing and the transmission of different kinds of personal data, in many cases of a sensitive nature.

42. However, it is also essential that this increased exchange of personal data between national administrations of Member States, while providing better conditions for free movement of people, also ensures a high level of protection of personal data, thereby guaranteeing one of the EU fundamental rights.

43. The Proposal will rely on the harmonised data protection framework laid down by Community provisions on protection of personal data, and in particular by Directive 95/46/EC and national implementing laws. The EDPS is glad that the applicability of this data protection framework is recalled by both the basic Regulation 883/2004 and by the Proposal. However, specific issues relating to the application of data protection principles in the framework of coordination of social security systems should be further and explicitly addressed.

44. With regard to the *purpose limitation principle*, the EDPS considers that the Proposal respects the basic data protection provisions on purpose limitation. Furthermore, the EDPS notes that the prohibition to use personal data for purposes other than social security is not explicitly laid down in the Proposal but arises from the applicable data protection legislation, which would allow for exceptions to this general principle only in specific circumstances and under strict conditions. In this context, the legislator might consider whether to specifically refer in the Proposal to the conditions under which social security data may be processed for a different purpose.

45. With regard to *proportionality in data processed, competent bodies and storage periods*, the EDPS highlights that in such a complex system, whereby personal data are processed and further transmitted through an asymmetric network of bodies, special attention should be paid to ensure that personal data are processed by the competent authorities, for a proportionate period of time, and that duplications of databases are avoided. In this context, further clarifications on the modalities of transmitting and storing the data could be added to the Proposal.

46. With regard to *legal grounds for processing personal data*, the EDPS, without entering into the details of the various specific mechanisms laid down by the Proposal, recommends the EU legislator to ensure that each and every proposed mechanism of processing and transmission of personal data is clearly based on a specific legal obligation directly laid down by the Proposal or on other legitimate grounds for processing pursuant to Articles 7 and 8 of the Directive.

47. With regard to *information to insured persons*, the EDPS recommends adding an explicit reference in the Proposal to the need to provide concerned persons with specific and adequate information on processing of their personal data.

48. With regard to *data subjects' rights*, the EDPS warmly welcomes Article 3.2 of the Proposal and suggests supplementing this provision with a broader reference to all data subjects' rights, including the right to and the safeguards concerning automated individual decisions. Furthermore, the EDPS invites the legislator to facilitate the effective exercise of data subjects' rights in a trans-border context by providing that the competent authority which is in direct contact with the insured person should act as a one-stop-shop not only with regard to social security benefits, but also with regard to all data processed in connection with those benefits.

49. With regard to *security measures*, the EDPS recommends that the 'common secure framework' for the transmission of data laid down by Article 4 of the Proposal duly take into account relevant recommendations on data protection and security of processing. In this context, expert advisers in data protection and security should be duly involved in the relevant works of the competent Administrative Commission.

Done at Brussels on 6 March 2007

Peter HUSTINX

European Data Protection Supervisor

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Non-opposition to a notified concentration

(Case COMP/M.4577 — Blackstone/Cardinal Health (PTS Division))

(Text with EEA relevance)

(2007/C 91/04)

On 3 April 2007, the Commission decided not to oppose the above notified concentration and to declare it compatible with the common market. This decision is based on Article 6(1)(b) of Council Regulation (EC) No 139/2004. The full text of the decision is available only in English and will be made public after it is cleared of any business secrets it may contain. It will be available:

— from the Europa competition website (http://ec.europa.eu/comm/competition/mergers/cases/). This website provides various facilities to help locate individual merger decisions, including company, case number, date and sectoral indexes,

— in electronic form on the EUR-Lex website under document number 32007M4577. EUR-Lex is the on-line access to European law. (http://eur-lex.europa.eu)

Non-opposition to a notified concentration

(Case COMP/M.4594 — OEP/Arvinmeritor Emissions Technologies Business)

(Text with EEA relevance)

(2007/C 91/05)

On 10 April 2007, the Commission decided not to oppose the above notified concentration and to declare it compatible with the common market. This decision is based on Article 6(1)(b) of Council Regulation (EC) No 139/2004. The full text of the decision is available only in English and will be made public after it is cleared of any business secrets it may contain. It will be available:

— from the Europa competition website (http://ec.europa.eu/comm/competition/mergers/cases/). This website provides various facilities to help locate individual merger decisions, including company, case number, date and sectoral indexes,

— in electronic form on the EUR-Lex website under document number 32007M4594. EUR-Lex is the on-line access to European law. (http://eur-lex.europa.eu)

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Euro exchange rates [1]

25 April 2007

(2007/C 91/06)

1 euro =

	Currency	Exchange rate		Currency	Exchange rate
USD	US dollar	1,3649	RON	Romanian leu	3,3315
JPY	Japanese yen	161,95	SKK	Slovak koruna	33,655
DKK	Danish krone	7,4511	TRY	Turkish lira	1,8168
GBP	Pound sterling	0,68100	AUD	Australian dollar	1,6405
SEK	Swedish krona	9,1746	CAD	Canadian dollar	1,5298
CHF	Swiss franc	1,6416	HKD	Hong Kong dollar	10,6702
ISK	Iceland króna	87,34	NZD	New Zealand dollar	1,8321
NOK	Norwegian krone	8,1640	SGD	Singapore dollar	2,0629
BGN	Bulgarian lev	1,9558	KRW	South Korean won	1 264,92
CYP	Cyprus pound	0,5820	ZAR	South African rand	9,5817
CZK	Czech koruna	28,106	CNY	Chinese yuan renminbi	10,5317
EEK	Estonian kroon	15,6466	HRK	Croatian kuna	7,3745
HUF	Hungarian forint	246,30	IDR	Indonesian rupiah	12 396,02
LTL	Lithuanian litas	3,4528	MYR	Malaysian ringgit	4,6686
LVL	Latvian lats	0,7000	PHP	Philippine peso	64,498
MTL	Maltese lira	0,4293	RUB	Russian rouble	35,0650
PLN	Polish zloty	3,7864	THB	Thai baht	44,200

[1] *Source:* reference exchange rate published by the ECB.

NOTICES FROM MEMBER STATES

PUBLIC HOLIDAYS IN 2007

(2007/C 91/07)

BELGIQUE/BELGIË	1.1, 9.4, 30.4, 1.5, 17.5, 18.5, 28.5, 21.7, 15.8, 1.11, 2.11, 11.11, 15.11, 16.11, 24.12, 25.12, 26.12, 27.12, 28.12, 29.12, 30.12, 31.12
БЪЛГАРИЯ	1.1, 3.3, 9.4, 1.5, 6.5, 24.5, 6.9, 22.9, 24.12, 25.12, 26.12; 31.12
ČESKÁ REPUBLIKA	1.1, 9.4, 1.5, 8.5, 5.7, 6.7, 28.9, 28.10, 17.11, 24.12, 25.12, 26.12
DANMARK	1.1, 5.4, 6.4, 9.4, 4.5, 17.5, 28.5, 5.6, 24.12, 25.12, 26.12
DEUTSCHLAND	1.1, 6.4, 9.4, 1.5, 17.5, 28.5, 15.8, 3.10, 1.11, 24.12, 25.12, 26.12, 31.12
EESTI	1.1, 24.2, 6.4, 8.4, 1.5, 27.5, 23.6, 24.6, 20.8, 24.12, 25.12, 26.12
ÉIRE/IRELAND	1.1, 17.3, 9.4, 7.5, 4.6, 6.8, 29.10, 25.12, 26.12
ΕΛΛΑΔΑ	1.1, 6.1, 19.2, 25.3, 6.4, 9.4, 1.5, 28.5, 15.8, 28.10, 25.12, 26.12
ESPAÑA	1.1, 6.1, 6.4, 1.5, 15.8, 12.10, 6.12, 8.12, 25.12
FRANCE	1.1, 9.4, 1.5, 8.5, 17.5, 14.7, 15.8, 1.11, 11.11, 25.12
ITALIA	1.1, 6.1, 9.4, 25.4, 1.5, 2.6, 15.8, 1.11, 8.12, 25.12, 26.12
ΚΥΠΡΟΣ/KIBRIS	1.1, 6.1, 19.2, 25.3, 1.4, 6.4, 9.4, 1.5, 28.5, 15.8, 28.10, 24.12, 25.12, 26.12
LATVIJA	1.1, 6.4, 8.4, 9.4, 1.5, 4.5, 13.5, 27.5, 23.6, 24.6, 18.11, 25.12, 26.12, 31.12
LIETUVA	1.1, 16.2, 11.3, 8.4, 9.4, 1.5, 6.5, 24.6, 6.7, 15.8, 1.11, 25.12, 26.12
LUXEMBOURG	1.1, 19.2, 9.4, 1.5, 17.5, 28.5, 23.6, 15.8, 3.9, 1.11, 25.12, 26.12
MAGYARORSZÁG	1.1, 15.3, 9.4, 1.5, 28.5, 20.8, 23.10, 1.11, 25.12, 26.12
MALTA	1.1, 10.2, 19.3, 31.3, 6.4, 1.5, 7.6, 29.6, 15.8, 8.9, 21.9, 8.12, 13.12, 25.12
NEDERLAND	1.1, 9.4, 30.4, 5.5, 17.5, 28.5, 25.12, 26.12
ÖSTERREICH	1.1, 6.1, 9.4, 1.5, 17.5, 28.5, 7.6, 15.8, 26.10, 1.11, 8.12, 25.12, 26.12
POLSKA	1.1, 8.4, 9.4, 1.5, 3.5, 27.5, 7.6, 15.8, 1.11, 11.11, 25.12, 26.12
PORTUGAL	1.1, 6.4, 25.4, 1.5, 7.6, 10.6, 15.8, 5.10, 1.11, 1.12, 8.12, 25.12
ROMÂNIA	1.1, 2.1, 9.4, 1.5, 25.12, 26.12
SLOVENIJA	1.1, 2.1, 8.2, 8.4, 9.4, 27.4, 1.5, 2.5, 27.5, 25.6, 15.8, 31.10, 1.11, 25.12, 26.12
SLOVENSKO	1.1, 6.1, 6.4, 9.4, 1.5, 8.5, 5.7, 29.8, 1.9, 15.9, 1.11, 11.11, 24.12, 25.12, 26.12
SUOMI/FINLAND	1.1, 6.1, 6.4, 8.4, 9.4, 1.5, 17.5, 23.6, 3.11, 6.12, 25.12, 26.12
SVERIGE	1.1, 6.1, 6.4, 8.4, 9.4, 1.5, 17.5, 27.5, 6.6, 23.6, 3.11, 25.12, 26.12
UNITED KINGDOM	Wales and England: 1.1, 6.4, 9.4, 7.5, 28.5, 27.8, 25.12, 26.12 Northern Ireland: 1.1, 19.3, 6.4, 9.4, 7.5, 28.5, 12.7, 27.8, 25.12, 26.12 Scotland: 1.1, 2.1, 6.4, 7.5, 28.5, 6.8, 25.12, 26.12

