



Opinion on a notification for Prior Checking received from the Data Protection Officer of European Anti - Fraud Office on Mutual Assistance Exchanges

Brussels, 19 October 2007 (Case 2007-202)

1. Proceedings

On 21 March 2007, the European Data Protection Supervisor (EDPS) received a prior checking notification on "Mutual Assistance Exchanges" from the Data Protection Officer (DPO) of the European Anti-Fraud Office (OLAF).

On 30 April 2007, the EDPS sent a request for additional information. He received the replies 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 12 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. He received the comments on 9 October 2007.

2. Examination of the matter

2.1 The facts

The purpose of the present data processing operation is that OLAF assists competent authorities in the Member States of the EU referred to in Council Regulation (EC) 515/97 in preventing, investigating and prosecuting violations of customs or agricultural legislation and to enhance the effectiveness of the cooperation among Member States and between them and the European Commission. For this purpose, competent authorities of Member States communicate and exchange anti-fraud information with each other and with the Commission [OLAF]. Anti-fraud information is also exchanged with Third countries under Mutual Assistance Agreements.

These exchanges are made by means of the mailing applications of OLAF Anti-Fraud Information System (AFIS). AFIS is a collection of applications facilitating the exchange of anti-fraud information between OLAF and competent administrations in the framework of the Mutual Assistance Regulation (Council Regulation (EC) No 515/97¹).²

¹ 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. O.J. J 082, 22/03/1997 P. 0001-0016

² AFIS has several applications, of which AFIS Mail (structured and unstructured communications) is only one. Other applications include the Customs Information System (CIS) and the FIDE system. For more details see

Technical means to facilitate information exchange and description of processing

The data providers (see below) decide which format to use to send a message ("exchange") depending on its nature and type and on the reason for sending it. The exchange may refer to specific types of operation such as requesting or responding to:

- spontaneous assistance from one or more Member States,
- one or more Member States to be alert to individuals and companies in relation to specific movements, warehousing and transport of goods and to related documentation,
- an administrative enquiry or coordination request.

These exchanges are made by means of the mailing application of the Anti-Fraud Information System (AFIS) and are organised via the use of screens, called modules, which are designed to cover a specific type of information regarding a particular area of movement of goods and/or means of transport. The existing modules are the following:

- (1) Structured, relating to confirmed seizures/suspicious (information provided in templates)
 - Yachtinfo relates to information exchanges and seizure of goods on board of non-commercial vessels,
 - Marinfo: relates to information exchanges and seizure of goods made in containerised maritime traffic,
 - Ciginfo: relates to seizure of tobacco products and cigarettes.

This relates to actual seizure and suspicions based on confirmed information.

- (2) Structured, relating to unconfirmed seizure/suspicious (information provided in templates)
 - EWS-Customs: relates to information exchange of movements in Customs Transit of sensitive (highly taxed) goods,
 - Viasur concerns the collection for intelligence purposes of information relating to road traffic,
 - Consur concerns the collection of information for intelligence purposes related to containerised maritime traffic,
 - Marsur concerns the collection for intelligence purposes of information related to non-commercial vessels.

With the help of these structured messages concerning unconfirmed seizure and suspicions, the Commission supports Member States, international organisations and third countries in particular operational and intelligence activities during Joint Customs Operations (JCOs) or other similar short term regional and Commission hosted operations. The exchanges made in this context are input by the Member States and the Commission using a browser application, the AFIS portal, into a format called "Virtual Operations Coordination Unit" (Virtual OCU). The main differences from the so-called traditional exchange formats are that this is held centrally by OLAF and is only accessible for the receivers of the information during a specified limited period to enable one- time checking and collection of intelligence.

- (3) Unstructured (information provided in unstructured format, free text messages): AFIS mail.

DPO-81 notification on AFIS User Register and IT Service Management Tools. Available at: http://ec.europa.eu/anti_fraud/dataprotectionofficer/register/index.cfm?TargetUrl=D_REGISTER. It has to be noted that the EDPS has already prior checked the Customs Information System (CIS), see Opinion of 24 July 2007 on a notification for prior checking on the Custom Information System (Case 2007-177). Available at: www.edps.europa.eu.

Information may be exchanged in an unstructured format, in other words in free text. This is described as "AFIS mail".

