

JOAQUIN BAYO DELGADO
ASSISTANT SUPERVISOR

Ms Laraine LAUDATI
Data Protection Officer
European Commission
European Anti-Fraud Office (OLAF)
B - 1049 BRUXELLES

Brussels, 21 May 2007
JBD/EDK/ktl D(2007)727 C 2007-0214

Dear Mrs Laudati,

I am referring to the prior checking notification concerning the investigations by the OLAF Data Protection Officer at the European Anti-Fraud Office (case 2007-214).

After examining the content of the notification, we have come to the conclusion that even though the case includes the processing of personal data, **it is not subject to prior checking** under Article 27 of Regulation (EC) No 45/2001 ("the Regulation").

In general, the personal data processing activities by the Data Protection Officer (DPO) in the framework of his or her investigations is based on Paragraph 1 of Annex 1 of the Regulation (and possibly on further implementing rules on the basis of Article 24.8 of the Regulation). The DPO may on his or her initiative or at the request of the Community institution/body which appointed him or her, the controller, the Staff Committee concerned or any individual, investigate matters and occurrences directly relating to his or her tasks and which come to his or her notice and report back to the person who commissioned the investigation or to the controller.

Article 27(1) of the Regulation submits for prior checking by the European Data Protection Supervisor, processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes.

Article 27(2) of the Regulation contains a list of processing operations likely to present specific risks in the above sense. The prior checking notification has been submitted under Article 27(2)(a) and 27(2)(b) of the Regulation.

The investigation by the DPO is an independent administrative investigation. In his consistent practice, the EDPS scrutinized administrative investigations (e.g. administrative inquiries as a fact finding exercise before a disciplinary proceedings) in the framework of the prior checking

procedure under the two above mentioned provisions. Investigations by the DPO have however a fundamentally different nature.

Article 27(2)(a) of the Regulation concerns cases where the processing of data typically involves data relating to health, suspected offences, offences, criminal convictions or security measures. In the course of his or her independent investigation, the DPO can establish the violation of the data protection rules under Regulation (EC) No 45/2001. Establishing breaches of the provisions of the Regulation in itself is a broader concept than (suspected) offences or criminal convictions, and therefore such investigations fall out of the scope of Article 27(2)(a) of the Regulation, even if interpreted as including disciplinary proceedings. The fact that these investigations may, occasionally, also involve data that are within the scope of this provision does not lead to a different conclusion.

Article 27(2)(b) of the Regulation states that the specific risk is present in processing operations which intend to evaluate personal aspects related to the data subject, including his or her ability, efficiency and conduct. Thus, the data processing operation itself should aim at evaluating individual aspects, which is clearly the case concerning administrative inquiries, in the sense of Annex IX of the Staff Regulations. This is not the case here, because in contrast to that type of administrative investigations, the investigations by the DPO do not aim at any type of personal evaluation (and personal responsibility); rather they aim at ensuring that the provisions of the Regulation are applied. Because of this consideration, the case is not subject to prior checking under Article 27(2)(b) of the Regulation either.

Finally, we have found no reason to think that Article 27(1) of the Regulation might be applicable on other grounds.

In conclusion we believe that the processing operation does not qualify for a prior checking and the EDPS decided to close the case, unless you can give us specific grounds to reconsider.

In any case, nothing in the notification has appeared to be in breach of Regulation 45/2001.

This conclusion is however without prejudice to the other possible scrutiny of the appropriateness of a DPO investigation, for example in a consultation by the DPO on how to proceed in a specific case, or in the frame of a complaint lodged with the EDPS against an investigation by the DPO in such a case.

The EDPS, of course, remain available for any further consultation on the matter.

Thank you for your valuable collaboration.

Yours sincerely,

Joaquín BAYO DELGADO