Summary information communicated by Member States regarding State aid granted under Commission Regulation (EC) No 1/2004 of 23 December 2003 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production, processing and marketing of agricultural products

(2007/C 91/08)

XA number: XA 2/07

Member State: Federal Republic of Germany

Region: All German Länder as aid providers

Title of aid scheme or name of company receiving individual aid: Principles for promoting measures to improve the genetic quality of farm animals

Legal basis: *Rahmenplan der Gemeinschaftsaufgabe „Verbesserung der Agrarstruktur und des Küstenschutzes"*

Annual expenditure planned under the scheme or overall amount of individual aid granted to the company: EUR 20 million per year

Maximum aid intensity: A maximum of 60 % of costs that arise within the framework of the measures set out in the 'Objective of aid' section. Furthermore, the subsidy is limited to the following amounts:

EUR 10,23 per cow per year,

EUR 0,69 per fattening pig for all fattening pigs inspected by the end of the fattening period and sold during the financial year in question,

EUR 2,76 per sow's litter for all sow's litters inspected during the financial year in question,

EUR 0,28 per month for each fattening bovine undergoing inspection by the end of the fattening period,

EUR 0,61 per animal for all fattening lambs inspected by the end of the fattening period and sold during the financial year in question.

Date of implementation: 1 January 2007

Duration of scheme or individual aid award: December 2010

Objective of aid: Collection and analysis of data on maintaining and improving the genetic quality of farm animals in breeding programmes. To this end, the service provider will carry out tests and collect and analyse data. The service provider will be paid at the market rate, with the costs covered partially by aid and partially borne by the farmer. The cost of routine milk quality checks is not covered by aid

This measure is based on Article 15 (Support for the livestock sector).

Sectors concerned: Cattle, pig and sheep farming.

Name and address of the granting authority: Aid is granted by the relevant provincial authorities.

Internet address:

www.bmelv.de > Landwirtschaft > Förderung > GAK

Other information: —

XA Number: XA 8/07

Member State: Federal Republic of Germany

Region: All the German *Länder* as aid-granting authorities

Title of aid scheme: Framework plan for the joint task 'improving agricultural structure and coastal protection'

Legal basis: Rahmenplan der Gemeinschaftsaufgabe „Verbesserung der Agrarstruktur und des Küstenschutzes"

Annual expenditure planned under the scheme: Approximately EUR 1 billion for all measures under the framework plan for the joint task of improving agricultural structure and coastal protection, the majority of which will be used to part-finance the national framework plan in accordance with Article 15(3) of Regulation (EC) No 1698/2005.

Maximum aid intensity for:

— Investment in agricultural holdings: maximum 40 % and maximum EUR 400 000 over three marketing years

— Support for advice to individual holdings in connection with management systems: maximum 80 % and maximum EUR 2 000

— Land consolidation: maximum 90 %

— Cost of establishing producer groups: maximum 60 %, but in total not more than EUR 400 000 per group over five years.

Date of implementation: 15 February 2007

Duration of scheme: Until 31 December 2010

Objective of aid:

— Investment in agricultural holdings ('Agrarinvestitionsförderungsprogramm (AFP)')

  In order to support agriculture which is competitive, sustainable and environment-friendly, takes proper account of animal welfare and is multifunctional, aid can be granted to promote investment in agricultural undertakings for the primary production of agricultural products. The interests of consumers, the development of rural areas and the preservation of biodiversity are to be taken into account just as much as the improvement of living, working and production conditions

  The measure is based on Article 4 (investment in agricultural holdings).

— Support for advice to individual holdings in connection with management systems (AFP)

Support will be granted for advice to individual holdings which goes beyond routine advice and which relates to the application of documentation systems. The measure is intended to help farmers comply with the standards of modern agriculture with its emphasis on quality, and in particular with the requirements under Articles 4 and 5 of and Annexes III and IV to Regulation (EC) No 1782/2003 (cross-compliance). The advisory services will be provided by public and private bodies which must be approved by the *Länder*. The records from the documentation systems form the basis for the holding-based advice. The measure is in principle open to all aid recipients and is paid to the advisory bodies as a contribution

The measure is based on Article 15 (provision of technical assistance in the agricultural sector)

— Land consolidation (principles for promoting integrated rural development (promoting reorganisation of rural land ownership))

The objective of support is to reorganise rural land ownership and the arrangement of rural areas in order to improve agricultural structures in procedures under the Law on land consolidation and the Law on agricultural adjustment, including measures to ensure a sustainably efficient natural balance and plans for voluntary exchange of use. Procedural costs arising are eligible for support

The measure is based on Article 13 (aid for land consolidation).

— Cost of establishing producer groups (principles for promoting market structure improvement (formation of groups))

The assistance is aimed at supporting the establishment and working of groups and improving the competitiveness of firms involved in processing and marketing agricultural products, thereby contributing to ensuring sales or creating profit advantages at producer level

The assistance helps to adapt the collection, processing and marketing of agricultural products to market requirements with regard to the nature, quantity and quality of the products on offer

The promotion of groups is based on Article 9 (aid for producer groups).

Sector(s) concerned: Agriculture

Name and address of the granting authority: The aid will be granted by the relevant *Land* authorities.

Web address:

www.bmelv.de > Landwirtschaft > Förderung > GAK > Rahmenplan 2007

— Grundsätze für die einzelbetriebliche Förderung landwirtschaftlicher Unternehmen

— Grundsätze für die Förderung der integrierten ländlichen Entwicklung (Förderung der Neuordnung des ländlichen Grundbesitzes)

— Grundsätze für die Förderung zur Marktstrukturverbesserung (Zusammenschlüsse)

http://www.bmelv.de/cln_044/nn_751002/DE/04-Landwirtschaft/Foerderung/GAK/Rahmenplan/Rahmenplan2007.html__nnn=true

Other information: —

XA Number: XA 9/07

Member State: Netherlands

Region: Province of North Brabant

Title of aid scheme or name of company receiving individual aid: M. M. Donkers, Elsendorpseweg 86, Elzendorp

Legal basis: Volgens AWB (art. 4:23 lid 3 sub d) en provinciale ASV (art. 33) aangemerkt als incidentele subsidie

Annual expenditure planned under the scheme or overall amount of individual aid granted to the company: EUR 38 000 in 2007

Maximum aid intensity: 40 %

Date of implementation: February/March 2007

Duration of scheme or individual aid award: December 2007

Objective of aid: Implementation in 2007 of a new generation of air washers which reduce emissions of odours, ammonia and particulate matter. These air washers will be demonstrated, tested and studied for a period of three years. The scheme involves aid for investment in environmental measures over and above the statutory requirements to improve air quality.

