

## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Anti-Fraud Office (OLAF) on the use of dedicated sectoral modules on the AFIS system.**

Brussels, 29 June 2007 (Case 2007-84-85-86-87)

### **1. Proceedings**

On 15 February 2007, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) at the European Anti-Fraud Office (OLAF) four notifications for prior checking relating to the use of dedicated sectoral modules for irregularities reporting on the Anti Fraud Information System (AFIS) system. A document entitled "*Privacy statement for irregularities reporting*" was also enclosed.

The EDPS requested OLAF provide some further information on 19 February 2007. A response was given on 28 February 2007. A further request for information was sent on 5 March 2007 and a response was received on 26 April 2007. The case was suspended pending comments on the draft opinion from the DPO on 30 May 2007 and these were received on 22 June 2007.

The EDPS considers that the nature and use of the four dedicated modules for irregularities reporting are such that all four notifications can be dealt with in one prior checking opinion.

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

#### **2.1 The facts**

- Purpose of the data processing activities

Under sectoral legislation, Member states are requested to periodically notify OLAF of any irregularities which they have detected involving Community resources, and to update relevant information concerning their administrative/judicial and financial follow up. Communications are received from member states via modules of AFIS dedicated to a specific sector. These are:

- Module 595/91 for communications concerning irregularities in the field of the European Agricultural Guidance and Guarantee Fund (EAGGF);
- Module 1681/94 for communications concerning irregularities in the field of Structural Funds;
- Module 1831/94 for communications regarding irregularities in the field of the Cohesion Fund; and

- A dedicated module for communications regarding irregularities in the field of pre-accession instruments.

Once received, communications are stored in the Electronic Communications Registry (ECR). If communications are received in paper form, a team dedicated to each sector inserts the data manually into the ECR. Each module automatically generates a communication ID, which is used for the sole purpose of tracking communications. It records the date of the communication and the name of the organisation which has notified OLAF of the irregularities. It is not used as a personal identifier.

In this case the data collected and processed for the purpose of irregularities reporting are as follows:-

- Name
- Address
- Date of birth
- Provisions infringed
- Nature and descriptions of the sanctions imposed.

These five data fields are broadly split into two categories, personal identification data and data related to the administrative, judicial and financial procedures concerning the irregularities affecting EU contributions in the sectors covered by irregularities reporting.

Information is analysed through IT tools and is used by OLAF for intelligence purposes. OLAF provides feedback to the Member States that provided the information in relation to the financial follow up of irregularities. Member states are also informed about general trends, modus operandi and recovery procedures. No further personal data is provided as part of the feedback to member states. Access to competent Directorate Generals of the Commission (REGIO, EMPL, FISH, AGRI, ELARG) is provided on motivated request in order to conciliate data at the time of closure of the programmes/projects.

Each of the four dedicated modules are used to ascertain the nature of irregular practices and the financial effects of irregularities, to recover sums wrongly paid and in preventing irregularities occurring by enhancing risk analysis and fraud prevention. The exchange of information in each dedicated module is also intended to reinforce the cooperation between member states and the Commission.

Individuals who are identified when an irregularity is reported are not informed by OLAF. There are several thousand irregularities reported every year. However, OLAF have developed a privacy policy in relation to irregularities reporting which they intend to place on their website. OLAF intend to make this statement available on the data protection page of their website alongside privacy statements relating to their other areas of competence. The preparation and content of grant applications are the responsibility of national authorities who distribute the funds.

When receiving Community and national funds, the data subject signs a contract which foresees the possibility of the recovery of funds paid.

## 2.2 Legal aspects

### 2.3 Prior checking

Regulation (EC) 45/2001 of the European Parliament and of the Council on the protection of personal data by Community institutions and bodies and on the free movement of such data (hereinafter Regulation 45/2001) applies to the processing of personal data by Community institutions and bodies.

Personal data are defined as any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. Dedicated modules are used to process data about individuals implicated in irregularities. The data therefore qualify as personal data according to Article 2(a) of Regulation 45/2001.

