

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Anti-Fraud Office on Criminal assistance cases

Brussels, 12 October 2007 (Case 2007-203)

1. Proceedings

On 23 March 2007, the European Data Protection Supervisor received a prior checking notification from the Data Protection Officer (DPO) of the European Anti-Fraud Office (OLAF) on "Criminal assistance cases".

On 7 May 2007, the EDPS made a request for further information. He received the responses on 3 July 2007. On 12 July, the EDPS extended the deadline to issue the opinion due to the complexity of the matter for one month.

On 10 September 2007, the EDPS sent the draft opinion for comments to the DPO with a request to provide any additional information that may be necessary. The answer was received on 3 October 2007.

2. Examination of the matter

2.1. The facts

Purpose and description of data processing operations

The activities of OLAF in criminal assistance cases aim at facilitating and coordinating investigations carried out by the relevant national authorities in order to protect the Community's financial interests. In these cases, the competent authorities of a Member State, candidate country or third country carry out criminal investigations and request OLAF's assistance or OLAF offers its assistance. No investigation activities may however be undertaken by OLAF itself, although OLAF may provide intelligence.¹ On the other hand, an OLAF investigator may be present as part of a team during a national investigation and he/she may provide advice.

Criminal assistance by OLAF is based on Article 1(2) of Regulation (EC) No 1073/99 which stipulates that *"The Office [OLAF] shall provide the Member States with assistance from the Commission in organizing close and regular cooperation between their competent authorities in order to coordinate their activities for the purpose of protecting the European Community's financial interests against fraud. The Office shall contribute to the design and development of*

¹ OLAF data processing activities with regard to intelligence are currently under prior check by the EDPS: 2007-027 and 2007-028.

*methods of fighting fraud and any other illegal activity affecting the financial interests of the European Community."*²

Furthermore, Article 2 of Commission Decision 1999/352/EC foresees :

5. The Office shall be responsible for any other operational activity of the Commission in relation to the fight against fraud as referred to in paragraph 1, and in particular:

(a) developing the necessary infrastructure;

(b) ensuring the collection and analysis of information;

(c) giving technical support, in particular in the area of training (...) to the competent national authorities.

6. The Office shall be in direct contact with the police and judicial authorities.

*7. The Office shall represent the Commission, at service level, in the forums concerned, in the fields covered by this Article.*³

When OLAF considers whether to open a criminal assistance case or not, it evaluates the initial information received to determine whether it relates to the protection of the EU's financial interest. This evaluation may involve the assessment of individual involvements. Once a criminal assistance case is open, the assistance provided by OLAF includes organising meetings, gathering and forwarding information and facilitating the execution of mutual (administrative and legal) assistance requests.

When OLAF organises meetings, this concerns a case under investigation by the authorities of a Member State or related investigations in several Member States and/or third countries.

"Gathering and forwarding of information" means that OLAF may gather information from operational partners, public sources or sources within OLAF, and forward such information to the national authorities responsible for the investigation for which the information is relevant.

"Mutual assistance requests" concern situations where the competent authorities of member States communicate and exchange information with the Commission [OLAF] in the framework of the Mutual Assistance Regulation (Council Regulation (EC) 515/97⁴) with the aim of preventing, investigating and prosecuting violations of customs or agricultural legislation. Information is also exchanged with third countries under Mutual Assistance Agreements. The related processing operations were notified to the EDPS separately⁵.

Personal data concerned

The categories of data concerned are: identification data, professional data and case related data. In particular, the data categories may include: name, name of individuals involved in the activities of companies, address, telephone number, e-mail address, date of birth, nationality, passport number, profession, employer, statements made regarding events under investigations where the data subject is mentioned or notes mentioning the data subject in relation to the events under investigation.

² Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Official Journal L 136 , 31/05/1999 P. 0001 - 0007.

³ Commission Decision of 28 April 1999 establishing the European Anti-Fraud Office (OLAF). Official Journal L 136/20, 31/05/1999 P 0020 - 0022.

⁴ 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. Official Journal L 082 , 22/03/1997 P. 0001 - 0016

⁵ Case numbers 2007-84, 85, 86 (published on www.edps.europa.eu), 2007- 178 (see EDPS response on FIDE database) and 2007- 202 (prior checking of the "mutual assistance exchanges" by EDPS is in process).

