

Opinion on five notifications for Prior Checking received from the Data Protection Officer of the European Anti-Fraud Office (OLAF) on external investigations

Brussels, 4 October 2007 (Cases 2007-47, 2007-48, 2007-49, 2007-50, 2007-72)

1. Proceedings

On 29 January 2007, the European Data Protection Supervisor (EDPS) received by regular mail four prior checking notifications from the Data Protection Officer (DPO) of the European Anti-Fraud Office (OLAF):

- 1) External investigations, external aid sector (Africa, Middle East, South and South-east Asia, Latin America, ACP countries (2007-0047)
- 2) External investigations and operations, direct expenditure sector (2007-0048)
- 3) External investigations and operations, external aid sector (2007-0049)
- 4) Investigations and operations, multi-agency sector (2007-0050)

On 9 February 2007, the EDPS received by regular mail a new prior checking notification on "External investigations and operations, Directorate B" (2007-0072). Directorate B deals with external investigations and coordination cases in the agricultural sector and in the domain of structural measures and customs (including cigarettes, VAT, alcohol and precursors).

The EDPS decided to analyse the five cases jointly, in a single prior checking opinion, because the processing operations at question and the personal data involved are much alike. On 5 March 2007, the EDPS requested further information regarding the five cases on external investigation and at the same time suspended the case. During the suspension period, on 15 March 2007, the EDPS made another information request. The EDPS received all the requested responses on 4 April 2007. Further, due to the complexity of the matter, the EDPS extended the deadline for one month on 11 April 2007.

On 16 May 2007, the EDPS made another information request. In the light of the follow-up information concerning the EDPS Opinion on internal investigations, the EDPS modified his previous information request on 29 May 2007. The EDPS received the responses on 3 July 2007.

On 10 July 2007, the EDPS sent the draft opinion for comments to the DPO with a request to provide any further information she may find necessary. The EDPS received the comments on the draft opinion on 28 September 2007.

2. Examination of the matter

2.1. Introduction - similarities between the data processing operations regarding internal and external investigations

Certain aspects of the data processing operations are similar in the course of external and internal investigations conducted by OLAF. This is the case for example regarding the handling of files, where the same rules apply for the handling of electronic files (Case Management System-CMS) and of the paper files (OLAF Greffe) during external and internal investigations.

Therefore, this opinion will not repeat the same facts or the conclusions made in the EDPS Opinion on internal investigations by OLAF,¹ but will only make a brief reference, where necessary, in those instances.

As a consequence of the EDPS opinion on OLAF's internal investigations OLAF issued an internal document titled "Instructions to staff conducting investigations following from opinion of European Data Protection Supervisor (EDPS) on prior checking on internal investigations"² (hereinafter referred to as: "OLAF Instructions to Investigators") in order to comply with the data protection recommendations of the EDPS made in the internal investigation opinion.³ The note attached to OLAF Instructions to Investigators, issued by the Director General of OLAF and addressed to OLAF staff, confirms that these Instructions to Investigators apply to all investigation activities⁴, including external investigations (it has also been confirmed to the EDPS at his information request⁵). OLAF later however explained that the instructions have to be modified to take into account certain differences between internal and external investigations and between investigations and other operational cases. The revised instructions are expected to be incorporated in the next version of the OLAF Manual.

2.2. The facts

The European Anti-Fraud Office (OLAF) conducts external investigations. External investigations are administrative investigations outside the Community organs and are performed for the purpose of detecting fraud or other irregular conduct of natural or legal persons affecting the financial interests of the European Communities. The results of OLAF's external investigations are referred to the appropriate national or Community authorities for judicial, administrative, legislative or financial follow-up. OLAF collects personal data of individuals during external investigations, uses those data for the assessment of the behaviour

¹ Opinion of 23 June 2006 on a notification for prior checking on OLAF internal investigations (Case 2005-418). Available at: www.edps.europa.eu

² Data Protection Guidelines for OLAF Investigators (Based on the Opinion of EDPS of 23.06.2006 regarding Internal Investigations), accompanied with a "Note for the attention of OLAF Staff" from the Director -General F.-H. Bruener on 15.09 2006. I/07559.

³ Opinion of 23 June 2006 on a notification for prior checking on OLAF internal investigations (Case 2005-418). Available at: www.edps.europa.eu

⁴ Second passage of Note to the attention of OLAF Staff: "While the prior checking concerned only internal investigations, the recommendations are relevant for the processing of personal data with respect to all investigations."

⁵ It has been noted that with respect to providing information to data subjects, the procedure expounded in the notification for prior checking of the external investigations applies (see part 2.2.6 of this Opinion), and not instruction 8.

of the individual(s) or legal person(s) concerned and further transfers or stores those data. These data processing operations are the object of the present opinion.

2.2.1. Collection of personal data by OLAF

Once OLAF has concluded that an external investigation should be opened, various legal bases stipulate the framework of the operational activities, including data collection activities to be carried out by OLAF. For example, OLAF exercises the power conferred on the Commission⁶ to carry out on-the-spot inspections and checks on economic operators in the Member States and in third countries (this latter in accordance with the cooperation agreements in force),⁷ pursuant to Council Regulation No 2185/96⁸:

- for the detection of serious or transnational irregularities or irregularities that may involve economic operators acting in several Member States, or
- where, for the detection of irregularities, the situation in a Member States requires on-the-spot checks and inspections to be strengthened in a particular case in order to improve the effectiveness of the protection of financial interests and so to ensure an equivalent level of protection within the Community, or
- at the request of the Member States concerned.

Once OLAF has opened an external investigation, it is then also empowered to request oral information; to ask any person for information and to make written requests for information.

As part of its investigative function, OLAF carries out inspections and checks on:

- (a) the conformity of administrative practices with Community rules,
- (b) the existence of the necessary substantiating documents and their concordance with the Communities' revenue and expenditure,
- (c) the circumstances in which such financial transactions are carried out and checked.⁹

In order to make it easier for OLAF to carry out such checks and inspections, economic operators¹⁰ shall be required to grant access to premises, land, means of transport or other areas, used for business purposes. Where strictly necessary in order to establish whether an irregularity exists, the Commission may also carry out on-the-spot checks and inspections on *other economic operators* concerned, in order to have access to pertinent information held by those operators on facts.¹¹

The Commission inspectors shall have access, *under the same conditions as national administrative inspectors and in compliance with national legislation*, to all information and documentation on the operations concerned which are required for the proper conduct of the on-the-spot checks and inspections. They may avail themselves of the same inspection

⁶ The power for external investigation is conferred on the European Commission by Regulation (Euratom, EC) No 2185/96.

⁷ Article 3 of Regulation (EC) 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

⁸ Article 2 of Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities

⁹ Article 9(1) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests

¹⁰ Community administrative measures and penalties may be applied to the economic operators (...), namely the natural or legal persons and other entities on which national law confers legal capacity who have committed the irregularity and to those who are under a duty to take responsibility for the irregularity or to ensure that it is not committed. See, Article 7 of Council Regulation no 2988/95 of 18 December 1995 of the protection of the European Communities financial interests.

¹¹ Article 5 of Council Regulation No 2185/96

facilities as national administrative inspectors and in particular copy relevant documents. It concerns in particular:

- professional books and documents such as invoices, lists of terms and conditions, pay slips, statements of materials used and work done, and bank statements held by economic operators,
- computer data,
- production, packaging and dispatching systems and methods,
- physical checks as to the nature and quantity of goods or completed operations,
- the taking and checking of samples,
- the progress of works and investments for which financing has been provided, and the use made of completed investments,
- budgetary and accounting documents,
- the financial and technical implementation of subsidized projects.¹²

Sectoral legal bases also empower OLAF to conduct investigations. For example, Regulation 515/97 on Mutual Assistance on customs and agricultural matters, in conjunction with Article 9(2) of Regulation 2988/95, empower OLAF to be present at inquiries carried out by Member State authorities and to collect information held at the offices of national administrative authorities concerning the application of the law on customs and agricultural matters. Further, they empower OLAF to conduct Community administrative and investigation cooperation missions in third countries in cooperation and close cooperation with the competent authorities of the Member States.

OLAF can conduct fact finding missions in order to undertake any necessary, appropriate and proper act for fact gathering purposes, e.g. consulting an expert. Though no specific legal basis is required for such activities, fact-finding missions must always be conducted in accordance with the legal provisions applying in the Member State or host country concerned and evidence gathered must meet the evidential requirements of the countries in which it is likely to be used.¹³

Regarding the data quality requirement, OLAF Instructions to Investigators¹⁴ stipulate that "OLAF case handlers must always observe and ensure respect for the rule that personal data must be adequate, relevant and not excessive in relation to the purposes for which collected and/or further processed" (paragraph (3)(a)); and it is required that "OLAF investigators should gather evidence for an against the person concerned" (paragraph (3)(b)).