State which of Articles 4 to 12 inclusive applies and the costs eligible for the scheme or individual aid: Article 4(2)(B), Article 4(3)(D) and Article 4(4)(A)

Economic sector(s) concerned: Livestock production sector, specifically primary pig farming

Name and address of the granting authority:

Provincie Noord-Brabant
Brabantlaan 1
Postbus 90151
5200 MC 's-Hertogenbosch
Nederland

Internet address for legal basis:

http://wettenbank.sdu.nl/wettenbank.sdu.nl/demo/awb_main.html

http://www.brabant.nl/Beleid/Regels%20en%20kaders/Algemene%20subsidieverordening.aspx?docindexid={6E5EE4A7-1D3F-480A-900D-975DD48879C6}

Other information: —

XA Number: XA 11/07

Member State: Netherlands

Region: Province of Limburg

Title of aid scheme or name of company receiving individual aid:

Subsidieverordening Inrichting Landelijk Gebied Limburg (Subsidy Ordinance for Rural Development in the Province of Limburg)

— Paragraph 1.1: reparcelling and exchange of plots of land by agreement to improve the structure of agriculture (legal and land registry costs)

— Paragraph 6.4: promoting groundwater-friendly land use (part of reparcelling; legal and land registry costs)

Legal basis: Artikel 11, lid 3 Wet Inrichting Landelijk Gebied, juncto Subsidieverordening inrichting landelijk gebied Limburg

Annual expenditure planned under the scheme or overall amount of individual aid granted to the company: Approximately EUR 10 000 000 for the 2007-13 period

Maximum aid intensity: Up to a maximum of 100 % of legal and land registry costs (surveying and registration costs)

Date of implementation: Grants shall be awarded only after Subsidieverordening Inrichting Landelijk Gebied Limburg has been approved by the Minister for Agriculture, Nature and Food Quality in accordance with Article 11(3) of the Wet Inrichting Landelijk Gebied and not before this Subsidy Ordinance has been notified in accordance with Regulation (EC) 1857/2006.

Duration of scheme or individual aid award: From 2007 until 31 December 2013 inclusive

Objective of aid: Aid for reparcelling, to meet the legal and administrative costs, in accordance with Article 13.

Economic sector(s) concerned: The aid scheme applies to small and medium-sized agricultural holdings (farms) active in the primary production of agricultural products.

Name and address of the granting authority:

Provincie Limburg
Limburglaan 10
Postbus 5700
6202 MA Maastricht
Nederland

Internet address: www.limburg.nl

Other information: —

XA Number: XA 12/07

Member State: Netherlands

Region: Province of Limburg

Title of aid scheme or name of company receiving individual aid:

Subsidieverordening Inrichting Landelijk Gebied Limburg (Subsidy Ordinance for Rural Development in the Province of Limburg)

— Paragraph 1.2: planned sites for intensive livestock farming;

— Paragraph 1.4: merging intensive livestock farms on sustainable sites;

— Paragraph 1.5: improving knowledge and innovation in agriculture (Greenport);

— Paragraph 1.9: extensification of dairy farms;

— Paragraph 6.1: restoration of natural areas that have dried out;

— Paragraph 6.4: promoting groundwater-friendly land use.

Legal basis: Artikel 11, lid 3 Wet Inrichting Landelijk Gebied, juncto Subsidieverordening inrichting landelijk gebied Limburg

Annual expenditure planned under the scheme or overall amount of individual aid granted to the company:

— Paragraph 1.2: EUR 3 000 000 for the 2007-13 period;

— Paragraph 1.4: EUR 60 000 for the 2007-13 period;

— Paragraph 1.5: EUR 1 250 000 for the 2007-13 period;

— Paragraph 1.9: EUR 4 500 000 for the 2007-13 period;

— Paragraph 6.1: EUR 3 000 000 for the 2007-13 period;

— Paragraph 6.4: EUR 1 200 000 for the 2007-13 period.

(These amounts are an estimation of the maximum share of the available funds that will go to farmers. The same paragraphs will, in fact, also form the basis for aid to be granted to non-entrepreneurs.)

Maximum aid intensity:

— Paragraph 1.2: a maximum of 60 % of the eligible costs, up to a maximum of EUR 1,2 million per planned site, in accordance with Articles 4(2)(e), 4(4)(a) and 4(4)(c);

— Paragraph 1.9: a maximum of 60 % of the eligible costs, in accordance with Articles 4(2)(e), 4(4)(a) and 4(4)(c);

— Paragraph 6.1: a maximum of 60 % of the eligible costs, in accordance with Articles 4(2)(e), 4(4)(a) and 4(4)(c);

— Paragraph 1.4: a maximum of 50 % of the eligible costs, up to a maximum of EUR 20 000 per project, in accordance with Articles 4(2)(e), 4(4)(a) and 4(4)(c);

— Paragraph 1.5: a maximum of 50 % of the eligible costs, up to a maximum of EUR 1,25 million, in accordance with Articles 4(2)(e), 4(4)(a) and 4(4)(c);

— Paragraph 6.4: a maximum of 50 % of the eligible costs, up to a maximum of EUR 50 000 per project, in accordance with Articles 4(2)(e), 4(4)(a) and 4(4)(c).

(Farmers only; the same paragraphs will also form the basis for aid to be granted to non-entrepreneurs.)

Date of implementation: Grants will be awarded only after Subsidieverordening Inrichting Landelijk Gebied Limburg has been approved by the Minister for Agriculture, Nature and Food Quality in accordance with Article 11(3) of the Wet Inrichting Landelijk Gebied and not before this Subsidy Ordinance has been notified in accordance with Regulation (EC) 1857/2006.

Duration of scheme or individual aid award: From 2007 to 31 December 2013 inclusive

Objective of aid:

— Paragraph 1.2: aid applies to the costs of feasibility studies and business plans as well as to constructing and improving property in line with the objectives set out in Article 4(3)(a) to (d);

— Paragraph 1.9: aid applies to the costs of constructing and improving property in line with the objectives set out in Article 4(3)(a) to (d);

— Paragraph 6.1: aid applies to the costs of constructing and improving property in line with the objectives set out in Article 4(3)(a) to (d);

— Paragraph 1.4: aid applies to the costs of feasibility studies and business plans focusing on constructing and improving property in line with the objectives set out in Article 4(3)(a) to (d);

— Paragraph 1.5: aid applies to the costs of feasibility studies and business plans as well as to constructing and improving property in line with the objectives set out in Article 4(3)(a) to (d);

— Paragraph 6.4: aid applies to the costs of feasibility studies and business plans focusing on improving property in line with the objectives set out in Article 4(3)(a) to (d).

Economic sector(s) concerned: The aid scheme applies to small and medium-sized agricultural holdings (farms) active in the primary production of agricultural products.

Name and address of the granting authority:

Provincie Limburg
Limburglaan 10
Postbus 5700
6202 MA Maastricht
Nederland

Internet address: www.limburg.nl

Other information: —

XA Number: XA 14/07

Member State: Netherlands

Region: Province of Limburg

Title of aid scheme or name of company receiving individual aid:

Subsidieverordening Inrichting Landelijk Gebied Limburg (Subsidy Ordinance for Rural Development in the Province of Limburg),

Paragraph 5.1: creation, restoration and conservation of natural, semi-natural and heritage sites.

Legal basis: Artikel 11, lid 3 Wet Inrichting Landelijk Gebied, juncto Subsidieverordening inrichting landelijk gebied Limburg

Annual expenditure planned under the scheme or overall amount of individual aid granted to the company: EUR 400 000 for the 2007-13 period.

(This amount is an estimation of the maximum share of the available funds that will go to farmers. The same paragraph will, in fact, also form the basis for aid to be granted to non-entrepreneurs.)

Maximum aid intensity: Up to a maximum of 100 % of the eligible costs for non-productive landscape features and up to a maximum of 60 % for (partially) productive landscape features. As part of the aid, a maximum of EUR 10 000 per year may be granted for work carried out by the farmers themselves or by their employees. (Farmers only; the same paragraph will also form the basis for aid to be granted to non-entrepreneurs.)

Date of implementation: Grants shall be awarded only after Subsidieverordening Inrichting Landelijk Gebied Limburg has been approved by the Minister for Agriculture, Nature and Food Quality in accordance with Article 11(3) of the Wet Inrichting Landelijk Gebied and not before this Subsidy Ordinance has been notified in accordance with Regulation (EC) 1857/2006.

Duration of scheme or individual aid award: From 2007 until 31 December 2013 inclusive

Objective of aid: The objective is to conserve traditional landscapes by granting aid for the costs of creating and restoring traditional landscape features such as standard orchards, hedgerows, rows of pollarded trees, lynchets, sunken lanes and ponds in accordance with Article 5.