According to the notification form, no data are processed which would fall under Article 10 of Regulation (EC) No 45/2001 ("special categories of data").

Categories of data subjects

- Staff members of EU institutions, bodies, offices and agencies.
- Persons outside the EU institutions, bodies, offices and agencies who are subject to or otherwise involved in an investigation by the national authorities, whose name appear in documents received or created by OLAF. More specifically these may be: persons concerned, informants, witnesses, economic operators and staff of companies concerned.
- Staff members of the national investigation and prosecuting authorities and of international organisations in cases where OLAF provides assistance.

Information and rights of data subjects

It is planned to inform data subjects of their rights through the privacy statement on the Europa website of OLAF. The draft privacy statement attached to the notification form provides information in the following terms:

- *reference to Articles 11 and 12 of Regulation (EC) No 45/2001,*
- *categories of data,*
- *storage of data,*
- *transfer of data,*
- *a general statement on security measures:* "OLAF has implemented appropriate technical and organisational measures designed to protect information in its possession from loss, misuse, unauthorised access, disclosure, alteration or destruction."
- *access to one's own data and rectification:* "On request, you may be sent your own personal data and correct or complete them."
- *lodging complaint with the European Data Protection Supervisor,*
- *name of controller.*

The Privacy Statement does not stipulate the specific purpose of the criminal assistance cases, nor the specific legal basis. It does not provide for the contact information of the controller.

Storage of personal data and blocking

OLAF may keep both electronic and paper files related to cases for a period of up to 20 years after the date on which the case was closed.

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

The time limit to block/erase data is one month.

Transfer of personal data

Transfers of personal data can be made to:

- *Community institutions, bodies, offices or agencies,* in order to request information from them or to inform them about the matter under investigation by the national authorities,
- *competent national authorities,* in order to allow them to take appropriate measures to protect the financial interests of the EU,

- *competent third country authorities and international organisations*, in order to ensure an appropriate follow-up and to maximise the protection of the financial interests of the EU.

Automated and manual processing and security measures

The Case Management System (CMS) contains all case-related documentation created during a criminal assistance case. All manual processing of personal data is done via the CMS. Paper data are stored in the OLAF "Greff" and in the working files of investigators.

Various security measures are put in place.

2.2 Legal aspects

2.2.1 Prior checking

OLAF criminal assistance cases concern the processing of personal data within the meaning of Article 2(a) and 2(b) of the Regulation (EC) 45/2001.

Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (hereinafter referred to as: "the Regulation") applies to the *"processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law."* The processing operation by OLAF in the context of criminal assistance on the basis of Regulation (EC) No 1073/1999 concerns activities falling within the scope of Community law (Article 3(1) of the Regulation). The processing of personal data is done partly by automatic means (Article 3(2) of the Regulation). Manual processing of personal data forms part of a filing system. Consequently, Regulation (EC) 45/2001 applies to the present processing operation.

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

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

In criminal assistance cases the competent national authorities carry out criminal investigations and request OLAF's assistance or OLAF offers its assistance. In this context therefore, OLAF can process personal data relating to suspected offences, offences and potentially even data related to former criminal convictions. Thus, Article 27(2)(a) of the Regulation applies. Moreover, when OLAF evaluates whether to open a criminal assistance case and determines whether it relates to the protection of the EU's financial interests, OLAF may make an assessment of the individual involvements. Therefore Article 27(2)(b) of the Regulation also can apply.

The notification form mentions that Article 27(2)(d) applies to the case. To the question of the EDPS requesting explanation as to why the controller considers that the said article applies to the processing operation, OLAF responded that the processing operation could lead indirectly to excluding individuals from a right, benefit or contract, although it would not directly result in such exclusion, and referred to the provisions already invoked by OLAF in the external investigation cases.⁶ The EDPS stresses in the prior checking of the external investigations that the exclusion from a right, benefit or contract can apply only inasmuch as the invoked rules fit under the Early Warning System of the Commission⁷.

It has to be noted that although intelligence and mutual assistance exchanges by OLAF can be closely related to criminal assistance cases, those data processing operations will be examined in separate prior checks.⁸

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case however the processing operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 23 March 2007. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than the 24 May 2007. The prior checking procedure was suspended for a period of 57 days + 23 days + the month of August 2007. Due to the complexity of the matter the deadline to issue the opinion was extended for one month. Thus, the opinion should be issued no later than 12 October 2007.