2.2.2. Key principles applicable to investigations

Several key principles always apply to the conduct of investigations and other operational actions:

- The rights of the individual must be respected,
- The admissibility of evidence must be preserved,
- OLAF investigative actions must be lawful and proportionate,
- OLAF's obligations to its institutional partners must always be fulfilled.¹⁵

2.2.3. Compliance with national legislation

Investigations undertaken by OLAF in either an EU Member State or a third country must comply with national rules of the jurisdiction in question, as well as national rules of the

¹² Article 7(1) of Council Regulation No 2185/96

¹³ Article 3.4.4.6 of OLAF Manual

¹⁴ See below the full reference to the document

¹⁵ Article 3.4 Investigation stage of OLAF Manual.

jurisdiction in which any criminal case or disciplinary proceedings are likely to be taken. A failure to do so may result in inadmissibility of the evidence gathered.¹⁶

2.2.4. Data subjects

1) *Outside* of EU institutions, bodies, offices and agencies, data subjects are those persons who are mentioned in the documents kept in the file as a result of OLAF investigative activities. This means that the persons concerned by the investigation, in other words the person who is the subject of the investigation, or the persons who work for or manage the companies concerned, informants or witnesses and other persons whose name may appear in the case file, are the data subjects. OLAF's operational partners are also data subjects.

- *An informant* is an individual who seeks to disclose information concerning a matter within the legal competence of OLAF regarding a matter which has already occurred or is ongoing; has obtained that information as a consequence of a business or personal relationship, often involving a duty of confidence; seeks to ensure that disclosure of his identity is withheld; *and is not an official or servant of a Community organ.*¹⁷ OLAF stated that it follows Community rules for the dealing with informants.¹⁸ Many Member States have a legal framework governing the dealings with informants, which requires disclosure and establishes how an informant is to be dealt with. OLAF needs to take into account those national rules not to prejudice later national enquiries or criminal proceedings. Any OLAF official having contact with an informant must assure him/her that while the Office will make its best effort to respect his/her desire for anonymity, it cannot guarantee anonymity once the case has been passed to national judicial or prosecution authorities. The OLAF Manual stipulates "If a request is made for the name of an informant, it will be handled in accordance with the requirements of Regulation (EC) 45/2001."

- *A witness* is an individual who is not an interested party and who provides information concerning a matter within the legal competence of OLAF either in respect of a situation which has already occurred or which is ongoing. Witnesses do not normally request or require anonymity,¹⁹ but may sometimes do so.

- *An operational partner to OLAF is a member of the staff of an EU Member States or third country administration, accounting or auditing body, staff of an international organisation, or professional services provider.*

2) Staff members of the EU institutions, bodies, offices and agencies may be involved in the matter under investigation as whistleblowers or witnesses.

- *A whistleblower* is an EU official and other EU Staff (temporary staff, auxiliary staff, local staff, contract staff and special advisers) of the Community organs who come forward to OLAF with information they have discovered in the course of or in connection with their duties concerning matters which may be within OLAF's competence.²⁰ Article 22a of the Staff Regulations covers "internal whistleblowing", which establishes that officials and other staff should transmit the information, without delay, to their immediate superior, their Director General, the Secretary General or OLAF directly. The recipients other than OLAF must transmit the information without delay to OLAF. Officials who comply with this duty

¹⁶ Article 3.4.2.2 of OLAF Manual

¹⁷ Article 3.3.2.1 of OLAF Manual

¹⁸ OLAF referred for example to Case 145/83 Adams v. Commission [1985] ECR 3539

¹⁹ Article 3.3.2.3 of OLAF Manual

²⁰ Article 3.3.2.2 of OLAF Manual

are protected from adverse consequences on the part of the institution, provided they have acted reasonably and honestly. Officials are not expected to prove that the wrongdoing is occurring, nor will they lose protection if the concern turns out not to be correct. Article 22b of the Staff Regulations covers "external whistleblowing". It establishes that an official, temporary agent, auxiliary agent, contract agent or special advisor who further discloses the information to the President of either the Commission or the Parliament, the Council, the Court of Auditors or the Ombudsman, continues to be protected, provided that he honestly and reasonably believes that the information is substantially true and he has previously disclosed the same information to OLAF or his institution, and allowed passage of the period of time set by OLAF or the institution to take appropriate action.²¹

- In the case of external investigations carried out by *Directorates A or B, staff of the EU institutions* can act as *operational partners* of OLAF. In these specific cases, the staff members of other Commission services may provide information to OLAF to assist the investigation or maybe asked to verify information received by OLAF. Their cooperation is linked to their professional function (e.g. forwarding an audit report to OLAF) and their role is different from that in internal investigations where Commission staff may trigger the investigation (as a whistleblower or informant) or may act as a witness about the conduct of a colleague.

2.2.5. Personal data concerned

In general, the categories of data concerned are: identification data, professional data and case involvement data.

In more detail: name, address, telephone number, e-mail address, date of birth, nationality, profession, employer, statements made regarding events under investigation where the data subject is mentioned, evidence or notes mentioning the data subject in relation to the events under investigation, information concerning personal relationships if relevant to the investigation (for example, possibility of a conflict of interest).

In the context of external investigations and coordination cases in the agriculture, structural measures and customs (including VAT, cigarettes and alcohol) sectors other data fields may be processed: company name linked to individuals and passport number.

As stated by OLAF, in principle, no data fields which would fall under Article 10 of Regulation 45/2001 are processed, unless they are directly relevant to the matter under investigation. Paragraph (2) of the OLAF Instructions to Investigators specifically stipulates that "The processing of special categories of data (revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership and data concerning health or sex life) is generally prohibited. Thus, OLAF case handlers must avoid inclusion of these categories of data in the files unless it is necessary for the establishment, exercise or defence of legal claims in the specific case at hand. In such cases, a note should be sent to OLAF DPO on a form designed for this purpose. Paragraph (3)(c) of the OLAF Instructions to Investigators specifies that "Data concerning marital status and children generally should not be maintained in case files, unless relevant to the particular case under investigation."

²¹ There can be "internal" and/or "external whistleblowers" in both types of investigations: in the internal and external investigation.

2.2.6. Information given to data subjects

In the process of cooperating with OLAF, the EDPS has received various pieces of information concerning the short notices to be given to data subjects: 1) information contained in the notification form for prior checking, 2) DPO-6 concerning standard letters of internal investigations, 3) OLAF Instructions to Investigators (as a follow up of the EDPS Opinion on internal investigations), 4) OLAF responses to the EDPS information requests in the course of the present prior checking procedure.

According to the notification form, data subjects will be informed of their rights through OLAF standard letters (save the procedure foreseen in Directorate B, see below). DPO-6 "External investigations and operations master" has been referred by OLAF to provide examples of standard data protection clauses. Those standard letters concern information provided to the person concerned ("interested party" in the terminology used by OLAF documents referring to the person under investigation), whistleblowers, informants and witnesses in the course of *internal investigations*. In the case of internal investigations the standard letters provide for a general data protection clause and also information to the data subject concerned depending on the phase of the particular investigation: acknowledgement of receipt of information (informant); invitation to interview (witness); beginning of investigation (person concerned); invitation to interview (person concerned); case closure with/ without follow up (person concerned), etc.

At the request of the EDPS, OLAF confirmed, that in the revised version of the OLAF Manual, a separate set of standard letters will be included for external investigations. In the course of the prior checking procedure, OLAF stated that as soon as the draft standard letters are adopted for external investigations, OLAF will transfer them for the review of the EDPS.

Directorate B (2007-072) plans to inform data subjects of their rights through standard clauses and a privacy statement. Directorate B intends to rely on specific clauses which can be used in various ways (i.e. attached to an on-the-spot control report, e-mail, etc) as appropriate. Directorate B does not plan to rely on standard letters. Attached to the prior checking notification form, the EDPS has received four data protection clauses: Clause 1- Informants; Clause 2-Witness; Clause 3- Person concerned; Clause 4-National/third country official.

Member State and third country authorities receive information in a short privacy statement inserted in the first letter addressed to them.

OLAF Instructions to Investigators specify that the following information must be given to the data subject on a form drafted for this purpose²²:

(a) "If the data has been obtained from the data subject: identity of controller, purposes of the processing operation, recipients or categories of recipients of the data, whether replies to questions to data subject are obligatory or voluntary, existence of right of access to and right to rectify data concerning himself/herself, any further information such as legal basis, time limits for storing, right of recourse to EDPS, insofar as necessary, having regard to the specific circumstances in which data are collected."

(b) " If the data has not been obtained from the data subject: identity of controller, purpose of processing operation, categories of data concerned, recipients or categories of recipients, existence of right of access to and right to rectify the data concerning him/her; any further

²² Paragraph (8) of OLAF Instructions to Investigators

information such as: legal basis, time limits for storage, right to have recourse to EDPS, origin of data, except where this cannot be disclosed for reasons of professional secrecy."

OLAF Instructions to Investigators further state that "Such information should be provided when it is recorded, or no later than when it is first disclosed. It can be withheld, however on a case-by-case basis, for as long as it would be harmful to the investigation to provide this information. On each such occasion:

- (c) A note to the file must be made specifying the reasons for imposing this restrictions; and
- (d) The data subject must subsequently be informed of the reasons for imposition of the restriction and of his right to have recourse to the EDPS, unless it would be harmful to the investigation to provide this information."

2.2.7. Rights of data subjects

It is planned that data subjects are informed of their rights through the brief privacy statements inserted in the standard letters. The standard letters in DPO-6 (applicable in internal investigations) and the clauses attached by Directorate B inform the data subject that "On request, you may be sent your own personal data and correct or complete them."