Economic sector(s) concerned: The aid scheme applies to small and medium-sized agricultural holdings (farms) active in the primary production of agricultural products.

Name and address of the granting authority:

Provincie Limburg
Limburglaan 10
Postbus 5700
6202 MA Maastricht
Nederland

Internet address: www.limburg.nl

Other information: —

XA Number: XA 15/07

Member State: The Netherlands

Region: Province of Limburg

Title of aid scheme or name of company receiving individual aid:

Subsidieverordening Inrichting Landelijk Gebied Limburg (Subsidy Ordinance for Rural Development in the Province of Limburg)

Paragraph 1.14: relocation of dairy farms

Legal basis: Artikel 11, lid 3 Wet Inrichting Landelijk Gebied, juncto Subsidieverordening inrichting landelijk gebied Limburg

Annual expenditure planned under the scheme or overall amount of individual aid granted to the company: Paragraph 1.14: EUR 700 000 for the 2007-13 period

Maximum aid intensity: Paragraph 1.14: a maximum of 40 % of the costs of dismantling the facilities at the old site, moving them and re-erecting them at the new site, up to a maximum of EUR 100 000 per relocation.

Date of implementation: Subsidies shall be granted only after Subsidieverordening Inrichting Landelijk Gebied Limburg has been approved by the Minister for Agriculture, Nature and Food Quality in accordance with Article 11(3) of the Wet Inrichting Landelijk Gebied and not before this Subsidy Ordinance has been notified in accordance with Regulation (EC) 1857/2006.

Duration of scheme or individual aid award: From 2007 until 31 December 2013

Objective of aid: Relocating and closing down farms in the public interest, with particular focus on nature and the quality of the landscape and environment, in accordance with Article 6.

Economic sector(s) concerned: This aid shall apply to small and medium-sized agricultural holdings (farms) active in the primary production of agricultural products.

Name and address of the granting authority:

Provincie Limburg
Limburglaan 10
Postbus 5700
6202 MA Maastricht
Nederland

Internet address: www.limburg.nl

Other information: —

XA Number: XA 16/07

Member State: Czech Republic

Region: —

Title of aid scheme or name of company receiving an individual aid: Podpora poradenství v zemědělství – Metodická činnost k podpoře zemědělského poradenského systému

Legal basis: Zákon č. 252/1997 Sb., o zemědělství

Annual expenditure planned under the scheme or overall amount of individual aid granted to the company: Up to CZK 15 million

Maximum aid intensity: Up to 100 % of proven expenditure, up to a maximum of CZK 500 000, per methodological tool

Date of implementation: From 16 February 2007

Duration of scheme or individual aid award: Until 31 December 2013

Objective of aid: The aid is granted on the basis of Article 15 (Provision of technical support in the agricultural sector) of Commission Regulation (EC) No 1857/2006.

The objective is to assist with methodological activities under the agricultural consultancy system and create methodological tools for the practical application of scientific and research knowledge, particularly with regard to legal requirements and good agricultural practice. Aid applicants submit a plan for the creation of methodological tools for agricultural undertakings and consultants. The plans which best fulfil the practical requirements will be selected for implementation

The selection will be made by a committee from the Research, Training and Establishment Activities Department of the Ministry of Agriculture of the Czech Republic, together with a representative from the farming sector, acting on a proposal from the National Advisory Board for Agriculture and Rural Development of the Ministry of Agriculture of the Czech Republic. Projects will be evaluated and allocated a score, and a list will be drawn up in order of rank; applicants will be awarded a grant in the proposed order until the available resources are exhausted.

Sectors(s) concerned: Primary agricultural production

Name and address of the granting authority:

Ministerstvo zemědělství ČR
Těšnov 17
CZ-117 05 Praha 1

Web address:

http://www.mze.cz/Index.aspx?deploy=1802&typ=2&-ch=74&ids=1802&val=1802

Other information: The Ministry of Agriculture of the Czech Republic declares that the conditions laid down in Commission Regulation (EC) No 1857/2006 will be met, i.e. the aid will be targeted at small and medium-sized enterprises engaged in primary agricultural production, and in particular the conditions mentioned in Article 15 of Commission Regulation (EC) No 1857/2006 will be fulfilled. Applicants are mainly public research institutions and universities, but also other bodies involved in research. The measures are aimed at the practical application of research results in the farming sector

Projects are targeted at designing and distributing methodological materials which can be used in the management of agricultural undertakings. The project selection criteria are contained in the rules published on the granting of aid.

XA Number: XA 17/07

Member State: Czech Republic

Region: —

Title of aid scheme or name of company receiving an individual aid: Podpora poradenství v zemědělství – Regionální přenos informací o realizaci společné zemědělské politiky, zejména požadavků na plnění cross compliance, zajišťovaný prostřednictvím Krajských informačních středisek pro rozvoj zemědělství a venkova (KIS)

Legal basis: Zákon č. 252/1997 Sb., o zemědělství

Annual expenditure planned under the scheme or overall amount of individual aid granted to the company: Up to CZK 10 million

Maximum aid intensity: Up to 100 % of proven costs, up to a maximum of CZK 500 000 a year, for each regional information centre for agricultural and rural development, which will supply services to the final beneficiary, i.e. the person receiving technical support.

Date of implementation: From 16 February 2007

Duration of scheme or individual aid award: Until 31 December 2013

Objective of aid: The aid is granted on the basis of Article 15 (Provision of technical support in the agricultural sector) of Commission Regulation (EC) No 1857/2006.

The objective of the aid is to support consultancy activities carried out by accredited consultants for agricultural entities, regional transfer of information on the common agricultural policy and standards of good farming practice, and information on rural development programmes and consumer protection (food safety)

Information will be provided free of charge using various methods, particularly electronic means of communication (internet, e-mail, SMS), but also in paper form (letters, information leaflets and similar) and through personal contacts (in the course of seminars and consultations); it will be supplied in a non-discriminatory manner to all target groups in the region focusing on the area's agricultural and rural development problems

The eligible costs are:

— actual cost of organising information services;

— travel expenses;

— fees for consultancy services which neither constitute a continuous or periodic activity nor relate to the enterprise's usual operating expenditure.

Sectors(s) concerned: Primary agricultural production

Name and address of the granting authority:

Ministerstvo zemědělství ČR
Těšnov 17
CZ-117 05 Praha 1

Web address:

http://www.mze.cz/Index.aspx?deploy=1802&typ=2&-ch=74&ids=1802&val=1802

Other information: The Ministry of Agriculture of the Czech Republic declares that the conditions laid down in Commission Regulation (EC) No 1857/2006 will be met, i.e. the aid will be targeted at small and medium-sized enterprises engaged in primary agricultural production, and in particular the conditions mentioned in Article 15 (Provision of technical support in the agricultural sector) will be fulfilled.

NOTICES CONCERNING THE EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

Public holidays in 2007: EEA EFTA States and EEA institutions

(2007/C 91/09)

2007	Iceland	Liechtenstein	Norway	EFTA Surveillance Authority	EFTA Court
1 January	X	X	X	X	X
2 January		X			
6 January		X			
2 February		X			
20 February		X			
19 March		X			
5 April	X		X		
6 April	X	X	X	X	
9 April	X	X	X	X	X
19 April	X				
1 May	X	X	X	X	X
17 May	X	X	X	X	X
18 May				X	
28 May	X	X	X	X	X
7 June		X			
17 June	X				
23 June					X
6 August	X				
15 August		X			X
8 September		X			
1 November		X		X	X
8 December		X			
24 December		X			
25 December	X	X	X	X	X
26 December	X	X	X	X	X
31 December		X			

V

(Announcements)

PROCEDURES RELATING TO THE IMPLEMENTATION OF THE COMPETITION POLICY

COMMISSION

STATE AID — UNITED KINGDOM

State aid No C 7/07 (ex NN 82/06 and NN 83/06) — Alleged aid in favour of Royal Mail and POL

Invitation to submit comments pursuant to Article 88(2) of the EC Treaty

(Text with EEA relevance)

(2007/C 91/10)

By means of the letter dated 21 February 2007 reproduced in the authentic language on the pages following this summary, the Commission notified the United Kingdom of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty concerning certain measures.

The Commission decided not to raise any objections to certain other measures, as described in the letter following this summary.

Interested parties may submit their comments on the measures in respect of which the Commission is initiating the procedure within one month of the date of publication of this summary and the following letter, to:

European Commission
Directorate-General for Competition
State Aid Greffe
SPA 3 6/5
B-1049 Brussels
Fax No: (32-2) 296 12 42

These comments will be communicated to the United Kingdom. Confidential treatment of the identity of the interested party submitting the comments may be requested in writing, stating the reasons for the request.