2.2.2 Lawfulness of the processing

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

Article 5 (a) of the Regulation stipulates that personal data may be processed only if the *"processing is necessary for 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 (...)"*. This Article requires three closely related elements: 1) the *Treaty or other legal instrument* based on the Treaty should foresee the data processing activity, 2) the processing activity should be performed *in the public interest*, and 3) the processing operation should *be necessary for the performance of a public interest task*.

The EDPS notes that the legal instruments mentioned in point 2.1 of the present Opinion constitutes *the legal basis* for the processing operation. OLAF's activities in criminal assistance cases aim at facilitating and coordinating investigations carried out by the relevant national, candidate country or third country authorities in order to protect the financial interests of the Community. Thus, it should be considered as serving the *public interest*. The assistance provided by OLAF to the national competent authorities *in abstracto* can help to

⁶ Joint cases: 2007/47, 2007/48, 2007/49, 2007/50, 2007/72.

⁷ See, Opinion of 4 October 2007 on a notification for prior checking on the Early Warning System (Case 2007-243). Available at: www.edps.europa.eu

⁸ Intelligence cases: 2007-027 and 2007-028, mutual assistance exchanges: 2007-202 (to be issued shortly)

protect the Community's financial interests. On the other hand, the EDPS emphasizes that the real "*necessity*" of the personal data processing must be analysed *in concreto* in each and every particular criminal assistance case and the particular data processing should be proportionate to the aims pursued by the processing operation. This proportionality requirement should be evaluated on a case-by-case basis.

2.2.3 Processing of special categories of data

The notification for prior checking states that no data falling under Article 10 of the Regulation are processed in criminal assistance cases. On the other hand the purpose of OLAF's activities in criminal assistance cases is to facilitate and coordinate investigations carried out by the relevant national authorities. In this context OLAF obviously processes personal data on (suspected) offences.

According to Article 10(5) of the Regulation: *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 (...)*". In the present case, the processing of these special data is expressly authorised as described above in Part 2.1 of the opinion.

2.2.4 Data Quality

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

OLAF should ensure that its procedure guarantees the principle of data quality. The amount and type of data processed in every criminal assistance case may vary according to the nature of the particular matter, therefore it is not possible for the EDPS to determine whether the data in the dossier are appropriate in general. The question whether personal data included in the files are adequate, relevant and not excessive will always depend on the particular case at stake. OLAF should pay special attention in safeguarding this principle in its intervention in criminal assistance cases. To this aim the EDPS suggests the development of some internal guidelines addressed to agents responsible for such a processing operation reminding them and describing the rules to follow towards ensuring the data quality principle.

The EDPS would like to stress that the name and other personal information of staff members of companies and economic operators concerned should be included in the OLAF file only to the extent that it is adequate and relevant for the criminal assistance.

Data should also be *accurate and where necessary kept up to date*. (Article 4(1)(d) of the Regulation). Criminal assistance cases are specific from this perspective as it is the competent national authority which is responsible for the investigation procedure and for the data quality principle, OLAF does not undertake investigation on its own. OLAF does, however, keep case files on cases where it provided criminal assistance. In this regard, obviously OLAF relies on the one hand on the information received from national authorities, but on the other hand OLAF itself may obtain personal data. For example OLAF may gather information from operational partners, public sources or sources within OLAF. Ensuring the accuracy of personal data and keeping it updated is especially important as OLAF forwards such information to national authorities responsible for the investigation.

Therefore, OLAF should make every reasonable step to ensure that:

- A) the information coming from national authorities and used and kept by OLAF are accurate and updated, and
- B) the information collected by OLAF and forwarded to national authorities are accurate and updated.

To achieve this end, the EDPS recommends that OLAF establish internal guidelines, assisting OLAF agents in the ways to ensure that personal data kept in OLAF dossiers are accurate and updated.

Further, the EDPS recalls that "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed are erased or rectified.*" The system, as described, aims at achieving data accuracy. Furthermore, this principle is also connected to the right of access and rectification and will therefore be examined in part 2.2.7 of this opinion.