Right of access by the data subject to his/her own personal data

OLAF Instructions to Investigators of 16 September 2006 provide for further details on the exercise of the right of access²³:

"When a data subject requests OLAF to provide access to his own personal data undergoing processing and any information as to their source, such data shall be provided" on a form drafted for this purpose.

A form has been drafted by OLAF: "Notice to the data subject" regarding "Access to personal data in reply to data subject's request under Article 13 of Regulation 45/2001". The notice contains the following information:

- Data related to you are being processed (yes/no)
- Purpose of processing operation
- Recipients or categories of recipients to whom the data are disclosed
- Data undergoing processing
- Source of data.

The notice provides further information:

- "1 You have a right of access to the personal data concerning you undergoing processing and of any available information as to their source;
2. You shall have the right to obtain rectification without delay of inaccurate or incomplete personal data concerning you;
3. You have the right to have recourse at any time to the European Data Protection Supervisor."

The current version of OLAF Manual stipulates that the interested party (or his lawyer or other representative) has no right of full access to the OLAF investigation file and that this right is provided at a later stage or during the national judicial proceedings.²⁴

²³ Paragraph (6) of OLAF Instructions to Investigators

²⁴ Article 3.6.2 of OLAF Manual

Right to rectification provided for the data subjects

OLAF Instructions to Investigators set forth detailed rules on the right to rectification of one's own data. "The data subject has the right to rectify inaccurate or incomplete data in order to guarantee data quality, which is linked to the rights of defence. The right to rectification is of key importance in the context of OLAF investigations, given their sensitivity. Any restriction to this right must be based on the same criteria, and follow the same procedures, as those specified in paragraph 6 with respect to the right of access."

Exemptions and restrictions on data subjects' rights

OLAF Instructions to Investigators specify that:

"..., access may be denied during the course of an investigation if:

- (a) It would be harmful to the investigation to provide such access;
- (b) It would be harmful to the rights and freedoms of others, such as whistleblowers and informants, to provide such access. The identity of whistleblowers must never be revealed, unless this would contravene national rules regulating judicial procedures.

Such restrictions can only be applied when necessary, on a case-by-case basis. On each occasion that a restriction on the right of access is imposed:

- (c) A note to the file must be made specifying the reasons for imposing this restriction" on a form drafted for this purpose; and
- (d) "The data subject must subsequently be informed of the reasons for imposition of the restriction and of his right to have recourse to the EDPS, unless it would be harmful to the investigation to provide this information." ²⁵

A form should be filled in and attached to the file concerning the "Reason for restriction of the data subject's right of access/right of rectification/right to receive information." The concerned official should indicate on it the name of the data subject, the right that is being restricted and the reason for the restriction.

In the OLAF Manual OLAF specifically refers to two interests upon which restrictions under Article 20 of Regulation (EC) No 45/2001 can be relied on: "the prevention, investigation, detection and prosecution of criminal offences" and "an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters."²⁶

National judicial procedural rules normally require secrecy. In response to a request for further information from the EDPS, OLAF indicated that national authorities can make a request to OLAF to restrict some of the rights of the data subjects. It was also stated by OLAF that OLAF would always apply the criteria established in Article 20 to determine whether it should restrict the right of the data subject.

2.2.8. Conservation of data

OLAF may keep both electronic and paper files relating to investigations for up to 20 years after the date on which the investigation was closed.

²⁵ Paragraph (6) of OLAF Instructions to Investigators

²⁶ Article 5.4.1.6 of OLAF Manual

In order to allow for the comparison of precedents and the compilation of statistics, final case reports in external investigations may be kept in an anonymous form for 50 years.

OLAF Instructions to Investigators set forth that "Case files for cases closed with follow-up shall be retained for 20 years after the completion of follow up. In 2009, when OLAF has been in existence for 10 years, a preliminary evaluation of the necessity of the 20 years period will be conducted, and a second evaluation will be conducted in 2019, when OLAF has experienced 20 years of existence." "Case files for cases closed without follow-up shall be retained for 10 years" (paragraph (4) of Instructions to Investigators).

Blocking of data

The time limit to block/erase data on justified legitimate request from the data subject is one month.

2.2.9. Categories of data recipients

The recipients of data during or following an investigation may be:

- the concerned Community institutions, bodies, offices, agencies (in order to allow them to take appropriate measures to protect the financial interests of the EU)
- competent authorities of Member States, (in order to allow them to take appropriate measures to protect the financial interests of the EU)
- competent authorities in third countries and international organisations (in order to maximise the protection of the financial interests of the EU and to ensure appropriate follow-up).

In the multi-agency sector, cooperation with international organisations, including the United Nations Office of Internal Oversight Services, can take place, involving an investigation on the financial interests of both the EU and the international organisation.

The information obtained during an investigation is subject to professional secrecy. Disclosure of information gathered in the course of OLAF investigations is governed by various provisions of Regulation 1073/99 and 2185/96²⁷ and various sectoral legal bases (for example, Regulation 5151/97).²⁸

● According to the OLAF Manual there are three main scenarios concerning disclosure of information²⁹:

1) Disclosure of information *to concerned Community organs*:

Article 8(1) of Regulation No 2185/96 establishes the rule on discretionary distribution of information communicated or acquired in any form under the regulation. It provides that such information may be distributed to persons within Community institutions whose functions require them to know. This would include, for example, officials in other services of the Commission who are responsible for taking follow-up action on the case in question. It provides further that the information may only be used by Community institutions for the purpose of ensuring effective protection of the Communities' financial interest in all Member States.

²⁷ Article 3.5.2 of OLAF Manual

²⁸ Article 3.5.2 of OLAF Manual

²⁹ Article 3.5.2.2 of OLAF Manual

The sectoral regulations (e.g. Council Regulation 515/97 (customs and agriculture cooperation); Council Regulation 595/91 (Common Agricultural Policy); Commission Regulation 1681/94 (structural funds), Council Regulation 1469/95 (EAGGF)) establish the rules on discretionary distribution of the information obtained under these provisions. They provide that such information may only be sent to persons within the Community institutions whose duties require that they have access to it, unless the Member State supplying it has expressly agreed otherwise.

OLAF Instructions to Investigators stipulate that Reports shall be transferred only if necessary for the legitimate performance of tasks covered by the competence of the recipient institution or body. Any transfer must be proportionate, taking into account the nature of the data collected and further processed and the competence of the recipient. The OLAF forms for transmission of information to the institutions will be modified to include a notice to the recipient that personal data can only be processed for the purposes for which they are transmitted.³⁰

If the findings of the report are relevant to the Early Warning System³¹ Direct Expenditure, Unit C.2 should be advised to include the information as appropriate.

2A) Disclosure of information to *concerned Member States in the investigation phase*:

Article 8(2) of Regulation No 2185/96 establishes the rules on compulsory distribution of any fact or suspicion relating to an irregularity which has come to the Commission's notice in the course of the on-the-spot check or inspection. It requires that such information be reported as soon as possible to the competent authority of the Member States within whose territory the check occurred.

Article 8(1) of Regulation 2185/96 establishes the rules on discretionary distribution of information communicated or acquired in any form under the regulation. It provides that such information may be distributed to persons within Member States whose functions require them to know.

Article 10(1) of Regulation 1073/99 establishes the rules on discretionary distribution of information obtained in the course of external investigations. It provides that such information may be forwarded to the Member State authorities concerned.

The sectoral regulations (e.g. Council Regulation 515/97 (customs and agriculture cooperation); Council Regulation 595/91 (Common Agricultural Policy) establish the rules on discretionary distribution of the information obtained under these provisions. They provide that such information can only be sent to persons within Member States whose duties require that they have access to it, unless the Member State supplying it has expressly agreed otherwise.

Where OLAF transmits information to competent Member State judicial authority when it becomes apparent that a criminal offence may have been committed, OLAF should clearly specify whether the interested party has been provided with the opportunity to present his views on the facts.

³⁰ Paragraph (5)(a) of OLAF Instructions to Investigators

³¹ The EDPS has already prior checked the Early Warning System of the European Commission. See, Opinion of 6 December 2006 on a notification for prior checking on the Early Warning System (Case 2005-120). Available at: www.edps.europa.eu

Information gathered during an OLAF investigation may be transmitted to Member State judicial authorities either during the course of the investigation or when the investigation is completed.³²

Transmission of information *during* the external investigations³³: A decision may be taken to send information to a national judicial authority during the course of an OLAF investigation, when it becomes apparent that a criminal offence may have been committed. In such cases, the investigator and the staff member from Unit C.1 assigned to the case jointly prepare the Interim case report. The investigator first prepares the statement of facts, making reference to the documentary evidence, which should be listed and attached. The investigator then provides the statement of facts to the staff member from Unit C.1, who prepares the legal analysis, which should identify the criminal offences committed under national law, the judicial authorities competent to receive the information, and the time limit beyond which the offence can not be prosecuted. The report, consisting of the statement of facts and the legal analysis, is then signed by the two authors.

The Supervisory Committee, under Article 11(7) of Regulation 1073/99, should receive information of cases requiring information to be forwarded to the judicial authorities of a Member State, in the form of a note on the transmission.³⁴

2B) Transmission of the *final case report*³⁵ to concerned Member States:

Article 9(3) of Regulation 1073/99 specifies that the final case report of an external investigation and useful related documents must be provided to the competent authorities of the Member States responsible for taking follow-up action. Article 10(2) of Regulation 1073/99 requires that the judicial authorities of the Member State concerned be informed of matters liable to result in criminal proceedings, and that subject to the requirements of the investigation, the Member States concerned shall be informed simultaneously. This may include the transmission of the final case report, as well as the final case report cover letter, explanatory remarks, legal analysis and a note to the Supervisory Committee.