TEXT OF SUMMARY

PROCEDURE

The measures on which the Commission has opened the procedure laid down in Article 88(2) were brought to the Commission's attention either by means of complaints, or in correspondence with the United Kingdom authorities following such complaints. None of these measures have been notified to the Commission.

THE MEASURES IN RESPECT OF WHICH THE COMMISSION IS INITIATING THE PROCEDURE

Beneficiary

The beneficiary of the alleged State aid is Royal Mail Group plc (RM) which (through a holding company, Royal Mail Holdings plc) is a 100 % State-owned company. RM is the UK's main postal operator and had a legal monopoly over most basic letter services until the end of 2005. The post office network is operated by POL, which is a subsidiary of RM. RM has a separate parcels business division, Parcelforce. Parcelforce accumulated

losses since 1991 and apart from a small trading profit in 1995/1996 and despite numerous restructuring efforts, made losses until it became profitable again in 2005.

The 2001 loan

In February 2001, the UK authorities made a loan of GBP 500 million to RM to finance overseas acquisitions for the mails and parcels business. The loan is repayable between 2021 and 2025 and carries an average interest rate of around 5,8 %. The UK authorities have stated in correspondence with the Commission that this loan was on commercial terms, and that they followed advice from consultants designed to ensure that this was so. In addition, they have stated that the loan was not for any Parcelforce restructuring, that its terms were not linked to such restructuring, and that it was made solely to finance overseas acquisitions.

The loan facilities

In 2003 the UK authorities made available to RM various loan facilities to finance its 'renewal plan'. These facilities consisted of a loan facility of GBP 544 million from the National Loans Fund (NLF) secured on RM's accumulated cash balances and the acquisition by the authorities of two bonds issued by RM (one of GBP 300 million and one of GBP 200 million). Again, the UK authorities have stated in correspondence with the Commission that these loan facilities were on commercial terms, and that they followed advice from consultants designed to ensure that this was so. As of October 2006 these loan facilities had not been drawn down, and the GBP 200 million facility had by then expired. Commitment fees had nonetheless been paid by RM. In May 2006 the UK authorities announced their intention to extend the remaining loan facilities and to increase their level from GBP 844 million to GBP 900 million.

The pensions escrow account

In 2006 the UK authorities decided to set up an 'escrow account' with cash balances in RM's reserves over which the UK authorities have specific control under section 72 of the Postal Services Act 2000. The account could be drawn on by the Royal Mail Pension Plan (RMPP) in certain circumstances if RM were to fail. The background was that the various RM pension schemes, of which the RMPP is by far the largest, showed a total deficit of GBP 5,6 billion in its 2005/6 accounts. The account allows RM to agree with the trustees of the RMPP a longer period for addressing the deficit thereby reducing its pension contributions in the next years. The UK authorities have stated that they believe the use of the reserves for this purpose is in RM's best commercial interests, and that by enabling RM to complete its strategic plan they will bring about an increase in the value of the UK authorities' shareholding. The Commission understands that this measure has been fully committed to, and that consequences have already followed from it, and therefore considers that it has been put into effect.

The GBP 300 million shareholder loan

On 8 February 2007 the UK authorities made an announcement concerning the pensions measure, the GBP 900 million loan facility and also a new loan of GBP 300 million to Royal Mail.

ASSESSMENT OF THE MEASURES

Existence of aid

The 2001 loan is repayable between 2021 and 2025 and carries an average interest rate significantly below the reference rate applicable to the UK at the time the UK informed the Commission that the loan was granted, which was 7,06 %. The UK authorities have provided certain evidence that at that time the interest rates for such a long term loan could be below the reference rate (which is based on five year rates) without contravening the market economy investor principle. However, this evidence also appears to indicate that part of the loan was granted in 1999 and 2000. Not only does this contradict earlier information, but it involves a period when the reference rate was even higher (7,64 % in 2000).

The loan facilities granted in 2003 were not drawn down. However, it cannot be concluded from this point alone that the loan facilities provided no advantage, since the availability of the loan facilities has an 'option value' to the company. It could not have been known in 2003 that they would not be drawn down. The 2003 loan facilities still existing in October 2006 are to be extended, on revised terms. The UK authorities informed the Commission on 31 October that the terms were still being negotiated. On the basis of the information available to the Commission it cannot be ruled out that an aid element is involved.

One effect of the pensions escrow account, which is clearly selective towards RM, is to reduce the pensions contributions that RM has to make to the RMPP to address its current deficit. This is an indication that the measure may provide an advantage to RM and therefore be State aid. The UK authorities have argued that the measure can be justified as the intervention of a market economy investor, because it allows RM to modernise its business through its current strategic plan. However, the Commission has doubts about this argument, which has not been backed up by projections or by financial analysis, and is not in a position to allay its doubts that aid may be involved.

The terms of the GBP 300m loan have not been communicated to the Commission. Given the fact that the loan is part of package of measures where the Commission has not allayed its doubts that State aid may be involved, the terms of the loan could not in any case be assessed independently.

Compatibility of aid

In the case of these measures, the legal basis of Article 86(2) does not seem to be available. The 2001 loan and loan facilities have been explicitly linked by the UK authorities to other projects than services of general economic interest, namely the overseas acquisitions of RM and the renewal plan adopted in 2003. The pensions escrow account and GBP 300 million shareholder loan have similarly not been linked to any service of general economic interest performed by RM.

The only basis for compatibility for these measures, if they contain State aid, would at this stage appear to be Article 87(3)(c) of the Treaty. However, the measures do not appear to conform with any of the rules concerning the application of that sub-paragraph that the Commission has promulgated to date. If therefore State aid is involved, the Commission doubts whether these measures are compatible with the common market.

In accordance with Article 14 of Council Regulation (EC) No 659/1999, all unlawful aid can be subject to recovery from the recipient.

TEXT OF LETTER

'The Commission wishes to inform the United Kingdom that, having examined the information supplied by your authorities on the aid/measure referred to above, it has decided to initiate the procedure laid down in Article 88(2) of the EC Treaty. The Commission decided not to raise any objections to certain other measures, as described in this letter.

1. **PROCEDURAL ASPECTS**

(1) On 3 December 2002, Deutsche Post (DP) lodged a complaint against alleged cross-subsidies granted to the parcel activities of Royal Mail Group (RM).

(2) In response to Commission requests for information, the UK authorities provided information relevant to the matters raised in the complaint by letters of 25 February 2003 and 13 February 2004, and by email dated 17 December 2003. This information included certain other Government measures in relation to Royal Mail.

(3) On 27 May 2003, the Commission approved a series of measures in favour of Post Office Limited ("POL") which is a subsidiary of RM (case N 784/02) [1]. Under these measures, compensation was granted to POL, financed through a reserve constituted from surplus cash generated by RM. On 22 February 2006 the Commission raised no objection to continuation of one of these measures (rural network support) for a further period (case N 166/05).

(4) On 8 October 2003, DP lodged an action for annulment (T-343/03) against the N 784/02 Commission Decision, arguing that this decision had implicitly rejected its CP 206/02 complaint. On 16 November 2005, the Court of First Instance rejected the action of DP saying that the N 784/02 Decision did not imply the rejection of the complaint and that the Commission was carrying on investigations (as demonstrated by the correspondence presented before the Court).

(5) On 10 August 2006, DP sent a letter which invited the Commission to take a position on its complaint of 2002 within the period of two months, on the basis of Article 232 of the Treaty. The same letter contained information concerning a series of alleged new State aid measures. These measures are distinct from those which were the subject of the complaint of 2002 and the complaint against them was therefore treated as a separate complaint which was attributed the reference CP 221/06, subsequently NN 83/06. The alleged measures were as follows:

— a transfer of GBP 850 million to a special account dedicated to finance RM's pensions,

— decision of Department of Trade and Industry to increase the amount of a loan granted to RM from GBP 844 million to GBP 900 million,

— violation of DG Comp's N 166/05 Decision concerning support for POL's rural network, since GBP 150 million was transferred to POL directly from the State budget and not, as approved by the Decision, from a special, ring-fenced reserve.

(6) In response to Commission requests for information, the UK authorities provided information relevant to the matters raised in the two complaints by letters of 6 October and 31 October 2006. By letter of 5 December 2006 they supplemented this information with respect to one of the other measures mentioned at paragraph (3) above.

(7) By letter of 27 October 2006, the Mail Competition Forum (MCF), a body representing entrants to the postal market in the UK, submitted a complaint about the special account dedicated to finance RM's pensions also covered by DP's second complaint. The complaint of MCF was attributed the reference CP 164/06, subsequently NN 82/06. A non-confidential version of the complaint was sent to the UK authorities on 20 November 2006. The UK authorities supplied some comments on the complaint by letter of 19 December 2006.