Information is organised through the Operation Manager tool, where the structured and unstructured data are stored locally on the recipient's system, thus making it available for retransmission and analysis. This requires a local installation of software approved by the responsible national department.

Concerned data subjects

According to the notification form, the following individuals are data subjects:

1) Individuals and companies are mentioned in the mutual assistance exchanges communicated between the Member States' competent authorities and OLAF. In the case of companies, the data subjects are in particular the individuals involved in the activities of companies who are implicated in operations detected or planned which constitute or appear to constitute breaches of the customs or agricultural legislation, according to the applicant authority. The details of the individuals (name, address, date of birth, etc) involved in the activities of the company are mentioned provided that they are concerned by the irregularity or fraud.

2) Officials of the Member State authorities using the system and thus providing and receiving the information

There are therefore, three main categories of stakeholders involved in the processing operation whose personal data therefore are processed: the *persons concerned* by the investigation or prosecution, the *providers* of information to the system and the *recipients* of the information (both of these latter can be OLAF agents or individuals in Member States authorities).

The categories of data concerned

The following categories of personal data are involved: identification data, professional data, financial data, case involvement and criminal record data. More particularly:

- 1) surname, forename, maiden name, "alias"
- 2) date, place and country of birth
- 3) identification document/passport number
- 4) nationality
- 5) gender, family members
- 6) address, communication details (telephone and fax number), e-mail address, website
- 7) any particular or permanent physical characteristics
- 8) reason for inclusion of data
- 9) action(s) suggested and taken
- 10) notification if arrested or under arrest
- 11) warning indicating any history of being armed, violent or escaping.

In response to a question of the EDPS, OLAF replied that the details of family members are concerned only if they are relevant to the irregularities or fraud. Although the prior checking notification form includes information on the marital status, in response to a question of the EDPS, OLAF confirmed that such data are not included. Maiden name however can be processed in order to ensure the correct identification of a woman involved in an operation.

The controller noted that special categories of data falling under Article 10(1) of Regulation (EC) 45/2001 are not processed.

Information given to data subjects

The Privacy Statement for Mutual Assistance Exchanges (DPO-90) is available for the general public on the Europa site of OLAF (<http://ec.europa.eu/dgs/olaf/data/pst/MA%20exchanges.pdf>). It will also be available on the home page of AFIS Portal, which is accessible to the users of AFIS. The privacy statement supplies information on the personal data collected, the purpose of the processing operation, the technical means to exchange information between the Commission and Member State authorities, the transfer of personal data and who can be recipients, security measures taken, the storage of data, how data subjects can exercise their rights of access, modification and correction of their data and the right to have recourse to the EDPS.

Rights of data subjects

According to the Privacy statement, data subjects have the right to access the personal data OLAF holds regarding themselves and to correct and complete those data.

- Upon request, data subjects may be sent a copy of their own personal data to correct and complete. Any request for access, rectification, blocking or erasing should be directed to the delegated data controller for "Mutual Assistance Exchanges" (the name and email address of the delegated controller is given in the privacy statement).
- If the personal data for which an application for access has been received was supplied by another Member State, access shall be permitted only if the supplying partner has been given the opportunity to state its position.

The Privacy Statement stipulates that "*You have the right to have recourse to the European Data Protection Supervisor if you consider that OLAF has infringed your rights under Article 286 of the Treaty as a result of the processing of your personal data*".

Access to information and recipients of data

According to the notification form, recipients of personal data can be the nominated users of the AFIS System in OLAF, in the Member States or Third Countries' competent authorities. These include: concerned EU institutions, bodies, offices or agencies, competent national authorities and competent third country authorities and international organisations.

The Privacy statement further specifies the purposes of such data transfers, notably:

- Providers to and recipients of the information from the AFIS users within the Commission, in the Member States or Third Countries can access and receive data to enable them to carry out the related intelligence, investigation and operational activities in the prevention and pursuit of actual and suspected breaches of customs and agricultural regulations.
- The personal data may be transferred partly or wholly to designated persons in the competent administrative, legislative or judicial authorities in Member States, EU institutions, bodies, offices and agencies, international organisations and/or to authorities with similar

competences in third countries. Such transfers would be made in order to ensure the appropriate conduct and completion of operational activities as described in EC Regulation 515/97 or, in the case of third countries, to follow the procedures specified in the co-operation agreement.