OLAF Instructions to Investigators stipulate that when OLAF transfers personal data to a Member State authority, it must specify the necessity of the transfer in a reasoned decision, which may be contained in the interim report or final case report of a particular case which is transferred to such authority.³⁶

3. Legal aspects

3.1. Prior checking

The prior checking relates to the processing of personal data of natural persons or in the case of companies the processing concerns managers or representatives of those companies in the context of external investigations by OLAF (Article 2(a) and 2(b) of Regulation (EC) No 45/2001 (hereinafter as "the Regulation"). The processing activity is carried out by the European Anti-Fraud Office in the framework of Community law (Article 3(1) of the Regulation). The processing is done partly by automated means (Case Management System

³² Article 3.5.5 of OLAF Manual

³³ Article 3.5.5.1 of OLAF Manual

³⁴ The data processing operations by the Supervisory Committee, whose function is to reinforce the Office's independence by regular monitoring of implementation of the investigative function, is subject to another prior checking analysis (case: 2007-0073).

³⁵ Article 3.5.5.2 of OLAF Manual

³⁶ Paragraph (5)(b) of OLAF Instruction to Investigators

(CMS)). Paper files of the investigation also form part of a filing system (OLAF *Grefte* and "working files" of the investigators). Therefore, Article 3(2) of the Regulation is applicable.

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

Section 3.4.1 of the OLAF Manual highlights that OLAF administrative investigation activities consist of more detailed investigation activities [than an audit] with the objective of detecting facts or irregular behaviour liable to give rise to administrative or criminal proceeding against individuals (or companies) and the recovery of monies illegally obtained. External investigations should be seen in this light as OLAF collects personal data with the goal to make an assessment of an individual's or a legal person's behaviour, in order to detect fraud or other irregular conduct of natural and legal persons affecting the interests of the European Communities. Where legal persons are concerned, the individuals behind the company can be identified. Therefore, OLAF clearly evaluates individual conduct and in the framework of external investigations personal data related to (suspected) offences and criminal convictions are/can be processed. Thus, Article 27(2)(a) and (b) of the Regulation applies.

The controllers consider that in addition to the above grounds, Article 27(2)(d) of the Regulation serves as another ground for prior checking. The EDPS examined the rules³⁷ referred to by the controllers and concluded that to the extent those rules fit under the Early Warning System of the Commission, the present processing operation falls under Article 27(2)(d) of the Regulation.

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. This is not a serious problem in that any recommendations made by the EDPS in the present opinion may still be adopted accordingly.

The notification of the DPO was received by regular mail on 29 January 2007. According to Article 27(4) of the Regulation, the present opinion must be delivered within a period of two months, that is no later than the 30 March 2007. The information requests prolonged this deadline by a period of 30 + 48 + 80 days. The extension of the deadline for one month makes the opinion to be delivered no later than 4 October 2007.

³⁷ Articles 93 and 96 of the Financial Regulation, Grant Agreements of the Commission (e.g. Commission's model contract agreement), Contracts of the Commission (e.g. Article II.5 of the Commission's Draft Model Contract for Services) and various sectoral provisions (e.g. Article 24 of Council Regulation 1782/2003 establishing common rules for direct support schemes under the common agricultural policy; Commission Regulation (EEC) 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes).

3.2. Lawfulness of the processing

Personal data may only be processed if grounds can be found in Article 5 of the Regulation.

The five processing operations notified for prior checking fall under Article 5(a) of the Regulation, pursuant to which 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."

In order to determine whether the processing operations comply with Article 5(a) of the Regulation three elements must be taken into account: first, whether either the Treaty or other legal instrument foresees the data processing operations carried out by OLAF; second, whether the processing operations are performed in the public interests; third, whether the processing operations are necessary. The three requirements are closely related. Article 5(b) of the Regulation stipulates that personal data may be processed only if: "*processing is necessary for compliance with a legal obligation to which the controller is subject*".

The instruments quoted below show that the external investigations conducted by OLAF are tasks carried out in the public interest (combat fraud, etc). Furthermore, OLAF carries out those activities in the legitimate exercise of official authority (Article 3 of Regulation 1073/1999) and thus is complying with its legal obligation to investigate matters within its scope of competence. The "necessity" of the processing has to be analysed *in concreto*. From this perspective, it has to be borne in mind that the processing of personal data to be conducted in the context of the investigations has to be proportional to the general purpose of processing (combat fraud, etc) and to the particular purpose of processing in the context of the case under analysis (considering, for instance, the seriousness of the fact under investigation, the sort of data needed to clarify the facts, etc.). Thus, the proportionality has to be evaluated on a case-by-case basis.

The legal basis is analysed below in more detail.

In ascertaining the legal grounds in the Treaty or other legal instruments that legitimise the five processing operations in the framework of external investigations, the EDPS takes note of the following:

OLAF must always have a legal basis for opening an investigation. This is a basis in Community law that empowers OLAF to conduct an investigation, and establishes its investigative powers.³⁸ The general rules on conducting investigations by OLAF are laid down in Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999, which is currently under revision³⁹. Regulation No 1073/99 specifies the scope of all investigations, but does not itself provide a legal basis for external investigations. Those may be carried out on the basis of either horizontal or sectoral legislation.⁴⁰

³⁸ Article 3.4.1 of the OLAF Manual

³⁹ The EDPS expressed his view on the proposal in Opinion of 27 October 2006 on the Proposal for a Regulation amending Regulation (EC) No. 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), JO C 91, 26.04.2007, p. 1. Available at: www.edps.europa.eu.

⁴⁰ Article 3.4.1.2 of OLAF Manual

According to OLAF Manual, Article 3 of Regulation 1073/99 specifies three alternative sources of legal basis for external investigations.⁴¹

1) Horizontal: Article 2 of Regulation 2185/96 provides:

"The Commission may carry out on-the-spot checks and inspections pursuant to this Regulation:

- for the detection of serious or transnational irregularities or irregularities that may involve economic operators acting in several Member States, or*
- where, for the detection of irregularities, the situation in a Member States requires on-the-spot checks and inspections to be strengthened in a particular case in order to improve the effectiveness of the protection of financial interests and so to ensure an equivalent level of protection within the Community, or*
- at the request of the Member States concerned."*

The horizontal anti-fraud investigative powers are based on Article 2 of Regulation No 2185/96 in conjunction with Article 3 of Regulation No 1073/99. The scope covers all Community expenditure, both direct and indirect; income collected directly on behalf of the Communities (traditional own resources).

2) Sectoral: Article 9(1) of Regulation 2988/95 provides:

"1. Without prejudice to the checks carried out by the Member States in accordance with their national laws, regulations and administrative provisions and without prejudice to the checks carried out by the Community institutions in accordance with the EC Treaty, and in particular Article 188c thereof, the Commission shall, on its responsibility, have checks carried out on:

- (a) the conformity of administrative practices with Community rules;*
- (b) the existence of the necessary substantiating documents and their concordance with the Communities' revenue and expenditure as referred to in Article 1;*
- (c) the circumstances in which such financial transactions are carried out and checked."⁴²*

3) Sectoral: Article 9(2) of Regulation 2988/95 and one of the sectoral regulations.

Article 9(2) of Regulation 2988/95 provides:

"In addition, it [meaning the Commission] may carry out checks and inspections on the spot under the conditions laid down in the sectoral rules.

Before carrying out such checks and inspections, in accordance with the rules in force, the Commission shall inform the Member States concerned accordingly in order to obtain any assistance necessary."

According to the OLAF Manual, this legal basis allows on the spot checks of economic operators.

Many sectoral legal bases exist under Community law. The sectoral legislation relevant in the domains of the five present prior checking cases respectively is the following:

⁴¹ Article 3.4.1.2 of OLAF Manual

⁴² As the OLAF Manual highlights, this legal basis normally allows for audit type checks of national administrative systems responsible for implementing Community programmes, which should not typically be OLAF's responsibility. Rather, the Directorate General responsible for the sector in question, such as Agriculture, Budget or Employment, should perform the audit-type functions allowed under this legal basis. OLAF should rely upon this legal basis only when necessary in the context of an investigation of an economic operator concerning an irregularity, where there is the possibility of a criminal follow-up action by a national judicial authority.

1) In the external aid sector (Unit A04) the general legal basis of Article 3 of Regulation (EC) No 1073/1999 and Article 6 of Council Regulation (Euratom, EC) No 2185/96 and Article 9 of Council Regulation (EC, Euratom) No 2988/95:

- Article 4 of Council Regulation (EC) No 1080/2000 of 22 May 2000 on support for the *United Nations Interim Mission in Kosovo (UNMIK) and the Office of the High Representative in Bosnia and Herzegovina (OHR)*, providing that the *financing agreements and any contract or implementing instruments* resulting from which shall expressly provide that the Commission or bodies authorised by the Commission, (...) and the *European Anti-Fraud Office (OLAF)* may carry out inspections on the spot, if necessary.