(8) By letter of 7 December 2006 the Commission informed DP that it did not see sufficient grounds for continuing the investigation concerning complaint CP 206/02, and that if it did not hear from DP within 20 working days, the complaint would be considered withdrawn. No response was received within the deadline. That complaint is therefore considered withdrawn and the specific allegations made in it are not treated in this decision.

[1] — an annual compensation of GBP 150 million granted to POL for the net public service cost of rural counter coverage ("rural network support"),
— an aid devoted to back POL's debt to Royal Mail Group plc which had financed POL's balance-sheet deficits up to 31 March 2002 ("debt payment funding"),
— a rolling working capital loan to POL for over-the-counter cash payments meant to fund the basic postal account.
These measures complement earlier measures the Commission approved in 2002. On 12 March 2002 the Commission approved the funding of a basic postal account to credit social benefits and from which cash can be withdrawn at post office counters for those benefits holders who do not want to open an account with a bank. On 18 September 2002 the Commission approved minimum funding necessary for POL to close 3 000 urban counters no longer required under the 2000 UK Postal Services Act (2000).

(9) On 7 December 2006 the United Kingdom notified the proposed extension of another of the measures in favour of POL (debt payment funding) covered by N 784/02 which was otherwise due to expire in 2007. The Commission is treating this notification (N 822/06) in a separate decision.

(10) On 8 February 2007 the UK authorities communicated to the Commission the terms of an announcement concerning the pensions measure, the GBP 900 million loan facility and also a new loan of GBP 300 million to Royal Mail.

2. DESCRIPTION OF THE MEASURES

2.1. The beneficiary of the alleged State aid

(11) The beneficiary of the alleged State aid is Royal Mail Group plc (RM) which (through a holding company, Royal Mail Holdings plc) is a 100 % State-owned company. RM is the UK's main postal operator and had a legal monopoly over most basic letter services until the end of 2005. The post office network is operated by POL, which is a subsidiary of RM.

(12) Before 2001, the postal activities in the UK were carried out by The Post Office Corporation, a statutory body created by the Post Office Act 1969. The assets and liabilities of The Post Office Corporation were transferred to Consignia Holdings (now renamed Royal Mail Holdings plc) and to its subsidiary, Consignia plc (now RM) on 26 March 2001, under the terms of the Postal Services Act 2000.

(13) RM has a separate parcels business division, Parcelforce, which was cited as the particular beneficiary in DP's complaint of 2002. Parcelforce has its own separate hub and spoke infrastructure. In 2003 a part of parcels activity (including the provision of a universal service for parcels handed in at post offices) was transferred from Parcelforce to RM and is now operated through RM's infrastructure. Today Parcelforce is focused only on time critical parcels.

2.2. Financial regime of the beneficiary and relationship with the State

(14) Under the regime in existence before the incorporation and transfers of 2001, there was no requirement for The Post Office Corporation to pay any dividends to the UK authorities and it did not do so. It was however obliged to invest a proportion of the profits it generated each year in Government securities or National Loan Fund deposits. These investments, classed as current assets and often referred to as the "gilts", remained with RM following the 2001 transfers and amounted to GBP 1,8 billion at 31 March 2002. Following directions of the UK authorities under section 72 of the Post Office Act 2000 dated 30 January 2003, RM placed these assets in a special reserve ("the mails reserve") to be used to finance specific measures as directed.

(15) Following the incorporation and transfers of 2001, the possibility exists for RM Holdings plc to pay a dividend to its shareholder the UK Government. It has not however done so having made losses for most of the subsequent years.

(16) Beginning in 2001, the UK authorities have made certain loans or loan facilities available to RM. These are described in section 2.4 below.

(17) Through directions dated 30 January 2003, 25 May 2006 and 11 July 2006, the UK authorities directed RM to use the mails reserve to fund measures in favour of POL. The Commission had raised no objection to these measures by decisions of 27 May 2003 [2] (case N 784/02) and 22 February 2006 (N 166/05). By means of an agreement dated 9 August 2006 and through directions dated the same day and 28 September 2006, the UK authorities made arrangements to end the use of the mails reserve to fund these measures and to fund them instead directly from the State budget. The UK authorities informed the Commission of this change by means of a letter dated 6 October 2006.

(18) Parcelforce had accumulated losses since 1991. Before 1996 Parcelforce underwent a restructuring with the effect of containing its losses and Parcelforce made a small trading profit in 1995/1996. Since that date, despite numerous restructuring efforts, including the closure of five sort-centres, the elimination of some 5 000 jobs and the closure of 50 out of 102 depots in 2002, Parcelforce generated further losses until the implementation of a far-reaching restructuring plan starting in 2003. After a successful implementation of this plan, Parcelforce became profitable again in 2005.

2.3. State financing measures in favour of RM

2.3.1. *The 2001 loan*

(19) In February 2001, the UK authorities made a loan of GBP 500 million to RM to finance overseas acquisitions for the mails and parcels business. The loan is repayable between 2021 and 2025 and carries an average interest rate of around 5,8 %. The UK authorities have stated in correspondence with the Commission that this loan was on commercial terms, and that they followed advice from consultants designed to ensure that this was so. In addition, they have stated that the loan was not for any Parcelforce restructuring, that its terms were not linked to such restructuring, and that it was made solely to finance overseas acquisitions. The loan was secured on RM's shareholding in General Logistics Systems International Holdings BV and certain other RM assets. The loan was not notified to the Commission.

2.3.2. *The measures in favour of POL*

(20) By letter dated 3 December 2002 the UK authorities notified the measures in favour of POL referred to at paragraph (4) above. These measures were approved by the Commission in May 2003. The decision noted the funding mechanism from the mails reserve.

[2] It should be noted that this decision stated the measures not to be State aid given the jurisprudence existent at the time, but in the alternative to be compatible with the common market if they were considered to be aid. When one measure (rural network support funding) was reassessed in case N 166/05 in the light of the subsequent jurisprudence, it was considered to be State aid.

(21) By letter of 18 March 2005 the UK authorities notified the extension of one of these measures, Rural Network Support, which had been authorised for three years up to 31 March 2006. This extension was approved by the Commission on 22 February 2006. By letter of 6 October 2006 the UK authorities informed the Commission that they were now funding the two continuing measures, namely Rural Network Support and Debt Funding Mechanism, directly from the State budget and indeed had begun to make payments on that basis. In that letter the UK authorities noted that the mails reserve represented State resources and that therefore the UK believed the change in funding arrangements had any bearing on the previous clearance decisions. In the case of one payment, the State made a capital injection to RM for an amount (GBP 145 million) that RM had loaned to POL.

2.3.3. *The loan facilities*

(22) In 2003 the UK authorities made available to RM various loan facilities to finance its "renewal plan" (including the restructuring of Parcelforce described at paragraph (19) above). These facilities, described by the UK authorities as "a commercial package" were negotiated between RM and the Government and consisted of a loan facility of GBP 544 million from the National Loans Fund (NLF) secured on RM's accumulated cash balances (in particular the funds allocated to the mails reserve) and the acquisition by the authorities of two bonds issued by RM (one of GBP 300 million and one of GBP 200 million). Again, the UK authorities have stated in correspondence with the Commission that these loan facilities were on commercial terms, and that they followed advice from consultants designed to ensure that this was so. They also informed the Commission that as of October 2006 these loan facilities had not been drawn down, apart from a GBP 50 million testing of the draw down process which was repaid in 7 days, and that the GBP 200 million facility had by then expired. Commitment fees of some GBP […] (*) had nonetheless been paid by RM. These loan facilities were not notified to the Commission.

(23) In May 2006 the UK authorities announced their intention to extend the remaining loan facilities and to increase their level from GBP 844 million to GBP 900 million. The UK authorities indicated on 31 October 2006 that the precise terms of this extension were still being finalised but the intention was that it would be on commercial terms and that the lending would not constitute State aid. They did not therefore intend to notify the extended loan facilities to the Commission. On 8 February 2007 the UK authorities announced that the terms of the extended facilities had been agreed.

2.3.4. *The pensions escrow account*

(24) In 2006 the UK authorities decided to release GBP 850 million of the cash balances remaining in the mails reserve within RM to set up an "escrow account", which could be drawn on by the Royal Mail Pension Plan (RMPP) in certain circumstances if RM were to fail as a business. The background to this measure was that the various RM pension schemes, of which the RMPP is by far the largest, showed a total deficit (excess of projected liabilities over assets, on certain prudential assumptions) of GBP 5,6 billion in its 2005/6 accounts, where for the first time this deficit was included in RM's balance sheet. The RMPP, like other UK occupational pension schemes, is a funded scheme which is required to hold assets in respect of its liabilities. According to the UK authorities, RM would not be able to pay off this deficit quickly and modernise the business at the same time, given projected cash flows. The account therefore allows RM to agree with the trustees of the RMPP a longer period for addressing the deficit thereby reducing its pension contributions in the next years. The UK authorities have stated that they believe the use of the mails reserve for this purpose is in RM's best commercial interests, and that by enabling RM to complete its strategic plan they will bring about an increase in the value of the UK authorities' shareholding. Without the escrow account and the extended loan facilities, the UK authorities claim there is a possibility that shareholder value would be destroyed not enhanced, and therefore that they are acting in a commercial manner and notification is not necessary.