Data must also be "processed *fairly and lawfully*" (Article 4(1)(a) of the Regulation). The question of lawfulness has already been considered in part 2.2.2. Fairness relates to the information given to the data subjects and therefore will be examined in part 2.2.8 of this opinion.

2.2.5 Conservation of data/ Data retention

Personal data should be kept in a form which permits identification of data of data subjects for not longer than is necessary for the purposes for which the data are collected and/or further processed. (Article (4)(1)(e) of the Regulation).

According to the notification form, OLAF may keep both electronic and paper files related to criminal assistance cases for up to 20 years after the date on which the case was closed.

The EDPS suggests, as he did in his previous opinions⁹ that when OLAF has experienced 10 years of existence a preliminary evaluation of the necessity of the 20 year period *vis-à-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 notification form specifies that in order to allow for the comparison of precedents and compilation of statistics, final case reports may be kept in an anonymous form for 50 years. As personal data are to be kept in anonymous form for that purpose, it meets the requirement of the second sentence in Article 4(1)(e) of the Regulation.

2.2.6 Transfer of data

Articles 7, 8 and 9 of the Regulation 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 within or between Community institutions or bodies, *ex* Article 8 to recipients subject to Directive 95/46/EC or to other recipients outside of this scope *ex* Article 9 of the Regulation.

⁹ See the first one, Opinion of 23 June 2006 on a notification for prior checking on OLAF internal investigations (Case 2005-418). Available at: www.edps.europa.eu

According to the notification for prior checking OLAF transfers personal data A) to recipients in Community institutions, bodies, offices or agencies, B) to competent national authorities of Member States of the EU, and C) to third country authorities and to international organisations.

Transfer to Community institutions and bodies covered by Article 7 of the Regulation

The notification for prior checking specifies that Community institutions (bodies, agencies, offices) receive personal data from OLAF in order to request information from them or to inform them about a matter under criminal investigation by the national authorities.

The EDPS recalls that Article 7 of the Regulation requires that personal data are only transferred *"if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient."* In order to comply with this article in sending personal data, OLAF must ensure that (i) the recipient has the appropriate competence and (ii) the transfer is necessary. Whether a given transfer meets such requirements should be assessed on a case-by-case basis. Accordingly, OLAF agents should apply this rule for each and every particular data transfer. Doing so will avoid unnecessary transfers of information as well as transfers of information to parties that do not have the appropriate competences.

An arrangement similar to that specified in paragraph 5 (a) of "Instructions to staff conducting investigations,"¹⁰ as suggested by the DPO of OLAF, would satisfy this requirement. Paragraph 5 lays down 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 proportional, 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."

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

According to the notification for prior checking, competent national authorities can be data recipients in order to allow them to take appropriate measures to protect the financial interests of the EU, namely authorities in criminal investigations. Two scenarios can be observed in Member States: (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, (...)."*

¹⁰ "Instructions to staff conducting investigations following from opinion of European Data Protection Supervisor (EDPS) on prior checking on internal investigations". 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.

Whereas under Article 8(a) of the Regulation, it is up to the recipient to establish the interest and necessity to receive the information, given the specific activities of OLAF, the EDPS understands this provision to mean that if the sending of the information is not carried out at the request of the recipient, the sender should accredit such a need. Accordingly, each and every time when OLAF sends personal information to competent national authorities on its own initiative, OLAF should establish that the data are necessary for the performance of a task carried out in the public interest. This is an assessment that OLAF agents must carry out each time when they transfer personal information. OLAF agents responsible for criminal assistance cases should be made aware of this rule.

A similar arrangement to that of paragraph 5(b) of "Instruction to investigators," as suggested by the DPO of OLAF, could satisfy this requirement, as that paragraph requires 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 or final case report of a case which is transferred to such authority."

Compliance with Article 8(a) of the Regulation requires the addressees of the information to use the data to perform a task in the public interest. The EDPS considers that the sending of the personal data in criminal assistance cases in principle fulfils the conditions of Article 8(a) insofar as the national authorities to whom the information is sent are authorities of Member States that are competent for the carrying out the purposes of the processing. Such authorities will use the data to perform tasks in the public interest, taking appropriate measures to protect the financial interest of the EU.

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.