- Article 8 of Council Regulation (EC) No 2666/2000 of 5 December 2000 on assistance for *Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia*, repealing Regulation (EC) No 1628/96 and amending Regulation (EEC) No 3906/89 and (EEC) No 1360/90 and Decisions 97/256/EC and 1999/311/EC. The provision requires that the *financing decision and any agreements or contracts* should expressly provide for a monitoring and financial control by the Commission, including OLAF. On the spot checks and inspections can be carried out, in accordance with Regulation 2185/96 and with Regulation No 2988/95.

- *Contractual provisions as to the African, Caribbean and Pacific (ACP) countries*: the Lome Convention replaced by the Cotonou agreement, notably Article 33 of the Annex IV of the Cotonou Partnership Agreement, in conjunction with Article 14(6) of the Financial Regulation of 27 March 2003 applicable to the 9th European Development Fund (EDF), the agreement with the third country involved (Financing Memo)⁴³ and Article 3 of Regulation 1073/1999 and Article 9(2) of Regulation 2988/95.

2) In the areas of direct expenditure, beside the general legal basis of Article 3 and 9 of Regulation (EC) 1073/1999, Article 9 of Regulation No 2988/95 and Articles 2 and 6 of Regulation 2185/96 :

- Article 18 and 20 of Regulation (EC) No 2321/2002 of the European Parliament and of the Council of 16 December 2002 concerning the *rules for the participation of undertakings, research centres and universities in, and for the dissemination of research results for, the implementation of the European Community Sixth Framework Programme (2002-2006)*.

- For the *European Refugee Fund*: Article 18(2) of 2000/596/EC, Council Decision of 28 September 2000 establishing a *European Refugee Fund* read in conjunction with Article 3 of Regulation 1073/1999 and Article 9 (1 or 2) of Regulation 2988/95.

- For the *Financial Instrument for the Environment (LIFE)*: Article 9 of Regulation (EC) No 1655/2000 of the European Parliament and of the Council of 17 July 2000 concerning the *Financial Instrument for the Environment (LIFE)*, in conjunction with the agreement with the third country concerned if the control is outside of the EU, and with Article 3 of Regulation 1073/1999 and Article 9(2) of Regulation 2988/95.

- For the *Leonardo Da Vinci programme*: Article 6 of Commission decision adopting the provisions concerning the responsibilities of the Commission and the Member States as regards the national agencies in the general guidelines for implementing the Leonardo da Vinci programme, in conjunction with the operating agreement between the Commission and the national agency on the annual or multi-annual work programme [and the agreement on decentralised measures relating to the management of funds remarked for projects] (or agreement with the third country concerned if the control is outside of the EU) Decision 1031/2000/CE, and Article 3 of Regulation 1073/1999 and Article 9(1 or 2) of Regulation 2988/95, and agreements with the implementing agencies as regards the programs Leonardo da Vinci and Youth.

⁴³ Article 3.4.1.2, p 118 of OLAF Manual. External actions:EDF/ACP-CE

3) In the external aid sector (unit A03) apart from the general legal basis of Articles 3 and 9 of Regulation (EC) 1073/1999, Article 9 of Regulation 2988/95 and Article 2 and 6 of Regulation 2185/96:

- For the *coordinating aid for pre-accession strategy*: Article 11(3) and the Annex⁴⁴ of Council Regulation (EC) No 1266/1999 of 21 June 1999 on coordinating aid to the applicant countries in the framework of the pre-accession strategy and amending Regulation (EEC) No 3906/89. Financing decisions, contracts or implementing instruments should expressly provide for inspections (on the spot) by the Commission. Regulation 1266/1999 has been replaced by Regulation 1083/2006 (IPA), however since OLAF still conducts investigations with regard to projects that were covered by Regulation 1266/1999, it remains the legal basis for those investigations.

- For the *Instrument for Structural Policies for Pre-accession*: Article 9(2) and Annex III⁴⁵ of Council Regulation (EC) No 1267/1999 of 21 June 1999 establishing the Instrument for Structural Policies for Pre-accession, together with the agreement with the third country involved (financing memorandum), with Article 3 of Regulation 1073/1999 and Article 9(2) of Regulation 2988/95. Although Regulation 1267/1999 is no longer in force, and has also been replaced by Regulation 1085/2006, as OLAF still conducts investigations with regard to projects that were covered by Regulation 1267/1999, thus it still remains the legal basis for those investigations.

- Article 8 of Council Regulation (EC) No 2666/2000 of 5 December 2000 *on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia* (see above in part external aid unit A04)

- For the *Instrument for Pre-Accession Assistance (IPA)*: Article 18(1) and(2) expressly requires that the agreements concluded under the Regulation should contain provisions as to Regulation No 2988/95, Regulation No 2185/96 and Regulation No 1073/1999, and that agreements should expressly authorise the Commission to carry out on the spot checks and inspections.

- Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA).

- Regarding *partner States in Eastern Europe and Central Asia*: Article 8(2) of Council Regulation (EC, Euratom) No 99/2000 of 29 December 1999 concerning the provision of assistance to the partner States in Eastern Europe and Central Asia stipulates that financial decisions and contracts shall expressly provide for the monitoring and financial supervision and control by the Commission (...) to be carried out on the spot, if necessary. Regulation 99/2000 has been replaced by Regulation 300/2007, the new instrument for nuclear safety. However, since OLAF still conducts investigations with regard to projects that were covered by Regulation 99/2000, it remains the legal basis for those investigations.

- For *external aid to Turkey*: Framework Convention concluded on 19 March 1999 by the European Commission and the Republic of Turkey, Article 24 of the General Terms and Conditions annexed to the Specific Financing Agreement between the European Community and the Republic of Turkey dated 7 December 2001.

- *External aid to third countries*: Financing memorandum with the relevant third country.

4) In the multi-agency sector there seems to be no specific sectoral legal basis for external investigations. Only the common horizontal provisions (Article 3 of Regulation 1073/99, and Article 2 of Regulation 2185/96) apply.

⁴⁴ The Annex defines the minimum criteria and conditions for decentralising management to implementing agencies in applicant countries.

⁴⁵ Annex III concerns the financial management and control.

5) Concerning external investigations and coordination cases in the agriculture, structural measures and customs (including cigarettes, VAT, alcohol and precursors) sector (Directorate B):

Beside the common legal basis (Regulation No 1073/99, Regulation No 2185/96, and Regulation No 2988/95) and sectoral legislation as specified in Section 3.1.4 of the OLAF Manual of 25 February 2005, including Regulation 515/97 and Regulation 595/91. The OLAF Manual defines the legal bases as the following⁴⁶:

- *As to mutual assistance on customs and agricultural matters:* A) Article 18(4) and (5) of Council Regulation (EC) No 515/97 of 13 March 1997 on *mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters*, in conjunction with Article 3 of Regulation 1073/99 and Article 9(2) of Regulation 2988/95. Article 18(4) and (5) stipulates that where the Commission considers that irregularities have taken place in a Member State, Commission officials may be present at the enquiry conducted by the Member States, officials of the Commission may collect information.

B) *The other possible legal ground* for the processing may be Article 20 of Council Regulation (EC) No 515/97, in conjunction with an agreement or protocol with a third country where the control will take place, and with Article 3 of Regulation No 1073/99 and Article 9(2) of Regulation No 2988/95. Article 20 of the referred Regulation provides the ground for the Commission, under specified conditions, to conduct Community administrative and investigative cooperation missions in third countries in coordination and cooperation with the competent authorities of the Member States.

- *As to the indirect expenditure: Common Agricultural Policy:* Ground A) Article 9(2) of Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy, in conjunction with Article 3 of Regulation 1073/99 and Article 9(1) of Regulation 2988/95. Article 9(2) of Council Regulation No 1258/1999 makes it possible, without prejudice to other procedures, that authorized representatives of the Commission carry out inspections on the spot, and have access to the books and all other documents, including electronic information relating to expenditure financed by the Fund.

Ground B) concerns Article 6 of Council Regulation (EEC) No 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72, in conjunction with Article 3 of Regulation No 1073/99 and Article 9(2) of Regulation 2988/95. Article 6 of Regulation No 595/91 makes it possible for Commission officials to take part in an inquiry held by Member State authorities (in case an irregularity is considered) and the conditions for that participation.

As to Indirect expenditures- Structural Funds:

Article 38(2) of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds in conjunction with Article 18 of Commission Regulation (EC) No 438/2001 of 2 March 2001 laying down detailed rules for the implementation of Council Regulation (EC) No 1260/1999 as regards the management and control systems for assistance granted under the Structural Funds and Article 3 of Regulation No 1073/99 and Article 9(1) and (2) of Regulation 2988/95.

⁴⁶ Articles 3.4.1.2 and 3.4.1.4 of OLAF Manual

3.3. Processing of special categories of data

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 or, if necessary, by the European Data Protection Supervisor, subject to appropriate safeguards. (Article 10(5) of the Regulation). In the present case, the processing of data relating to offences and criminal convictions is authorised by the legal instruments mentioned in point 3.2 above.

As far as other special categories of data are concerned, Article 10 (1) of the Regulation establishes a general prohibition on the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life is prohibited. Any exceptions under Articles 10 (2) or 10(4) of the Regulation should be construed narrowly.