The processing of personal data is carried out by OLAF in activities which fall within the scope of Community law and therefore fall within the scope of Regulation (EC) 45/2001 by virtue of Article 3(1).

Regulation 45/2001 shall apply to the processing of personal data wholly or partly by automatic means and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. In these cases, the personal data are held as part of a paper filing system and electronically. Data received in manual form are keyed onto the system by a team dedicated to each specific module, at which point a communication ID is automatically generated.

Regulation (EC) 45/2001 therefore applies by virtue of Article 3(2)..

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes:-

- Article 27(2)(a) *"processing of data relating to health and to suspected offences, offences, criminal convictions or security measures"*;
- Article 27(2)(b) *"processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency or conduct"*; and
- Article 27(2)(d) *"processing operations for the purpose of excluding individuals from a right, benefit or contract"*.

Each of the four modules for reporting irregularities involves the processing of personal data which may relate to suspected offences, offences or criminal convictions. Each of the four modules collects data which is used for intelligence purposes which may be used to evaluate the conduct of a natural person. Each of the four modules may also be used to process personal data for the purpose of excluding individuals from the EAGGF, Structural Funds, Cohesion Fund or Pre-accession Funds. Thus the processing operations defined for each module have to be prior checked by EDPS under Article 27(a)(b) and (d).

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case however the processing operation has already been established. In any case, this is not a

serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 15 February 2007. Article 27(4) of Regulation (EC) 45/2001 stipulates that the EDPS shall deliver his opinion within two months, so initially the opinion should be delivered by 16 April 2007. However this time period is suspended when further information is sought and when the DPO is asked to comment on the draft opinion. This prior check has been suspended for 9+51+22 days so the present opinion must be delivered no later than the 2 July 2007.

## **2.4 Lawfulness of the processing**

For any processing of personal data to be legitimate, it must meet one of the criteria stipulated in Article 5 of Regulation (EC) 45/2001. Thus the processing of personal data by OLAF using dedicated modules on the AFIS system will have to comply with one of these conditions.

Article 5(a) of Regulation 45/2001 stipulates that personal data may be processed if *"the processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body"*.

The processing of personal data in irregularities reporting on Module 595/91 is necessary for the performance of a task carried out in the public interest on the basis of a legal instrument adopted on the basis of the Treaty establishing the European Community and is therefore legitimate under Article 5(a) of Regulation 45/2001.

The legal basis for the processing of personal data using Module 595/91 can be found in Regulation (EC) 1848/2006. Article 3 provides the legal basis for reporting and details the information to be provided in an irregularities report, as well as the derogations from the duty to report. Article 5 provides that Member states provide information on the time limits for the initiation or abandonment of administrative or criminal sanctions, including the progress and results of those procedures. Article 10 provides the purposes for which the data may be processed. Article 11 provides limitations on the use and disclosure of personal data and ensures that the processing is conducted in line with Directive 95/46/EC and Regulation (EC) 45/2001.

Thus the processing of personal data in irregularities reporting on Module 1681/94 is necessary for the performance of a task carried out in the public interest on the basis of a legal instrument adopted on the basis of the Treaty establishing the European Community and is therefore legitimate under Article 5(a) of Regulation 45/2001.

The legal basis for the processing of personal data using Module 1681/94 can be found in Regulation (CE) 1681/94, as amended by Regulation (CE) 2035/2005. Article 3(1) provides the time limits for reporting by Member states and specifies the information to be communicated, as well as derogations from the requirement to report. Article 8a provides the Commission with the power to use the data for defined purposes.

The processing of personal data in irregularities reporting on Module 1831/94 is necessary for the performance of a task carried out in the public interest on the basis of a legal instrument adopted on the basis of the Treaty establishing the European Community and is therefore legitimate under Article 5(a) of Regulation 45/2001.