Transfers to other recipients not subject to Directive 95/46/EC covered by Article 9 of the Regulation

Although the notification for prior checking specifies that personal data can be transferred to competent third country authorities and international organisations in order to ensure an appropriate follow-up and to maximise the protection of the financial interest of the EU, these aspects will not be analysed in the opinion, as OLAF's compliance with Article 9 of the Regulation is being dealt with in the context of case 2005-154 and 2006-493. The EDPS is analysing the conformity of OLAF international data transfers in those two cases.

2.2.7 Right of access and rectification

Articles 13 and 14 of the Regulation provides for a right of access and rectification of personal data. These rights of the data subjects ensure that the file can be as complete as possible, and meanwhile ensure the quality of data. The right to rectify one's inaccurate or incomplete data is of key importance in order to ensure the quality of the data used.

The EDPS considers that due to the specificity of criminal assistance cases the individuals whose data are processed can have an access/rectification request submitted:

A) to the national authorities bound to apply national data protection law, with respect to data processed by those authorities, and also
B) to OLAF concerning the data processed by OLAF, which situation falls under Regulation (EC) 45/2001.

The right of access may also be applicable when a data subject requests access to the file of others, where information relating to him or her is involved. This would be the case of whistleblowers, informants or witnesses who demand access to the data relating to them included in a file.

The information can also 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, being the EDPS in the present context).

The draft privacy statement specifies that data subjects may be sent their own data and they may correct or complete them. The draft privacy statement gives the name of the data controller who can be contacted in case of any difficulty or for any questions related to the processing of one's personal data. The notification form further specifies that the exceptions and restrictions laid down in Article 20(a) and (b) of Regulation (EC) 45/2001 may be applicable. The EDPS finds it legitimate that whenever OLAF assists judicial authorities in an investigation, OLAF has to take into account national rules. In principle, respect for such national rules may have an impact on the restriction of the right of access and rectification but also on the right to provide information to data subjects (see in part 2.2.8).

The EDPS notes that the right of access and rectification to one's own personal data should be provided to the data subjects as a general rule unless the access and rectification could be harmful to certain interests stipulated in Article 20 of the Regulation. Any such exception or restriction can be applied only on a case-by-case basis and never in a systematic fashion.

Therefore, the EDPS recommends revising the draft privacy statement as to the right of access and rectification by emphasizing the main rule and informing data subjects about the possibility to restrict those rights in certain cases: *"You have a right of access, the right to correct and complete your personal data. These rights, however, can be restricted under the specific circumstances of Article 20 of Regulation (EC) 45/2001."*

Article 20(1)(a) and (b) of the Regulation provides for certain restrictions to the right of access and rectification, notably where such a restriction constitutes a necessary measure to safeguard (a) *"the prevention, investigation, detection 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."* In addition, the EDPS notes that Article 20(1)(c) of the Regulation may also be applicable. That provision allows for the restriction of the data subject's right where such restriction constitutes a necessary measure to safeguard "the protection of (...) the rights and freedoms of others", which may be the case with regard to accessing one's own personal data that may reveal or lead to disclosure of the identity of a whistleblower or informants (for more details on whistleblowers and informants, see below).

In accordance with the above, if OLAF uses an exception to suspend access or the right to rectification, it should take into account that the restriction to a basic right can not be applied systematically. OLAF must assess in each case whether the conditions for the application of one of the exceptions mentioned above apply. The restriction measure has to be "necessary".

This requires that a "necessity test" has to be conducted on a case-by-case basis. For example, if OLAF wishes to rely on an exception under Article 20(1)(b) of the Regulation, it must assess whether it is necessary to suspend access in order to safeguard an important economic or financial interest of the European Communities. In making such an assessment, OLAF must establish a clear link between the need to suspend access and the safeguarding of an economic or financial interest. Furthermore, OLAF should also recall that the exceptions to the data protection rights can only apply temporarily.

In any case, Article 20(3) of the Regulation has to be respected by OLAF: *"If a restriction provided 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."* Article 20(5) allows for deferring of that information *"for as long as such information would deprive the restriction imposed in paragraph 1 of its effect."* This necessity to determine such a deferral must be decided on a case-by-case basis. In order to give effect to this latter provision, the EDPS considers it a good practice and therefore suggests to the controller to draw up a note to the case file on the principal reasons of restricting the data subject's right. At the end of the period during which the data subject's right was deferred, the person concerned should receive the information specifying the restriction of his/her right and the fact that he/she can have recourse to the European Data Protection Supervisor.