Retention period and blocking

According to the notification form, the Commission may keep both electronic and paper files related to operations detected or planned which constitute or appear to the applicant authority to constitute breaches of customs or agricultural legislation for a maximum period of 10 years from the date on which the file was created.

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

2.2 Legal aspects

2.2.1 Prior checking

"Mutual Assistance Exchanges" between OLAF and competent authorities of Member States and third countries 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 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 in the context of mutual assistance exchanges on the basis of Regulation (EC) No 1073/1999 and Council Regulation No 515/97 concerns activities falling under the scope of Community law (Article 3(1) of the Regulation). The processing of personal data is done mainly by automatic means and paper files are also kept (Article 3(2) of the Regulation).

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."*

Mutual assistance exchanges can concern criminal record data as they concern anti-fraud information but also other type of data falling in this category, for example information on arrest or indication of any history of being armed, violent or escaping. The case involvement data certainly concern evaluation of individual conduct as to the breach of customs or agricultural legislation which may concern an irregularity or fraud (e.g. method of fraud, suspected concealment). Article 27(2)(a) and (b) therefore apply to this processing operation.

It has to be noted that although intelligence activities and transfers by OLAF to a third country are closely related to mutual assistance exchanges, those data processing operations will be examined in separate cases.³

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 21 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 22 May 2007. The procedure was suspended for a period of 64 days + 27 days with information requests; and for 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 the 22 of October 2007 (21 October 2007 being a Sunday).

2.2.2 Lawfulness of the processing

Personal data may only be processed 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 conjunctive elements: 1) the *Treaty or other legal instrument* based on the Treaty should foresee the data processing activities, 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*.

1) The EDPS notes that the following legislation and agreements constitute *the legal basis* for the processing operation:

- Article 1(2) of Council Regulation (EC) No. 1073/1999 stipulating that the European Anti-Fraud Office *"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 methods of fighting fraud and any other illegal activity affecting the financial interests of the European Community."*
- Council Regulation (EC) No 515/97 on mutual assistance between 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.⁴ More

³ Intelligence cases: 2007-027 and 2007-028, third country data transfers: 2005-154 and 2006-493.

⁴ Council Regulation (EC) No 515/97 on mutual assistance between 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. O.J. L 082, 22/03/1997. It has to be noted that a proposal for amending Regulation No 515/97 is currently making its way through the legislative process, and the EDPS issued his Opinion of 22 February 2007 on the proposal for a Regulation amending Council Regulation (EC) No 515/97 on mutual assistance between administrative authorities of the Member States and cooperation between the latter

specifically, Articles 17 and 18 of Title III "Relations with the Commission" of Council Regulation (EC) No 515/97 give ground to OLAF to exchange information with the competent authorities of Member States and receive personal data from them.

Article 17(1) specifies that *"The competent authorities of each Member States shall communicate to the Commission as soon as it is available to them: (a) any information they consider relevant concerning: goods which have been or are suspected of having been the object of breaches of customs and agricultural legislation, methods or practices used or suspected of having been used to breach customs or agricultural legislation, requests for assistance, action taken and information exchanged on application of Article 4 to 16 which are capable of revealing fraudulent tendencies in the field of customs and agriculture (...)"*. The Commission shall communicate to the competent authorities in each Member State, as soon as it becomes available, any information that would help them to enforce customs or agricultural legislation (Article 17(2) of Council Regulation 515/97).

Article 18(1) of Council Regulation 515/97 specifies: *"Where a Member State's competent authorities become aware of operations which constitute, or appear to constitute, breaches of customs or agricultural legislation that are of particular relevance at Community level, and especially: where they have, or might have, ramifications in other Member States, or where it appears likely to the above authorities that similar operations have also been carried out in other Member States, they shall communicate to the Commission, as soon as possible, either on their own initiative or in response of a reasoned request from the Commission, any relevant information, be it in the form of documents or copies of extracts thereof, needed to determine the facts so that the Commission may coordinate the steps taken by the Member States. The Commission shall convey this information to the competent authorities of the other Member States.*

Article 18(3) of Council Regulation 515/97 stipulates further that in response to a reasoned request from the Commission, the Member State's competent authorities should act according to the rules of assistance on request.⁵ This article establishes that the Commission (OLAF) shall be involved where there is a specific interest at Community level.