The legal basis for the processing of personal data using Module 1831/94 can be found in Regulation (CE) 1831/94, as amended by Regulation (CE) 2168/2005. Article 3(1) provides the time limits for reporting by Member states and specifies the information to be communicated, as well as derogations from the requirement to report. Article 5 provides for Member States to provide updates on the data provided, including details of recovered sums, administrative and criminal procedures, any sums recovered and details as to why certain payments cannot be recovered. Article 8a provides the Commission with the power to use the data for defined purposes. Article 10 provides limitations on the use and disclosure of personal data and ensures that the processing is conducted in line with Directive 95/46/EC and Regulation (EC) 45/2001.

The processing of personal data in irregularities reporting on the Module dedicated to pre accession funds irregularities is necessary for the performance of a task carried out in the public interest on the basis of a legal instrument adopted on the basis of the Treaty establishing the European Community and is therefore legitimate under Article 5(a) of Regulation 45/2001.

The legal basis for processing of personal data in the Module dedicated to pre-accession funds irregularities reporting can be found in several different pieces of legislation.

For irregularities reporting for funds provided under the Instrument for Structural Policy for Pre-accession, the legal basis is found in Regulation (EC) 1267/99. Article 9 provides the framework for Beneficiary States for time reporting and time limits, the information to be provided and applying financial memoranda. Point 10 of the financial memoranda states that Regulation (CE) 1681/94 will apply.

For irregularities reporting for funds provided under the Structural Aid for Pre-Accession Agriculture and Rural Development (SAPARD), the legal basis is found in Article 15(3) Regulation (EC) 2222/2000 which applies the rules contained in Commission Regulation (EC) No 1681/94 to SAPARD funds. Thus the processing of personal data in irregularities reporting related to SAPARD funds on the Module dedicated to pre accession funds irregularities has an explicit legal base and is necessary for the performance of a task carried out in the public interest on the basis of a legal instrument adopted on the basis of the Treaty establishing the European Community and is therefore legitimate under Article 5(a) of Regulation 45/2001.

For irregularities reporting for fund provided under PHARE (Economic Aid to certain countries of Central and Eastern Europe), Point 10 of the financial memoranda states that Regulation (CE) 1681/94 will apply.

## **2.5 Processing of special categories of data**

Article 10(5) of Regulation 45/2001 states that *"Processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof..."*

The various legal instruments quoted in 2.4. provide the authorisation for processing special categories of data relating to offences and criminal convictions in irregularities reporting and thus the EDPS is satisfied that the processing is in accordance with Article 10(5) of Regulation (EC) 45/2001.

## **2.6 Data Quality**

Article 4(1)(c) of Regulation 45/2001 states that personal data must be *"adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed."*

The EDPS does not regard the processing of the categories of personal data as excessive in relation to the identification of the individual or to the measures laid out by the legislative provisions detailed in 2.4.

Article 4(1)(d) of Regulation 45/2001 states that personal data must be *"accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified."*

The privacy statement which OLAF intends to publish on its website advises data subjects that national authorities have an implicit obligation to notify the Commission when modifications or corrections occur to the information held on national databases. When the notification of modifications or corrections occurs electronically, they are automatically recorded on the system.

While the fact that irregularities which are reported will be subject to further investigation by OLAF will in itself contribute towards the quality of data, the EDPS is concerned that the data subject may not be sufficiently aware of his rights of access and rectification to ensure the quality of the data. This is dealt with further in 2.11 Information to the data subject.

The EDPS is satisfied that, subject to the recommendations in 2.11 being implemented, the OLAF system ensures the quality of personal data processed.