(25) The Commission understands that the UK authorities have fully committed themselves to this measure including in statements to Parliament. They have informed the Commission that the measures in favour of POL are being financed from the State budget because the mails reserve has been allocated for this other purpose. The intention to implement the escrow account is referred to both in the accounts of the Department of Trade and Industry and in the recital to a legal act directing RM under s.72 of the Postal Services Act which ends the use of the mails reserve to fund the POL measures. The Commission therefore considers that this measure has been put into effect. It has therefore placed this measure on the register of non-notified aid, under the reference NN 82/06 (in relation to the complaint by the MCF) and NN 83/06 (in relation to the complaint by DP).

2.3.5. *The new GBP 300 million shareholder loan*

(26) On 8 February 2007 the UK authorities announced their agreement to provide RM with a GBP 300 million shareholder loan. This loan has not been notified to the Commission, nor have the UK authorities indicated their intention to do so. It is clear from the terms of the announcement that this loan is part of a package of measures with the pensions escrow account and loan facility.

3. **ANALYSIS**

3.1. **Qualification of the measures as State aid**

(27) Article 87(1) of the EC Treaty states:

Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

(*) Business secret.

In order for aid in the sense of Article 87(1) to be present, there needs to be an aid measure imputable to the State which is granted by State resources, affects trade between Member States and distort competition in the common markets, and confers a selective advantage to undertakings.

(28) The business of letters and parcels delivery is an international one, and the Commission believes that a selective advantage in favour of RM or Parcelforce would distort competition and affect trade between Member States.

3.1.1. *The 2001 loan*

(29) The 2001 loan was granted from State funds, and was selective in that it was granted only to RM.

(30) In order to determine whether the loan provided an advantage to RM, it is necessary to examine its terms so as to assess whether a private lender, acting in a market economy, would have been prepared to lend on the same terms. For these purposes the Commission has equipped itself with reference interest rates ([3]) by which the terms of loans may be assessed. These reference rates are based on the five-year interbank swap rate, plus a premium of 0,75 percentage points. As it has made clear in its 1993 Communication on the Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, "where the public authority controls an individual public undertaking … the Commission will take account of the nature of the public authorities' holding in comparing their behaviour with the benchmark of the equivalent market economy investor" ([4]), both for calls for funds to financially restructure a company and to finance specific projects. In the case of a company which "has underperformed", the owner called upon to provide the extra finance to such undertaking will normally examine "more sceptically" a call for finance. Where the call for finance "is necessary to protect the value of the whole investment the public authority like a private investor can be expected to take account of this wider context when examining whether the commitment of new funds is commercially justified" and where a decision is made "to abandon a line of activity because of its lack of medium/long term commercial viability, a public group, like a private group, can be expected to decide the timing and scale of its run down in the light of the impact on the overall credibility and structure of the group".

(31) As noted above, the 2001 loan is repayable between 2021 and 2025 and carries an average interest rate of around 5,8 %. This is significantly below the reference rate applicable to the UK at the time the UK previously informed the Commission that the loan was granted, which was 7,06 %. The UK authorities have provided certain evidence that at that time the yield curve in the UK was downward sloping and that therefore the interest rates for such a long term loan could be below the reference rate (which is based on five year rates) without contravening the market economy investor principle. However, this evidence also appears to indicate that part of the loan was granted in 1999 and 2000. Not only does this contradict earlier information, but it involves a period when the reference rate was even higher (7,64 % in 2000). The Commission has also noted that, at least in 2001, the decline in Royal Mail's financial performance was beginning. This would normally be reflected in the terms of any loan. For this reason, when assessing a loan to a company in financial difficulties, the Commission may use as a point of comparison a rate higher than the reference rate.

(32) The Commission also notes that the purpose of the loan was not linked to restructuring, and that it was made solely to finance overseas acquisitions. The UK authorities have not argued that the loan was necessary to protect the value of the whole investment in RM.

(33) The Commission therefore has doubts concerning the aid character of this loan and cannot exclude *a priori* that aid is involved. The Commission wishes to examine, within the context of the Article 88(2) procedure, whether the 2001 loan provided an advantage to RM.

3.1.2. *The measures in favour of POL*

(34) The Commission has already assessed the aid character of the measures in favour of POL in cases reference N 784/02 and N 166/05. In the case of N 784/02 it should be noted that the Commission considered that the measures did not constitute State aid in the sense of Article 87(1), given the absence of overcompensation for the provision of a service of general economic interest, in accordance with the Community jurisprudence at the time. In the alternative, were they to be considered State aid, they were compatible under Article 86(2) of the Treaty.

(35) As it has already stated in case N 166/05 in respect of one measure, the Commission believes that in the light of subsequent jurisprudence ([5]) these measures do constitute State aid because they do not meet the four criteria under which compensation for provision of services of general economic interest falls outside the definition in Article 87 (1) of the Treaty. These conditions are that, first, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport, would have incurred. The Commission considers that the fourth condition is not met by the measures in favour of POL.

([3]) Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).

([4]) OJ C 307, 13.11.1993, p. 3, paragraph 30.

([5]) Judgment of the Court of 24 July 2003, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, Case C-280-00, [2003] ECR I-7747.

(36) The qualification of these measures as State aid is not at all changed by the information provided by the UK in its letter of 6 October, that the two continuing measures, namely Rural Network Support and Debt Funding Mechanism, would now be funded directly from the State budget.

(37) These measures therefore constitute State aid. In so far as they respect the terms on which they have already been authorised by the Commission, they constitute existing aid in the sense of Article 1(b)(ii) of Council Regulation (EC) No 659/1999.

3.1.3. *The loan facilities*

(38) The UK authorities have informed the Commission that as at October 2006 the loan facilities granted in 2003 had not been drawn down. However, it cannot be concluded from this point alone that the loan facilities provided no advantage, since the availability of the loan facilities has an "option value" to the company. It could not have been known in 2003 that they would not be drawn down. The terms of the loan facilities therefore need to be assessed in the same way as the 2001 loan. The 1993 Commission communication mentioned and quoted at paragraph (31) above is also relevant to this assessment. It can be noted that these loan facilities were linked to RM's "renewal plan".

(39) The GBP 544 million NLF loan was granted at "[…] basis points above Libor or relevant gilt". It should be noted that the reference rate is set at 75 points above an interbank swap rate. The UK authorities have justified the low margin by reference to the security provided, namely the cash reserves of RM. However, the Commission notes that these reserves constitute State resources over which the UK authorities had control through specific legislation. The Commission therefore questions whether their use as security could necessarily dispel its doubts as to the aid character of the measure. It notes that if the loan had been drawn down a saving of […] basis points would outweigh the value of the commitment fees which have been paid by RM.

(40) The bonds of GBP 300 million and of GBP 200 million were issued at rates of […] and […] basis points above the "relevant gilt". The larger bond was secured by a floating charge over all assets of RM while the smaller one had lower security. The margin of […] basis points above a rate based on Government securities (which are typically below interbank rates) implies the GBP 300 million loan may have been at a rate below the Commission's reference rate.

(41) In order to assess whether the terms of these loan facilities contained an aid element, one test to be applied would be whether the commitment fees paid by RM covered the value of the option. If the loan facilities themselves contain an aid element (ie if the available loan was below a market economy investor rate) then it would be necessary to assess what account should be taken of this in assessing the value of the option.

(42) The UK authorities have informed the Commission, in response to questions, that the 2003 loan facilities still existing in October 2006 (namely the GBP 544 million National Loan Fund loan and the GBP 300 million bond) are to be extended, on revised terms. The UK authorities informed the Commission on 31 October that the terms were still being negotiated but that they were taking advice from consultants to ensure that the terms were commercial.

(43) On the basis of the information available to the Commission it cannot be ruled out that an aid element is involved.

(44) In the light of all the above information the Commission is unable to allay its doubts that the loan facilities made available to RM may contain State aid. It therefore invites the UK to provide full details to the Commission within the context of the Article 88(2) procedure so that it can be assessed whether the past and proposed extended facilities provide any aid element.

3.1.4. *The pensions escrow account*

(45) It is established case law that measures of State intervention need to be assessed under Article 87(1) not by reference to their causes or their aims but in relation to their effects ([6]). The UK authorities have made clear that one clear effect of the escrow account, which is clearly selective towards RM, is to reduce the pensions contributions that RM has to make to the RMPP to address its current deficit. This is an indication that the measure may provide an advantage to RM and therefore be State aid.