In addition, the controller should recall Article 20(4) of the Regulation which stipulates that *"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 necessary corrections have been made."* This indirect right of access then has to be guaranteed. Indeed, this provision will play a role for instance in those cases where the data subject has been informed about or has the knowledge of the existence of the criminal assistance case opened by OLAF, but the right of access is still being restricted under Article 20 of the Regulation. Article 20(5) permits deferring the provision of information on a case-by-case basis for as long as such information would deprive the restriction imposed of its effect.

As already mentioned, the right of access involves the right of the data subject to be informed about the data referring to him or her. However, as noted above, this right can be restricted to safeguard *"the protection of the (...) rights and freedoms of others."* This has to be taken into account in criminal assistance cases regarding access by the person concerned to the identity of the whistleblowers. 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 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."*¹¹ The same approach has to be applied concerning informants.¹² Therefore, the EDPS recommends the respect of the confidentiality of the identity of whistleblowers and informants in OLAF's activities in criminal assistance cases inasmuch as this would not contravene national rules regulating judicial procedures.

¹¹ Part IV point 4 (ii) of 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 (WP 117)

¹² Witnesses, in principle, do not require the confidentiality of their identity.

2.2.8 Information to the data subject

The Regulation requires that data subjects are informed about a number of obligatory items under Article 11, where the data have been obtained directly from the data subject, and under Article 12, where the data have not been obtained from the data subject. Pursuant to these two articles, those who collect personal data are required to inform the individuals to whom the data refer of the fact that their data are being collected and processed in order to ensure fairness of the processing of personal data.

The EDPS considers that due to the nature of criminal assistance cases, OLAF is more likely to collect information from sources other than the data subject him/herself in assisting national authorities, therefore in most cases Article 12 of the Regulation should be respected. Yet, in certain cases it is possible that the data are supplied by the data subjects themselves, for example when personal data of operational partners or sources within OLAF appear in the case file provided by the individuals themselves. Article 11 of the Regulation therefore applies to such cases.

The EDPS considers that the information OLAF foresees to provide to the persons concerned as described in the draft privacy statement is in general in line with the requirements of Articles 11 and 12, but requires revision with respect to certain elements.

First, the purposes of the processing operation are not described in sufficient detail. The draft privacy statement states in a very general fashion that "OLAF maintains a register of all information it receives." This description does not explain to the data subjects what the specific purpose of criminal assistance cases is, therefore the privacy statement should give more specific explanation in this respect.

Second, although the name of the data controller is mentioned, no contact information appears. The EDPS requests that the contact information (e.g. functional mailbox) of the controller is provided in the privacy statement.

Third, the legal basis of the processing operation is not described in the draft privacy statement. The EDPS requests inclusion of that information in the privacy statement having regard to the specific circumstances of the processing operation in order to guarantee fair processing in respect of the data subject.

Fourth, as already explained in part 2.2.7 of this opinion, as far as the right of access and rectification are concerned, the EDPS finds it more appropriate if the language used in the draft privacy statement is replaced by a sentence plainly acknowledging that individuals have such rights.

Regarding the moment in time when the information should be provided, the EDPS recalls that under Article 12 of the Regulation, the individuals concerned should be informed at the time of the recording of the data, or if a disclosure to a third party is envisaged not later than the time when the data are first disclosed. In principle, this would mean in the criminal assistance cases that the information should be provided A) either at the time when OLAF receives the information from national authorities, operational partners or public sources or B) when OLAF discloses the information to competent national authorities. As noted above with regard to the right of access, the provision of information may be deferred if one of the exceptions under Article 20 applies.

Regarding the manner in which information must be provided, the EDPS considers that the provision of information through the OLAF Europa website is a positive step towards complying with Articles 11 and 12 of the Regulation and it is a measure to enhance transparency regarding the data processing operations in which OLAF is engaged. However, the EDPS is concerned by the fact that many data subjects who are the object of criminal investigations may not visit the OLAF website, and thus, may never have access to such information. This emphasizes the need to supplement the publication on the Europa website of OLAF with personalised information notices addressed to individuals. The EDPS therefore calls upon OLAF to develop guidelines in providing personalised information to the individuals concerned to the degree that it is appropriate in the context of criminal assistance cases and inform the EDPS about such guidelines. In developing the guidelines, OLAF could take into account the need to be consistent with national rules of the Member States. Further, OLAF could recall Article 12(3) of the Regulation, which provides for an exception from the main rule on giving information to data subjects, where "the provision of such information (...) would involve a disproportionate effort or if recording or disclosure is expressly laid down by Community law." Such an exception is permitted however only if appropriate safeguards are put in place after consulting the European Data Protection Supervisor. Upon developing the guidelines and practices, the EDPS expects to be consulted on the matter.