## **2.7 Conservation of data/ Data retention**

Article 1(e) states that personal data must be *"kept in a form which permits identification of data of data subjects for not longer than is necessary for which the data are collected and/or further processed. The Community institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific use should be kept either in anonymous form only or, if that is not possible, only with the identity of the data subjects encrypted."*

Regarding Structural Actions (Regulations 1681/94 and 1831/94), the following provisions of sectoral legislation require retention of documents for three years following the payment by

the Commission of the final balance. This period is suspended either in the case of legal proceedings or at the duly motivated request of the Commission. These rules are established specifically by the following provisions:

- For R. 1681/94: Article 23 §3 of Regulation (EEC) 4253/88 for cases related to Programming period 1989-93; Article 23 §3 of Regulation (EC) 2082/93 amending Regulation 4253/88 for cases related to Programming period 1994-99; Article 38 §6 of Regulation (EC) 1260/1999 for cases related to Programming period 2000-2006.
- For R. 1831/1994: Article G §2 of Annex II of (EC) Regulation 1164/1994.

Regarding ISPA (instrument for structural Policies for Pre-accession), Article 9(5) of council Regulation (EC) N°1267/1999 in conjunction with Annex III, point 4, 4§ and the Financing Memorandum concerned require responsible authorities to keep available all the supporting documents regarding expenditure on any project for a period of 5 years following the last payment of a project. Regarding Pre Accession measures for Agriculture and Rural Development, the retention period for documents of five years after the date of final payment to the beneficiary also applies (Article 15 (1) of Regulation 2222/2000 and the financing memorandum concerned).

Regarding the agricultural area where EU support is granted through EAGF and EARDF, the new Commission Regulation dealing with irregularity communications from 1 January 2007 onwards, Regulation No 1848/2006 does not provide a maximum retention period. Council Regulation 1290/2005 and Commission Regulation 885/2006 provide that for the cases of irregularity or negligence, the relevant documentation is to be kept by Member States for a duration of three years following the year during which complete recovery of the funds or during which the Commission took a Decision clearing the amounts unduly paid (art 9§3 of Regulation 885/2006 and art 32 and 33 of Regulation No 1290/2005).

All four notifications state that anonymised data can be maintained on the system for a maximum of 30 years to allow for statistical analysis of irregularities, especially time series analysis.

The EDPS considers that the retention periods in each of the four notifications is justified considering the purposes for which the data are collected and as such they are compliant with the obligations imposed by Regulation (EC) 45/2001. Data held beyond the periods specified in the legislation is anonymised in line with the requirements of Article 4(1)(e) of Regulation (EC) 45/2001.

## **2.8 Compatible use / Change of purpose**

Article 4(1)(b) provides that personal data must be "*collected for specified explicit and legitimate purposes and not further processed in a way incompatible with those purposes*". OLAF does not conduct any further processing of the personal data contained in irregularities reporting for purposes other than ascertaining the nature of irregular practices and the financial effects of irregularities, recovering sums wrongly paid and in preventing irregularities. The EDPS is satisfied that these purpose are not incompatible with the original purpose for which the data were collected and the processing is in accordance with Article 4(1)(b).

## 2.9 Transfer of data

Article 7(1) provides that *"Personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

The only transfer of data that is mentioned in the notifications is that access is granted to the data upon a motivated request, to the competent Directorate Generals of the Commission (REGIO, EMPL, FISH, AGRI, ELARG) in order to conciliate data at the time of the closure of programmes or projects. No transfer of personal data occurs in relation to funds related to a pre-accession instrument. No personal data are included in the feedback provided to Member States.

The EDPS is satisfied that the transfers that occur are in compliance with the provisions of Article 7(1) of Regulation (EC) 45/2001. The provisions for transfers of personal data contained in Articles 8 and 9 are not relevant to this notification.

## 2.10 Right of access and rectification

The privacy statement which OLAF intends to publish on its website states clearly that upon requests data subjects may be sent a copy of their personal data and correct or complete them and provides a contact name for any requests for access, rectification, blocking or erasing to be directed to.

Under Article 20 of Regulation (EC) 45/2001, the right of access and rectification may be restricted by Community institutions and bodies where such restriction constitutes a necessary measure to safeguard, among other matters:

- the prevention, investigation, detection and prosecution of criminal offences; or
- an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters.

As stated, the Regulation only provides that such restrictions on the rights of data subjects can be made where these restrictions are necessary and any restriction must be considered on a case-by case basis.