(46) As already noted the UK authorities have argued that the measure can be justified as the intervention of a market economy investor, which would imply that it does not provide any advantage and is therefore not State aid, because it allows RM to modernise its business through its current strategic plan. However, the Commission has doubts about this argument, which has not been backed up by projections or by financial analysis, and is not in a position to allay its doubts that aid may be involved. It therefore wishes to open the Article 88(2) procedure on this point.

(47) In examining this question the Commission will be considering three aspects, given the particular nature of the funds being allocated to the escrow account. Given that the reserve funds within the reserve are already held within Royal Mail and on its balance sheet, one issue is whether the creation of the escrow account can be regarded as a commercial decision by RM in spite of the involvement of the UK authorities, which arises through the particular legal regime applicable. A second issue, given the particular powers taken by the UK authorities over these reserves, is whether a shareholder acting commercially would agree to this use of shareholders' equity. A third issue, given that the use of the reserves for the pensions measure requires the authorities to fund the POL measures from the State budget, is whether a shareholder would agree to bring new equity to fund an escrow account of this type.

([6]) Judgment of the Court of 2 July 1974, Italian Republic v Commission of the European Communities — Family allowances in the textile industry, Case 173-73, [1974] ECR 709.

3.1.5. *The new GBP 300 million shareholder loan*

(48) The terms of the loan have not been communicated to the Commission. The Commission has therefore been unable to assess whether its terms include aid. Given the fact that the loan is part of package of measures where the Commission has not allayed its doubts that State aid may be involved, the terms of the loan could not in any case be assessed independently. The Commission therefore wishes to assess the terms of this loan within the 88(2) procedure it is opening.

3.2. **Assessment of compatibility of the measures if State aid is present**

(49) RM carries out certain services of general economic interest. Aid destined to meet the extra costs of providing such services could, under appropriate conditions, be authorised on the basis of Article 86(2) of the EC Treaty. Indeed, the measures in favour of POL referred to in section 3.1.3 above were authorised on this basis. The Commission believes that this authorisation is not put into question by the change of funding arrangements under which the measures are financed direct from the State budget and therefore raises no objection to this change.

(50) However, in the case of the other measures referred to above for which the Commission has not been able to allay its doubts that State aid may be involved, namely the 2001 loan, the loan facilities and the pensions escrow account, the legal basis of Article 86(2) does not seem to be available. The 2001 loan and loan facilities have been explicitly linked by the UK authorities to other projects, namely the overseas acquisitions of RM and the renewal plan adopted in 2003. The pensions escrow account and GBP 300 million shareholder loan have similarly not been linked to any service of general economic interest performed by RM.

(51) The only basis for compatibility for these measures, if they contain State aid, would at this stage appear to be Article 87(3)(c) of the Treaty. However, the measures do not appear to conform with any of the rules concerning the application of that sub-paragraph that the Commission has promulgated to date. If therefore State aid is involved, the Commission doubts whether these measures are compatible with the common market.

4. **DECISION**

(52) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests the United Kingdom to submit its comments and to provide all such information as may help to assess the 2001 loan, the loan facilities and the pensions escrow account within one month of the date of receipt of this letter.

(53) In particular, the Commission requests the UK to provide:

— clarification of the details and timing of the 2001 loan and any further considerations concerning its conformity to the market economy investor principle,

— clarification of the details of the loan facilities issued in 2003, any further considerations concerning their conformity to the market economy investor principle including concerning the market conformity of the commitment fees paid, and full details of the extended loan facility negotiated with Royal Mail,

— full details of the pensions escrow account, including the terms on which it may be called upon by the RMPP, the legal instruments establishing it, the effect of its creation on the pensions contributions to be paid by RM, and any further considerations concerning its assessment under Article 87(1) of the Treaty,

— full details of the GBP 300 million shareholder loan announced on 8 February 2007.

(54) The Commission raises no objection to the change of funding arrangements for the measures in favour of POL of which the United Kingdom informed the Commission on 6 October 2006.

(55) The Commission requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

(56) The Commission wishes to remind the United Kingdom that Article 88(3) of the EC Treaty has suspensory effect, and would draw your attention to Article 14 of Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

(57) The Commission warns the United Kingdom that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.'

Prior notification of a concentration

(Case COMP/M.4654 — IPR/Mitsui (UK Electricity generation business))

Candidate case for simplified procedure

(Text with EEA relevance)

(2007/C 91/11)

1. On 19 April 2007, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ([1]) by which the undertakings International Power plc ('IPR', United Kingdom) and Mitsui & Co., Ltd. ('Mitsui', Japan) acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of the undertakings Deeside Power Development Company Limited ('Deeside', United Kingdom), Rugeley Power Limited ('Rugeley', United Kingdom), International Power IQ Limited ('Indian Queens', United Kingdom) and International Power Fuel Company Limited ('IPFC', United Kingdom), currently solely controlled by IPR, by way of purchase of shares in a newly created company constituting a joint venture.

2. The business activities of the undertakings concerned are:

— for IPR: generation of electricity in the United Kingdom and in countries outside the EU;

— for Mitsui: trading in various commodity businesses worldwide;

— for Deeside, Rugeley and Indian Queens: generation of electricity in the United Kingdom;

— for IPFC: coal and biomass purchasing.

3. On preliminary examination, the Commission finds that the notified transaction could fall within the scope of Regulation (EC) No 139/2004. However, the final decision on this point is reserved. Pursuant to the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 ([2]) it should be noted that this case is a candidate for treatment under the procedure set out in the Notice.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation to the Commission.

Observations must reach the Commission not later than 10 days following the date of this publication. Observations can be sent to the Commission by fax ((32-2) 296 43 01 or 296 72 44) or by post, under reference number COMP/M.4654 — IPR/Mitsui (UK electricity generation business), to the following address:

European Commission
Directorate-General for Competition
Merger Registry
J-70
B-1049 Bruxelles/Brussel

([1]) OJ L 24, 29.1.2004, p. 1.
([2]) OJ C 56, 5.3.2005, p. 32.

Prior notification of a concentration

(Case COMP/M.4658 — Bridgepoint Capital/Wolters Kluwer Educational Division)

Candidate case for simplified procedure

(Text with EEA relevance)

(2007/C 91/12)

1. On 19 April 2007, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ([1]) by which the undertaking Bridgepoint Capital Group Ltd. ('Bridgepoint', United Kingdom) acquires within the meaning of Article 3(1)(b) of the Council Regulation sole control of the whole of the education division of Wolters Kluwer N.V. ('WKE', The Netherlands) by way of purchase of shares.

2. The business activities of the undertakings concerned are:

— for undertaking Bridgepoint: a private equity company,

— for undertaking WKE: a provider of educational content.

3. On preliminary examination, the Commission finds that the notified transaction could fall within the scope of Regulation (EC) No 139/2004. However, the final decision on this point is reserved. Pursuant to the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 ([2]) it should be noted that this case is a candidate for treatment under the procedure set out in the Notice.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation to the Commission.

Observations must reach the Commission not later than 10 days following the date of this publication. Observations can be sent to the Commission by fax ((32-2) 296 43 01 or 296 72 44) or by post, under reference number COMP/M.4658 — Bridgepoint Capital/Wolters Kluwer Educational Division, to the following address:

European Commission
Directorate-General for Competition
Merger Registry
J-70
B-1049 Bruxelles/Brussel

([1]) OJ L 24, 29.1.2004, p. 1.
([2]) OJ C 56, 5.3.2005, p. 32.

Prior notification of a concentration

(Case COMP/M.4498 — HgCapital/Denton)

(Text with EEA relevance)

(2007/C 91/13)

1. On 18 April 2007, the Commission received a notification of a proposed concentration pursuant to Article 4 and following a referral pursuant to Article 4(5) of Council Regulation (EC) No 139/2004 ([1]), by which the undertaking HgCapital Investments Managers Ltd, UK ('HgCapital'), acquire(s) within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertakings Denton ATD, Inc., USA, Robert Denton, Inc., USA, and Denton COE GmbH, Germany (together 'Denton'), by way of purchase of shares.

2. The business activities of the undertakings concerned are:

— for HgCapital (FTSS): Manufacture and supply of safety testing devices and related services,

— for Denton: Manufacture and supply of safety testing devices and related services.

3. On preliminary examination, the Commission finds that the notified transaction could fall within the scope of Regulation (EC) No 139/2004. However, the final decision on this point is reserved.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation to the Commission.

Observations must reach the Commission not later than 10 days following the date of this publication. Observations can be sent to the Commission by fax ((32-2) 296 43 01 or 296 72 44) or by post, under reference number COMP/M.4498 — HgCapital/Denton to the following address:

European Commission
Directorate-General for Competition
Merger Registry
J-70
B-1049 Bruxelles/Brussel

([1]) OJ L 24, 29.1.2004, p. 1.