The EDPS understands that the collection of those special categories of data is not OLAF's intention, although in the course of external investigations such data may appear. For this reason the EDPS welcomes the OLAF Instructions to Investigators stipulating that case handlers must avoid inclusion of those categories of data in the files, unless it is necessary for the establishment, exercise or defence of legal claims in the specific case at hand (Article 10(2)(d) of the Regulation). The EDPS welcomes the procedure as well, that whenever special categories of data are included in the file, a notice should be sent to the OLAF DPO, mentioning also the reason for the processing the data.

3.4. Data Quality

Data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed (Article 4 (1)(c) of the Regulation).

As the EDPS opinion on OLAF internal investigations already highlighted, even though certain standard data will always be present in the investigation file (typically identification data), the precise content of a file will of course be variable according to the specific case.

Guarantees must be established to ensure the principle of data quality. The EDPS welcomes Paragraph (3)(a) of OLAF Instructions to Investigators, stipulating that OLAF case handlers must observe and ensure the respect for the rule (adequate, relevant and not excessive in relation to the purposes for which collected and/or processed), as a first step to reinforce the data quality principle.

As a consequence of the follow up of the EDPS opinion on internal investigations, paragraph (3)(c) of OLAF Instructions to Investigators stipulates for all investigations that data on marital status and children generally should not be maintained in the case file, "unless relevant to the particular case under investigation." The form to be used for notifying to the DPO on processing special categories of data, which is annexed to the instructions, lists these two fields (among others). Although they are not "special categories of data" *per se*, they *nonetheless* concern more intimate aspects of private life, and thus the EDPS welcomes their inclusion in this list.

As to the data quality requirements in the context of forensic examination of computers⁴⁷: in his Opinion on OLAF internal investigations, the EDPS has already addressed the data protection requirements to such an examination, and of course, those comments are valid and apply in the present case, too.⁴⁸ It therefore will not be repeated in the context of the external investigations. Hereby, the EDPS only draws the attention of the controllers to the main data quality rules: the necessity and proportionality of access to any data contained in the computers (e.g. emails) needs to be evaluated on a case-by-case basis; and a methodology should be developed in a systematic and formal fashion. In addition, as was already recommended by the EDPS, a formal protocol on "Standard Operating Procedures" for conducting forensic examination of computers by OLAF should be adopted in order to safeguard not only the confidentiality of communications and the validity of evidence, but also data quality, i.e. that the collected data is adequate, relevant and not excessive in relation to the purpose for which they are collected by the means of computer forensic examination.

Personal data should be accurate and where necessary kept up to date, and 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. (Article 4(1)(d) of the Regulation).

This principle is very much connected to the exercise of the right of access, rectification, blocking and erasure of data (see part 3.7 below). In his opinion 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, the EDPS has already stressed the importance of and welcomed the inclusion of Article 7a1 into the instrument. This article requires the seeking of evidence for and against the person concerned, which affects the accuracy and completeness of the data being processed and thus contributes to the compliance with the principle of data quality. Hence, it increases the overall data protection safeguards in the context of OLAF investigations.⁴⁹ Paragraph (3)(b) of OLAF Instructions to Investigators requires that investigators should gather evidence for and against the person concerned. As already stressed, the EDPS welcomes the inclusion of this requirement in the OLAF Manual also with respect to external investigations.

3.5. Conservation of data

Personal data must be *"kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. 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. In any event, the data shall not be used for any purpose other than for historical, statistical or scientific purposes"* (Article 4(1)(e) of the Regulation).

According to the five notification forms, OLAF may keep both electronic and paper files relating to investigations for up to 20 years after the date on which the investigation was

⁴⁷ At the request of the EDPS, OLAF confirmed during the prior checking procedure, that OLAF has the powers to conduct forensic examination of computers not only in the context of internal investigations, but also during external investigations. The rules for forensic examination of computers are laid down in Article 3.4.4.2 of OLAF Manual.

⁴⁸ See part 2.2.10 of Opinion on a notification for prior checking received from the data protection Officer of the European Anti-Fraud Office (OLAF) on OLAF internal investigations (Case 2005-418).

⁴⁹ The EDPS opinion on OLAF internal investigations similarly endorsed this provision.

closed. In order to allow for the comparison of precedents and the compilation of statistics, final case reports in external investigations may be kept in an anonymous form for 50 years.

The guidance laid down by the EDPS in the case of OLAF internal investigations applies to external investigations as well: when OLAF has experienced 10 years of existence a preliminary evaluation of the necessity of the 20 years period *vis-a-vis* the purpose of such conservation frame should be conducted. A second evaluation should be conducted when OLAF has experienced 20 years of existence. The EDPS welcomes the OLAF Instructions to Investigators which foresee for 2009 a preliminary evaluation of the necessity of data storage for a 20 year period, and foresees a second evaluation in 2019. The EDPS also welcomes that the Instructions, as it was proposed in his opinion on OLAF internal investigations, reduce the data conservation period for the cases "closed without follow-up" to 10 years. This period should be applied also to external investigations closed without follow up. In a given case, it could be acceptable to retain a case file "closed without follow-up" for longer period (for 20 years) with appropriate justification if it is necessary, as OLAF suggested to the EDPS.

3.6. Transfer of data

Articles 7, 8 and 9 of Regulation (EC) No 45/2001 set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules differ depending on whether the transfer is made *ex Article 7* to Community institutions or bodies, *ex Article 8* to recipients subject to Directive 96/46/EC or to other types of recipients *ex Article 9* of the Regulation.

According to the notifications for prior checking, the concerned Community institutions, bodies, offices or agencies, competent authorities of Member states and competent authorities in third countries and international organisations may become recipients of personal data collected and processed during external investigations.⁵⁰ This is to say that Articles 7, 8 and 9 of the Regulation apply to the present processing operations. However Article 9 data transfers (i.e. transfers of personal data to recipients other than Community institutions and bodies which are not subject to Directive 95/46/EC) will not be analysed in the frame of this opinion, because the relevant issues will be dealt with in the context of case 2005-154. The EDPS analyses in that case the conformity of OLAF international transfers of personal data, taken as a whole, with Regulation (EC) No 45/2001.

Transfer to Community institutions and bodies ex Article 7 of the Regulation

As referred to in the facts above, the OLAF Manual describes the cases where information can be disclosed to a Community organ concerned.

The EDPS recalls that in addition to having legal grounds enabling OLAF to transfer the information, Article 7(1) of the Regulation requires that personal data are transferred within or to other Community institutions or bodies only where the data "are necessary for the legitimate performance of tasks covered by the competence of the recipients". In order to comply with this provision in sending personal data, OLAF should ensure that (i) the transfer of such data is necessary, and (ii) it is for the legitimate performance of a task covered by the competence of the recipient. In other words, even if a transfer of information is foreseen in relevant legislation, such transfer is only lawful if it meets those two requirements.

⁵⁰ The EDPS has already prior checked the data processing activities in the follow-up phase of OLAF investigations. See, Opinion of 26 March 2007 on "follow-up" data processing operations (disciplinary, administrative, judicial, financial) (Cases 2006-544, 2006-545, 2006-546, 2006-547). Available at: www.edps.europa.eu

Whether a given transfer meets those requirements will have to be examined on a case-by-case basis. Accordingly, OLAF's staff conducting external investigations should apply this rule for each particular data transfer. The EDPS is pleased by the content of OLAF Instructions to Investigators as those require that data transfers should be proportionate, and should take into regard the nature of the personal data concerned and the competence of the recipients.

To ensure compliance with the data transfer rule, the EDPS suggests that OLAF put in place a procedure whereby a note to the file is drafted establishing the necessity of the data transfers that have taken place or will take place in the context of a given case. The use of a single record, based on a form such as that developed by OLAF following recommendations of the EDPS in the consultation concerning OLAF's transfer of personal data to third parties, would also be appropriate for transfers under Articles 7 and 8. This would help not only the application of the rule (together with appropriate guidance provided to OLAF investigators who should apply the rule) but also would provide for a better accountability.

The EDPS is pleased to see that OLAF's plans to modify its forms for transmission of information to the institutions in order to include a notice to the recipient that personal data can only be processed for the purposes for which they are transmitted (Article 7(3) of the Regulation).

Transfer to competent authorities of Member States subject to Directive 95/46/EC ex Article 8 of the Regulation

With regard to transfer of personal data by OLAF to competent authorities of Member States which fall under Directive 95/46/EC, two scenarios can be observed: (A) those Member States where the national data protection law adopted for the implementation of Directive 95/46/EC covers authorities in criminal matters; and (B) those Member States where the national data protection law adopted for the implementation of Directive 95/46/EC does not cover authorities in criminal matters.

As to scenario (A), Article 8 of the Regulation should be recalled by OLAF: *"Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC (a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, (...)."*

The EDPS understands Article 8(a) of the Regulation to mean that if the sending of the information is not carried out at the request of the recipient, it is up to the sender to "accredit" such a need. Accordingly, when the information is not sent at the request of the recipient, OLAF has to establish the "necessity" of the transfer in a reasoned decision in this regard. The EDPS is pleased to see that OLAF Instructions to Investigators follow this requirement and specifically demand that a reasoned decision should be included in the interim report or final case report of a particular case which is transferred to such authority.

As to scenario (B): for those Member States that have not extended their implementation of Directive 95/46/EC to authorities in criminal matters, consideration to Article 9 of the Regulation has to be given. In those cases, Council of Europe Convention 108 which for the matter under analysis can be considered as providing an adequate level of protection, are in any case applicable to those authorities.