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 of recourse to the EDPS (Article 20(3) of the Regulation). 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.

Article 12 of the Regulation allows another exception from the controller's obligation to provide the listed information to the data subjects, where the data subject already has that information. The EDPS emphasizes that even if Article 43a of the Implementing Rules of the Financial Regulation¹³ requires information to be provided in the grant or procurement calls to the effect that in order to safeguard the financial interest of the Communities, beneficiaries' personal data may be transferred, among others, to OLAF, the fulfilment of this requirement in itself is more of a transparency measure than an exception from Article 12 of the Regulation.

The general information to be given under Article 43a of the Implementing Rules of the Financial Regulation should in no way prejudice the right of data subjects to receive from OLAF the information listed in Articles 11 and 12, where applicable. OLAF is an investigative body, not an auditing body. In the latter, 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). In order to ensure fair processing, OLAF must inform data subjects in a more detailed way. The inclusion of OLAF into Article 43a of the Implementing Rules of the Financial Regulation has been promoted by the EDPS as a transparency measure.

¹³ 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)

It cannot however be understood as a sufficient condition to fulfil the exception of Article 12 "except where [the data subject] already has [the information]".¹⁴

2.2.9 Security measures

In order to ensure a consistent approach to OLAF security measures, the EDPS has decided to analyse the security measures in a horizontal way, rather than doing it in the context of each particular prior checking notification. Accordingly, this Opinion will not deal with security measures and the analysis will be carried out in a different Opinion which will address security issues only.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation (EC) No 45/2001 providing the considerations expounded above are fully taken into account. In particular, OLAF should:

- develop some internal guidelines addressed to agents responsible for criminal assistance cases reminding them and describing the rules to follow towards ensuring the data quality principle, including the principle that data kept in the OLAF dossier are updated and accurate.
- include the name and other personal information of staff members of companies and economic operators concerned in the OLAF file only if it is adequate and relevant for the criminal assistance.
- evaluate the necessity of the 20 years data conservation period *vis-à-vis* the purpose of the collecting and processing of personal data when it has experienced 10 years of existence. A second evaluation should be conducted when OLAF has experienced 20 years of existence.
- ensure that its agents comply with the requirement of Article 7 of the Regulation and such data transfer takes place where (i) the recipient has the appropriate competence and (ii) the transfer is necessary. This assessment should be done on a case by case basis.
- establish that the data transferred on its own initiate under Article 8(a) of the Regulation to competent national authorities are necessary for the performance of a task carried out in the public interest. This is an assessment that OLAF agents must carry out each time when they transfer personal information. OLAF agents responsible for criminal assistance cases should be made aware of this rule.
- revise the draft privacy statement as to the right of access and rectification by plainly endorsing the main rule and informing data subjects about the possibility to restrict those rights in certain cases: *"You have a right of access and correction or completion of your personal data. These rights however can be restricted under the specific circumstances of Article 20 of Regulation (EC) 45/2001."*
- ensure that the right of access and rectification is not restricted in a systematic way, but only on a case-by-case basis meeting the requirements and specific conditions of Article 20 of the Regulation. If there is a restriction on these rights or the provision of information is

¹⁴ 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.)

deferred, OLAF should draw up a note to the case file on the principal reasons of restricting the data subject's right.

- respect of the confidentiality of the identity of whistleblowers and informants in its activities in criminal assistance cases inasmuch as this would not contravene national rules regulating judicial procedures.
- revise the privacy statement as it was suggested by the EDPS with regard to the purposes of the criminal assistance cases, legal basis, contact information of the controller and right of access and rectification.
- develop guidelines in providing personalised information to the individuals concerned to the degree that is appropriate in the context of criminal assistance cases and consults the EDPS about such guidelines.

Done at Brussels, 12 October 2007

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