Article 18(4) of Council Regulation 515/97 lays down the main rule when OLAF initiates an enquiry and information exchange should take place: *"Where the Commission considers that irregularities have taken place in one or more Member States, it shall inform the Member State or States concerned thereof and that State or those States shall at the opportunity carry out an enquiry, at which Commission officials may be present (...)"* The Member State(s) concerned should as soon as possible communicate their findings to the Commission.

- Mutual Administrative Assistance Agreements/Protocols concluded between the EC and some third countries serves as legal basis for exchanges of information in customs matters. Article 19 of Council Regulation (EC) 515/97 lays down that: *"Provided the third country concerned has given a legal undertaking to provide the assistance required to gather proof of the irregular nature of operations which appear to constitute breaches of customs or agricultural legislation or to determine the scope of operations which have been found to constitute breaches of that legislation, information obtained under the Regulation may be communicated to that third country as part of a concerted action, subject to the agreement of the competent authorities supplying the information, in accordance with their internal provisions concerning the communication of personal data to third countries."*

and the Commission to ensure the correct application of the law on customs and agricultural matters (COM(2006) 866 final). Available at: www.edps.europa.eu

⁵ Articles 4-8 of Title I of Council Regulation (EC) No 515/97

2) The aim of mutual assistance exchanges is to communicate and exchange anti-fraud information between Member States and the Commission with the aim of preventing, investigating and prosecuting violations of customs or agricultural legislation. The processing operation should therefore be regarded as serving *public interest*.

3) The exchange of information in the context of mutual assistance between OLAF and the Member States *in abstracto* can help to protect the Community's financial interest. 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 mutual assistance exchange 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.

It is stated in the notification that the processing operation falls under Article 5(b) of the Regulation. It has to be noted that there is a "grey zone" between Article 5(a) and 5(b) of the Regulation. The EDPS considers that Article 5(b) is applicable in cases where the law defines the list of specific personal data to be processed. This is not the case here.

2.2.3 Processing of special categories of data

OLAF noted that no data falling under Article 10(1) of the Regulation are processed in mutual assistance exchanges.

The EDPS is however concerned that special categories of data might appear in mutual assistance exchanges, in the fields where inserting a free text is possible, such as "remarks" or "comments;" and the description of physical characteristics may reveal data related to health or to race. Article 10(1) of the Regulation as a main rule prohibits 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. In those cases, where such data appear in the mutual assistance exchanges, the controller should duly respect the criteria embodied in Article 10(4) of the Regulation. The EDPS recalls hereby those conditions: "*subject to the provision of appropriate safeguards, and for reasons of substantial public interest, exemptions in addition to those laid down in paragraph 2 may be laid down by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by decision of the European Data Protection Supervisor.*" In any case, as it is a requirement of the data quality principle, no special categories of data should be exchanged unless those are directly relevant to the matter under investigation.

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 by Article 1(2) of Regulation (EC) No 1073/1999 and the respective provisions of the Council Regulation 515/97 and on the mutual administrative assistance agreements as it is described above in Part 2.2.2 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.*"

In order to meet the principle, OLAF should ensure that its procedure guarantees the principle of data quality. The amount and type of data processed in every mutual assistance exchanges may vary according to the nature of the particular matter and therefore it is not possible for the EDPS to determine whether the data in the dossier are appropriate in general. It is especially true, as "open field" data such as "remarks" or "comments" can be filled up in the exchanges. The question whether personal data included in the files are adequate, relevant and not excessive will always depend on the particular case at stake. As mentioned above (part 2.2.3), including special categories of data should be avoided unless it is directly relevant to the matter under investigation, and unless the specific requirements of Article 10 exceptions are met. It is a requirement of "relevance" of personal data, that the details of the individuals involved in the activities of the company can only be provided if those individuals are concerned by the irregularity or fraud. The EDPS approves OLAF's position that the details of family members can be included only if that is relevant to the irregularities or fraud, and the maiden name is included to ensure the correct identification of a woman involved in an operation. On the other hand, OLAF's correction explaining to the EDPS that in contrast to what is stated in the prior checking form, that marital status is not included in the exchanges, should be reflected in section 6 of the prior checking notification form (and in the corresponding section 17 of the DPO notification form).