3.7. Right of access and rectification

Article 13 of the Regulation provides for a right of access for data subjects, Article 14 grants the right to rectification of personal data.

The right of access gives individuals the possibility to learn whether and what type of information relating to them is being processed. The right of access is a *præ* to the right of rectification. Once individuals have had the opportunity to access their data and verify the accuracy and lawfulness of the processing, the right to rectification enables them to require rectification of any inaccurate or incomplete information. The respect of the rights of access and rectification is directly connected to the data quality principle and, in the context of investigations, it overlaps to a great extent with the right of defence. Ensuring the right of access to the person concerned by the external investigation is therefore of utmost importance.

The right of access and rectification of one's own data applies to all data subjects. This include also all those "third parties" whose name may appear in the case file of external investigation (for example: an informant can mention other people participating on a given meeting, or a witness can name other individuals witnessing the same event).

The guidance given by the EDPS in his opinion on OLAF internal investigations largely applies to the context of external investigations.

The right of access is applicable when a data subject requests access to the files of others, where information relating to him or her would be involved. This would be the case of whistleblowers, informants or witnesses who demand access to the data relating to them included in an investigation conducted on another person.

The information can be obtained directly by the data subject (this is the so-called "direct access") or, under certain circumstances, by a public authority (this is the so-called "indirect access", normally exercised by a Data Protection Authority, in the present context by the EDPS).

The data protection clauses in the standard letters so far used in the context of internal investigations, and the privacy clauses drafted by Directorate B, specify that on request data subjects may be sent their own personal data and correct or complete them. Because of the above expounded considerations, the EDPS finds it of utmost importance that the right of access to one's own personal data and to rectify them is ensured as a main rule, not as an exception. Therefore, the standard privacy clauses in OLAF external investigation letters should be formulated in a sentence acknowledging those rights: "You have a right to access the personal data OLAF holds regarding you and to correct or complete them." The following sentence could also be added: "Exemptions under Article 20(1)(a) (b) and (c) of Regulation 45/2001 may however apply."

The EDPS welcomes the content of OLAF Instructions to Investigators, and the fact that the content is planned to be introduced in the new OLAF Manual, which endorses in principle the right of access to one's own data (and provides for a formal notice to the data subject on that) and also further stipulates that restrictions may be applied on a case-by-case basis and welcomes the procedures proposed (note attached to the file on the restriction; informing data subjects subsequently of the reasons for applying the restriction and the possibility to recourse to the EDPS, unless withholding such information is necessary to safeguard the investigation). As the content of OLAF Instructions to Investigators is not reflected in the present version of OLAF Manual, and the present version of the OLAF Manual contains a general restriction on

the right of access of the interested party⁵¹, the EDPS finds it crucial that the revision of OLAF Manual incorporates the approach taken by OLAF's Instructions to Investigators regarding the right of access as soon as possible. The EDPS however also notes that according to OLAF, certain modifications on the instructions are necessary. Therefore the EDPS would like to be consulted on those modifications due time in advance to be able to make his comments.

Article 20(1) of the Regulation provides for certain restrictions to the right of access and rectification where such a restriction constitutes a necessary measure to safeguard (a) the prevention, investigation and prosecution of criminal offences and (b) an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters, and (c) the protection of the data subject or of the rights and freedoms of others. Although, the notifications for prior checking mention only Article 20(1)(a) and (b) as possible grounds for restriction on the rights of the data subjects, the EDPS would like to stress that the protection of the data subject or of the rights and freedoms of others (for example, the protection of the identity of the whistleblowers or informants, see below) also can apply.

If OLAF uses an exception to suspend access, it should take into account that the restrictions to a fundamental right can not be applied systematically. OLAF must assess in each case whether the conditions for the application of one of the exceptions in Article 20(1) as referred to above, may apply. The restriction should be "necessary" to safeguard those interests, thus it should meet a "necessity test" conducted on a case-by-case basis. For example, if OLAF wishes to rely on an exception of Article 20(1)(b), it must assess whether it is necessary to suspend the data subject's access in order to safeguard an important economic interest.

In any case, OLAF always has to consider and respect Article 20(3): "If a restriction provided for by paragraph 1 is imposed, the data subject shall be informed, in accordance with Community law, of the principal reasons on which the application of the restriction is based and of his or her right to have recourse to the European Data Protection Supervisor." Paragraph (6) of OLAF Instructions to Investigators lay down this principle.

Article 20(5) of the Regulation further provides that "provision of the information referred to under paragraph 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect." It may be necessary for OLAF to defer such information, in accordance with this provision, in order to safeguard the interest of the investigation. The necessity for such deferral must be decided on a case-by-case basis.

Account should be taken of Article 20(4) of the Regulation: "If a restriction provided for by paragraph 1 is relied upon to deny access to the data subject, the European Data Protection Supervisor shall, when investigating the complaint, only inform him or her of whether the data have been processed correctly and, if not, whether any corrections have been made." This indirect access *via* the EDPS has to be guaranteed for the data subject. This provision will play a role, for instance in those cases where the data subject has been informed about the existence of a process, or has knowledge of it, but the right of access is still being restricted in the light of Article 20.

As to the protection of whistleblowers, the EDPS has already given his guidance in his opinion on OLAF internal investigations. The right of access involves the right of the data subject to be informed about the data referring to him. However, as noted above, this right can

⁵¹ Article 3.6.2 of OLAF Manual

be restricted to safeguard the protection of the rights and freedoms of others. This has to be taken into account in the framework that is being analysed regarding access by the person concerned to the identity of the whistleblower or to information which may make the whistleblower identifiable for the person concerned. The Article 29 Working Party has made the following statement: "[u]nder no circumstances can the person accused in a whistleblower's report obtain information about the identity of the whistleblowers from the scheme on the basis of the accused person's right of access, except where the whistleblower maliciously makes a false statement. Otherwise, the whistleblower's confidentiality should always be guaranteed".⁵² The same approach has to be applied concerning informants. Therefore, the EDPS recommends the respect of the confidentiality of whistleblowers during the external investigations by OLAF and in the later stages (if, for examples, judicial authorities make a request for this information) inasmuch as this would not contravene national rules regulating judicial procedures. Furthermore, the EDPS is of the opinion that the guarantees protecting whistleblowers during OLAF investigations must be legally reinforced, as they are now only established in a Commission Communication (SEC/2004/151/2). The EDPS urged the European legislator in similar terms in his Opinion on the proposal for a Regulation amending Regulation (EC) No. 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF). The relevant provisions from OLAF Instructions to Investigators on whistleblowers and informants⁵³ should be added to the new version of the OLAF Manual.

Article 14 of the Regulation provides the data subject with a right to rectify inaccurate or incomplete data. Given the sensitivity in most cases of the investigations conducted by OLAF, this right is of key importance in order to guarantee the quality of the data used, which is connected to the right of defence in the context of investigations.

In principle, any restriction to this right should comply with Article 20 of the Regulation in similar ways to those described above regarding the restriction on the right of access. In short, a restriction on the right to rectify data can not be applied systematically, but should be applied on a case-by-case basis, and the measure should be "necessary" to safeguard an interest stipulated in Article 20 of the Regulation. A possibility should also be provided to the person concerned that at his/her request documentation related to any subsequent developments during a follow-up phase of the case is included in the investigation file (for instance, a court ruling).

3.8. Information to the data subject

The Regulation states that the data subject must be informed where his/her personal data are being processed and lists a number of obligatory items to be provided in order to ensure fair processing. In the course of external investigations personal data can be collected directly from the data subject (e.g. during an interview of the person concerned) or can be obtained indirectly (e.g. from informants or witnesses). Therefore, both Article 11 (information to be supplied where the data have been obtained from the data subject) and Article 12 (information to be supplied where the data have not been obtained from the data subject) apply.

⁵² 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. Adopted on 1 February 2006. WP 117.

⁵³ Paragraph (6)(b) of OLAF Instructions to Investigators specifies as stated in the "Facts " part of this opinion that the right of access may be denied during the investigations of "It would be harmful to the rights and freedoms of others, such as whistleblowers and informants, to provide such access. The identity of whistleblowers must never be revealed, unless this would contravene national rules regulating judicial procedures."

The EDPS recalls, as explained in the facts above (see point 1) in part 2.2.4 of this Opinion), that not only the persons subject to investigation, informants, whistleblowers, operational partners, etc can be data subjects, but basically any individual whose name is mentioned in a case file. These "third parties" also have the right to receive information about the processing of their data under Article 12 of the Regulation. OLAF should implement such an obligation. Exceptions can be possible under the conditions of Article 20 of the Regulation (see below)⁵⁴.

The EDPS considers that in providing the necessary information for data subjects a layered approach is needed:

- 1) Information provided in the data protection clauses (including the items of Articles 11 and 12), and
- 2) Further information included in the external investigations standard letters and standard clauses.

The content foreseen to be provided by OLAF

The EDPS overall assessment is that the information OLAF foresees to provide to individuals as described in the OLAF Instructions to Investigators⁵⁵ is in line with Articles 11 and 12 of the Regulation, however his suggestions below should also be taken into regard.