The EDPS is satisfied that, subject to the recommendations detailed in 2.11, the rights of access and rectification are provided for.

## 2.11 Information to the data subject

Article 12 of Regulation 45/2001 provides for information which the data controller is obliged to supply where the data have not been obtained from the data subject. However, Article 12(2) states that this will not apply where *"the provision of such information proves impossible or would involve disproportionate effort or if the recording or disclosure is expressly laid down by Community law. In these cases the Community institution or body shall provide for appropriate safeguards after consulting the European Data Protection Supervisor."*

In light of the fact that OLAF receive several thousand irregularity reports each year, they consider the supply of this information to the data subject to involve disproportionate effort. In addition, the legal instruments set out in 2.4 expressly lay down the supply of this personal



data by member states and the recording by OLAF provides that the information stipulated in Article 12 may not be required.

However, in order to provide adequate safeguards in cases such as this, the EDPS considers it good practice to produce a privacy statement which can be posted on the Community institution or body's website. OLAF have already drafted this statement, which they intend to publish on the OLAF Data Protection page of the "Europa" Website. This notice covers all of the dedicated modules for irregularities reporting and covers all of the information provided for in Article 12(1).

In addition, the EDPS recommends that a direct link should be installed from the AFIS home page which deals with irregularities reporting to the OLAF privacy statement.

For clarity, the EDPS recommends that the changes stipulated below be made to the privacy statement.

- In the list budget sectors under the heading "*Irregularities Reporting*", after "*structural measures*" add "*(including the Cohesion Fund)*".
- In the first paragraph under "*How can you verify, modify or delete your information?*" add a reference that personal data may be withheld from the individual if this is necessary for safeguarding the prevention or detection of crime or the financial interests of any Member State or Community Body.
- In the second paragraph under "*How can you verify, modify or delete your information?*" change "*is automatically recorded on the Commission system*" to "*is automatically recorded on the OLAF system*".
- In the same paragraph change "*dedicated staff of the Commission itself*" to "*dedicated OLAF staff*".

In addition, the EDPS has already been assured that the following text shall be inserted into the implementing rules for the Financial Regulation in each of the Community Institutions:

*"In any call made in the context of procurements, grants or structural funds, potential beneficiaries, candidates and tenderers shall be informed that, for the purpose of safeguarding the financial interests of the Communities, their personal data may be transferred to internal audit services, to the European Court of Auditors, to the Financial Irregularities Panel and/or to the European Anti-Fraud Office (OLAF), or to any other institution or body competent in the fields of auditing or investigation."*<sup>1</sup>

## **2.12 Automated individual decisions**

No decisions producing legal effects concerning a data subject are taken by purely automated means as part of the use of dedicated modules on the AFIS system for irregularities reporting, therefore article 19 of Regulation 45/2001 shall not apply.

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<sup>1</sup> Opinion of the European Data Protection Supervisor on: the Modified Proposal for a Council Regulation amending Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (COM(2006) 213 final) and on the Proposal for a Commission Regulation (EC, Euratom) amending Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (SEC(2006) 866 final)

## 2.13 Security measures

The EDPS notes that the security measures set forth in the context of OLAF's use of dedicated modules on the AFIS system are the same as those used in other data processing operations that have been notified to the EDPS for prior checking or will be notified. In order to ensure a consistent approach to OLAF security measures, the EDPS has decided to analyse the security measures in a horizontal way, rather than doing it in the context of each particular prior checking notification. Accordingly, this Opinion will not deal with security measures and the analysis will be carried out in a different Opinion which will address security issues only.

### Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the following considerations are fully taken into account:

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- In the second paragraph under "*How can you verify, modify or delete your information?*" change "*is automatically recorded on the Commission system*" to "*is automatically recorded on the OLAF system*".
- In the same paragraph change "*dedicated staff of the Commission itself*" to "*dedicated OLAF staff*".

Done at Brussels, 29 June 2007

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