OLAF should therefore pay special attention in safeguarding this principle in its intervention in mutual assistance exchanges. To this aim the EDPS suggests to develop 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.

Data should also be *accurate and where necessary kept up to date*. (Article 4(1)(d) of the Regulation). The specificity of the mutual assistance exchanges is that competent national authorities send information to OLAF and OLAF can also transfer information to national authorities with the aim of preventing, investigating and prosecuting violations of customs or agricultural legislation in Member States. In order to enhance effectiveness of cooperation, the accuracy of personal data exchanged is a key element. This is even more true in those cases where "unconfirmed seizures" and "suspicions" relates to personal data. 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 OLAF to establish internal guidelines, assisting OLAF agents on the ways to ensure that personal data kept in OLAF exchanges 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.*" This principle is connected to the right of access and rectification and will be therefore 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

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

The Commission keeps both electronic and paper files related to operations which are detected or planned and which constitute or appear to constitute breaches of customs or agricultural legislation, for a maximum period of 10 years. This period starts to run from the date on which the file was created.

The EDPS stresses that personal data permitting the identification of the data subjects in the files of mutual assistance exchanges kept by OLAF should not be kept longer than it is necessary for the purpose for which those are collected and processed. In this regard, the EDPS requests the controller to reconsider the reasons for keeping the electronic and paper documents for a 10 years period and inform the EDPS accordingly.

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.

According to the information received, OLAF transfers personal data A) to recipients within the Commission and in concerned Community institutions, bodies, offices or agencies, B) to competent national authorities of Member States of the EU, and C) to competent third country authorities or to international organisations.

Transfer within or between Community institutions and bodies covered by Article 7 of the Regulation

The information received by the EDPS specifies that:

- a) personal data can be transferred to AFIS users within the Commission to enable them to carry out the related intelligence, investigation and operational activities in the prevention and pursuit of actual and suspected breaches of customs and agricultural regulation, and
- b) designated persons in Community institutions (bodies, agencies, offices) can receive personal data from OLAF in order to ensure the appropriate conduct and completion of operational activities as described in EC regulation 515/97.

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.

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

During mutual assistance exchanges, nominated users of the AFIS system in the Member States competent authorities can receive personal data from OLAF to enable them to carry out the related intelligence, investigation and operational activities in the prevention and pursuit of actual and suspected breaches of customs and agricultural regulations. Personal data may be transferred partly or wholly to designated persons in the competent administrative, legislative or judicial authorities in Member States in order to ensure the appropriate conduct and completion of operational activities as described in Regulation 515/97.

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 all sectors, including judicial 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 judicial 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, (...)."*

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 mutual assistance exchanges should be made aware of this rule.

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 mutual assistance exchanges *in abstracto* can be seen to fulfil 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 by carrying out related intelligence, investigation and operational activities for the prevention, investigation and prosecution of (suspected) breaches of customs and agricultural regulations.

As to scenario (B): for those Member States that have not extended their implementation of Directive 95/46/EC to judicial 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

The notification for prior checking specifies that personal data can be transferred to competent third country authorities and international organisations. In those transfers Article 9 of the Regulation should be respected. These aspects will not be analysed in this opinion, as OLAF's compliance with Article 9 of the Regulation is being dealt with in the context of cases 2005-154 and 2006-493. The EDPS analyses 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 data quality. 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 mutual assistance exchanges the individuals whose data are processed can have an access/rectification request submitted:

- A) to the national authorities which situations are governed by national data protection law, and also
- B) to OLAF concerning the data processed by OLAF, which situation falls under Regulation (EC) 45/2001.

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, being the EDPS in the present context).

The privacy statement specifies that the data subjects have the right of access to their own personal data held by OLAF and that they have a right to correct and complete them. The exercise of the right is based on a request, and individuals concerned "may" be sent a copy of their personal data to correct or complete them. Requests should be addressed to the controller, whose name and contact information is furnished. If personal data to which the access request was made were supplied by another Member State, access shall be permitted only if the supplying partner has been given the opportunity to state its position. According to the notification, the exemptions and restrictions specified in Article 20 may be applicable to this processing activity in some cases.

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 and under the conditions laid down in that provision. The EDPS recalls that 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.*" For example, OLAF may allow suspension of access for the prevention or prosecution of a criminal offence. Any such exception or restriction can be applied only on a case-by-case basis and never in a systematic fashion.