The EDPS notes the intention of OLAF to consult the EDPS as soon as the draft letters for external investigations will be adopted. The EDPS expects that consultation as soon as possible, because he is not been in the position to review the content of those letters (as they are not yet drafted) and to make his particular comments in the present prior checking procedure. Meanwhile, he hereby set forth those general aspects of the internal investigation standard letters which he considers important to follow in the external investigations standard letters from a data protection perspective.

The content of the internal investigations letters are adequate for the different phases of the investigation (opening of an investigation, invitation to interview, closing of the case, etc) and to the categories of data subjects (person concerned, whistleblower, witness, informants). This content should also be reflected in the context of external investigations, providing in addition (as proposed by OLAF) specific pieces of information to the officials of Member State and third country authorities on the processing of their own personal data.

Investigations in general can bear more risks for the individuals. In order to ensure fair and lawful processing of personal data, it is crucial to provide further information to the data subjects, and not only to inform them of the mandatory items listed in Articles 11 and 12. In this regard, the standard letters of internal investigations provide an example to be followed. The internal investigation letters include not only a standard data protection clause, but also particular information as to the status of the individual during the investigation and as to his/her rights, which also concerns in many cases rights having relevance for the protection of personal data. For example, the person concerned receives particular information as to the opening of an investigation to which he/she is subjected to as an interested party; that person receives information as to his/her rights in the letter inviting him/her to an interview (including information on the right not to incriminate oneself, having an opportunity to express his/her views on all the facts which concern him/her, the duty to cooperate with OLAF and bring any document hold of them which may contain relevant information, etc). Obviously, there is a need to adapt the standard text of the internal investigations letters to the

⁵⁴ For similar requirements, see also the EDPS Opinion of 6 June 2007 on a notification for prior checking on a free phone service (Case 2007-74). Available at: www.edps.europa.eu .

⁵⁵ Paragraph (8) of OLAF Instructions to Investigators

rules of external investigations. For example, the duty to cooperate with OLAF during an on-the-spot check is an obligation established horizontally across all sectors by the second paragraph of Article 5 of Regulation 2185/96, and further established in specific sectors.

The EDPS recommends that while formulating the standard data protection clauses for external investigations, his comments made on 2 February 2007 addressed to the DPO of OLAF in his letter on the draft clauses⁵⁶ are taken into regard. Notably, that:

- *the purposes* of the processing operation should be well explained (for example: in some of the cases retaining the data serves not only the purpose of contacting the individual, but also that of evaluating of the information received and assessing whether the wrongdoing exists)
- the right of access and rectification (as expounded above in 3.7) should be mentioned as a main rule, and an indication of how such rights can be exercised should be provided.

The EDPS finds appropriate the content of the specific data protection clauses proposed by Directorate B *provided* that more specification is given *on the purpose* of the processing operations and the sentence on right of access and rectification is corrected in line with the reasons explained above.

Exceptions to the right to receive information

1) Article 2(g) of the Regulation specifies that authorities receiving data in the framework of a particular inquiry should not be regarded as recipients. This article provides for an exception to the right to information (Articles 11 and 12) in the frame of a particular enquiry. This is the case where OLAF transfers personal data to the competent national authorities in the course of or at the end of the external investigations.

It does not mean however that OLAF should not inform about the possibility of communication of personal data to such authorities as general information. It is appropriate to provide that general information in the standard data protection clauses included in OLAF standard letters and clauses.

2) There can be exceptions, in accordance with Article 20(1) of the Regulation, from the right to receive the list of information stipulated in Articles 11 and 12 (1) of the Regulation. However in those cases, the data subject should receive appropriate information of the principal reasons on which the application of the restriction is based and his/her right to recourse to the EDPS. In addition, the information can be deferred under Article 20(5) of the Regulation for as long as such information would deprive the restriction imposed by paragraph 1 of its effect. OLAF Instructions to Investigators, in line with these rules, allow for a possibility to withhold information, on a case-by-case basis, for as long as it is necessary to safeguard the investigation to provide that information. On those occasions a note to the file must be filled in specifying the reasons for imposing the restriction and the data subjects must subsequently be informed of the reasons for the imposition of the restriction and of the right to have recourse to the EDPS, unless it would be harmful to the investigation to provide this information.

The means and forms to provide that information

The EDPS observed, following an exchange of information with OLAF during the prior checking procedure, that save Directorate B, OLAF plans to rely on standard data protection clauses to be inserted in OLAF standard letters, similar to those sent out in the context of

⁵⁶ The letter has been addressed to the DPO of OLAF on 2 February 2007 regarding cases 2006-493 and 2005-418. D(2007)156.

internal investigations. The EDPS welcomes the confirmation by OLAF that in the revised version of the OLAF Manual a separate set of standard letters will be included for external investigations (and sent for the review of the EDPS before being adopted). As to the intention of Directorate B not relying on standard letters but to rely on specific clauses which can be used in various ways (ie attached to an on-the-spot control report, e-mail, etc) as appropriate, the EDPS stresses the following. The EDPS finds it very important that the level of personal data protection across all Directorates of OLAF working on the field of external investigations should be the same. Therefore, the EDPS finds that the best practice to achieve that goal is the use of standard clauses and standard letters or documents containing the necessary data protection information. Of course there can be certain degree of discretion involved in cases which allow for a derogation of the main rule to provide information to the data subject under Article 20 of the Regulation. Indeed, in certain cases it may be necessary not to inform the data subject so as not to harm the proper functioning of an investigation (see above).

Finally, the EDPS emphasizes the following. Article 43a of the Implementing Rules of the Financial Regulation⁵⁷ requires providing information in the grant or procurement calls, that for the safeguarding of the financial interest of the Communities, beneficiaries' personal data may be transferred, among others, to OLAF. This general information should in no way prejudice the right of data subjects to receive from OLAF the information listed in Articles 11 and 12, where applicable. In the case of OLAF, which is an investigative body, contrary to auditing bodies where the processing in most cases is a mere storage and the assessment of personal aspects is not the purpose, the personal data processing by OLAF is focused on personal behaviours and specific risks are present (hence Article 27 of the Regulation), which makes it necessary, for the processing to be fair, to inform data subjects in a more detailed way. The inclusion of OLAF has been promoted by the EDPS as a transparency measure, but cannot be understood as a sufficient condition to fulfil the exception of Article 12 "*except where [the data subject] already has [the information]*".⁵⁸

3.9. Security measures

The EDPS notes that the security measures set forth in the context of OLAF external investigations are the same as those used in other data processing operations that have been notified to the EDPS for prior checking. 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 analysis. 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.

4. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations above are fully taken into account, in particular OLAF should:

⁵⁷ Commission Regulation (EC, Euratom) No 2342/2002 of 23/12/2002 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 (OJ L 357, 31/12/2002, p. 1); Amended by the Commission Regulation (EC, Euratom) No 1261/2005 of 20/07/2005 (OJ L 201, 02/08/2005, p. 3), the Commission Regulation (EC, Euratom) No 1248/2006 of 07/08/2006 (OJ L 227, 19/8/2006, p. 3), and the Commission Regulation (EC, Euratom) No XXX of 23/04/2007 (OJ L 111 of 28/04/2007)

⁵⁸ For this exception being applicable to OLAF, see the EDPS' opinion on the special case of Monitoring by OLAF (case 2006-0548, point 2.2.8.)

- evaluate on a case-by-case basis the necessity and proportionality of access to personal data kept in the computers during forensic examinations. OLAF should adopt a formal Protocol of "Standard Operating Procedures" for the performance of forensic investigation of computers,
- attach a note to the file establishing the necessity of the transfer of personal data in a given case,
- ensure the right of access and rectification of one's own personal data as a main rule. The revised version of OLAF Manual should incorporate this rule. Endorsing the right of access and rectification as a main rule also applies to the formulation of OLAF data protection clauses, which are included in OLAF letters.
- ensure that any restriction under Article 20 of the Regulation on the right of access to one's own personal data and/or the right to rectify them should meet a necessity test and applied on a case-by- case basis, and that due respect is given to Article 20(3)(4) and (5) of the Regulation,
- respect the confidentiality of whistleblowers and informants during OLAF external investigations. The revised version of OLAF Manual should include the legal guarantees in that regard as laid down in the Instructions to Investigators,
- provide a possibility to the person concerned at his/her request to attach documentation to his/her dossier on subsequent developments during a follow-up phase,
- pay special attention in the formulation of standard data protection clauses (containing the mandatory items under Articles 11 and 12) relating to the purposes of the processing operation and the granting of the right of access and rectification,
- draft standard letters and clauses (modelling the internal investigation letters and following the guidance given by the EDPS) and include those in the revised version of the OLAF Manual containing information under Articles 11 and 12, and also information which has data protection relevance. The EDPS should be consulted on the content of those external investigations letters and clauses sufficiently in advance to allow him to comment,

- ensure that the content of external investigation letters and clauses is uniform across the various directorates and units concerned within OLAF from a data protection perspective,
- ensure the right to information, access and rectification to all those people ("third parties") who have been named in the external investigation files, subject to the application of the exceptions of Article 20 of Regulation (EC) No 45/2001. OLAF must decide on a case-by-case basis whether the exceptions apply.
- consult the EDPS on the planned revision of OLAF Instructions to investigators, so he can make his comments on the proposed modifications.

Done at Brussels, 4 October 2007

Peter HUSTINX
European Data Protection Supervisor