Therefore, 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 exception 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 suggest 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 on the restriction of his/her right and of 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 have to be guaranteed. Indeed, this provision, will play a role for instance in those cases where the data subject have been informed about the existence of a mutual assistance exchange conducted by OLAF or has the knowledge of it, 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.

2.2.8 Information to the data subject

The Regulation requires that the 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 refers 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 mutual assistance exchanges, OLAF more likely collects information from other sources 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 for the data being supplied by the data subjects themselves, for

example personal details of the forwarding agents given by 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 although on certain elements it requires some improvements.

First, the references to other notifications closely related to mutual assistance exchanges should be updated. For example, as OLAF Europa website indicates, DPO-77 "AFIS User Register" was merged with DPO-81 "AFIS IT Management Tool" and both notifications are currently available on the website as DPO-81 under the heading "AFIS User Register and IT Service Management Tools." More accurate cross-references will help the interested individuals to learn about OLAF data processing operations.

Second, the "right to recourse" section of the privacy statement makes a reference to Article 286 of the Treaty. The EDPS requests that a more specific reference to Regulation (EC) No 45/2001 is made, as this is the instrument which describes the right of the people concerned in more detail. For practical reasons, it would be useful to provide the contact information of the EDPS (edps@edps.europa.eu).

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 mutual assistance exchanges that the information should be provided A) either at the time when OLAF receives the information from national authorities 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 OLAF Europa website is a positive step towards complying with Article 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 which are concerned by the anti-fraud measure may not visit 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. As described above, such personalised notices should be provided at the time of recording of the data or at the time of transferring it to a third party. This obligation applies to information uploaded by OLAF. The EDPS therefore calls OLAF to develop practices in providing personalised information to the individuals concerned to the degree it is appropriate in the context of mutual assistance exchanges 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 and could recall Article 12(2) 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." 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 to 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.

For information regarding data subjects which has been uploaded by the Member States, it appears more appropriate and straightforward for them to ensure the provision of information. Indeed, in such cases, Member States are in more direct contact with such individuals with whom they are also more likely to share the language. In any event, the situation where individuals are not informed either because OLAF relies on Member States or vice versa should be avoided. Accordingly, the EDPS calls upon OLAF to make the necessary arrangements with the Member State authorities to make a commitment to notify the data subject in accordance with the requirements of their national data protection legislation.

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 45/2001 providing the considerations expounded above are fully taken into account. In particular, OLAF should:

- respect the criteria allowing exception from Article 10 (4) of the Regulation, in case special categories of data might appear in the open fields of the exchanges or in the description of physical characteristics. Such data in any case should be included only if those are relevant to the matter under investigation.
- should therefore pay special attention to the data quality principle in its intervention in mutual assistance exchanges. To this aim OLAF should develop some internal guidelines addressed to agents responsible for such processing operations reminding them and describing the rules to follow towards ensuring the data quality principle, including the requirement that personal data kept in OLAF exchanges dossier should be accurate and updated.
- correct section 17 of the notification form (section 6 of the prior checking notification), which in the present form includes information on the processing of marital status.
- reconsider the reasons for keeping the electronic and paper documents for a 10 years period and inform the EDPS accordingly.
- ensure, in order to comply with Article 7 of the Regulation in sending personal data, 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.
- establish that the data are necessary for the performance of a task carried out in the public interest each and every time when OLAF sends personal information to competent national authorities on its own initiative (cases falling under Article 8 of the Regulation as expounded above). This is an assessment that OLAF agents must carry out each time when they transfer

personal information. OLAF agents responsible for mutual assistance exchanges should be made aware of this rule.

- respect the conditions of Article 20 whenever a restriction on the right of access, rectification or right to receive information is applied. Rights can not be restricted systematically, but on a case-by-case basis, where such a restriction is necessary for safeguarding an interest specified in Article 20. Restrictions can apply only temporarily.
- correct the text of the privacy statement as requested above.
- develop practices in providing personalised information to the individuals concerned to the degree it is appropriate in the context of mutual assistance exchanges and consult the EDPS about such guidelines.
- make the necessary arrangements with the Member State authorities to notify the data subjects in accordance with the requirements of their national data protection legislation where data are entered by Member State authorities.

Done at Brussels, 19 October 2007

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