



## **Opinion on a notification for Prior Checking received from the Data Protection Officer of European Anti - Fraud Office on Coordination Cases**

Brussels, 7 April 2008 (Case 2007-699)

### **1. Proceedings**

On 22 November 2007, the European Data Protection Supervisor (EDPS) received a prior checking notification on "Coordination cases" from the Data Protection Officer (DPO) of the European Anti-Fraud Office (OLAF).

On 20 December 2007, the EDPS sent a request for additional information. He received the replies on 18 January 2008.

On 12 February 2008, 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 28 March 2008.

### **2. The facts**

The purpose of the present data processing operation is to coordinate investigations relating to the protection of the Communities financial interests carried out by national law enforcement agencies. Actually, coordination cases are cases that could be the subject of OLAF external investigations, but where OLAF's role is to contribute to investigations being carried out by other national or Community services by, among other things, facilitating the gathering and exchange of information and ensuring operational synergy among the relevant national and Community services. The main investigative input is provided by other authorities. OLAF's role includes facilitating contacts and encouraging the responsible authorities to work together. OLAF does not undertake any investigative activities, as defined in section 3.4.4 of the 2005 OLAF Manual.

The legal basis for coordination cases is Article 1(2) of Regulation 1073/99. In addition sector-specific legislation may be applicable, in particular: Article 18(4) of Regulation 515/97 (customs); Article 9 of Regulation 1258/1999 and Article 6 of Regulation 595/91 (agriculture); Articles 38(2) and (3) of Regulation 1260/99 (structural funds).

The Case Management System (CMS) contains all case-related documentation created during the course of a coordination case<sup>1</sup>.

### *Concerned data subjects*

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

- 1) Staff of the EU institutions, bodies, offices and agencies involved in the case as whistleblowers, informants or witnesses;
- 2) Persons outside the EU Institutions involved in the case and persons who are mentioned in the documents kept in the file as a result of the operational activities (e.g. representatives of the companies concerned, informants and witnesses).
- 3) Members of staff of Member States' and third countries' administrations, accounting or auditing bodies, staff of EU Institutions and international organisations acting as operational partners to OLAF.

There are therefore three main categories of stakeholders involved in the processing operation whose personal data 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 other Commission services, Member States' authorities, authorities in third countries or international bodies).

### *The categories of data concerned*

The following categories of personal data are involved:

- identification data, professional data: surname, forename, maiden name, "alias", company name, date, place and country of birth, identification document/passport number, nationality, address, communication details (telephone and fax number), e-mail address, website, profession, employer;
- case involvement data: statements made regarding events under investigation where the data subject is mentioned, evidence or notes mentioning the data subject in relation to the events under investigation, information concerning personal relationships if relevant to the investigation (for example possibility of a conflict of interest).

The controller noted that, in principle, special categories of data falling under Article 10(1) of Regulation (EC) 45/2001 are not processed. OLAF is not aware of having received data falling under Article 10 to date. However, OLAF cannot predict what information it may receive in the future. It is theoretically possible that Article 10 data might be contained in a future communication received by the Office in a coordination case. If that happens, OLAF would follow the paragraph 2 of the Data Protection Guidelines for OLAF investigators based on the opinion of the EDPS of 23 June 2006<sup>2</sup>. According to this provision, processing of special categories of data is generally prohibited and OLAF case handlers must avoid inclusion of these categories of data in the files unless it is necessary for the establishment, exercise or defence of legal claims in the specific case at hand. In such cases, a note should be sent to the OLAF DPO on a form provided.

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<sup>1</sup> For details, cf. EDPS case n° 2005-418 relating to OLAF's processing of personal data in the context of internal investigations.

<sup>2</sup> EDPS case n° 2005-418 relating to OLAF's processing of personal data in the context of internal investigations.

### *Information given to data subjects*

The Privacy Statement for Coordination cases (DPO-143) is available for the general public on the Europa site of OLAF (<http://ec.europa.eu/dgs/olaf/data/docpst/coordination.pdf>). The privacy statement supplies information on the nature of the data processing operation, personal data collected, the purpose of the processing operation, the transfer of personal data and who can be recipients. It also states the 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.

On the other hand, OLAF has not put in place information notices addressed directly to individuals who are the subject of coordination cases. OLAF has explained that given that its role in coordination cases is limited to coordinating the investigation activities of other national or Community services, OLAF could interfere with their proceedings by doing so. For this reason, in order to provide information to data subjects, OLAF proposes in the near future to enter into agreements with Member States asking them to include in their privacy statement addressed to the data subjects a paragraph informing them of the possibility for their personal data to be transferred to OLAF for coordination purposes.

### *Rights of data subjects*

According to the Privacy statement, data subjects have the right to access the personal data OLAF holds regarding them 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 "Coordination cases" (the name and email address of the delegated controller is given in the privacy statement). The privacy statement also states that the controller can be contacted "*in case of any difficulties, or for any questions relating to the processing of your personal data*". It states that "*Exemptions under Article 20 (1) (a) and (b) of Regulation 45/2001 may apply*".

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

### *Recipients of data*

According to the notification form, recipients of personal data can be: concerned EU institutions, bodies, offices or agencies, competent Member State authorities and competent third country authorities and international organisations<sup>3</sup>.

The privacy statement further specifies the purposes of such data transfers, notably to ensure the appropriate conduct of the national investigations and their follow-up.

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<sup>3</sup> Concerning transfers to third countries and international organisations, see OLAF's memorandum D/04668 of 13 June 2005 as well as the EDPS opinion n°2005-154.

### *Retention period and blocking*

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

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

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

## **3. Legal aspects**

### **3.1. Prior checking**

"Coordination cases" where OLAF's role is to contribute to investigations being carried out by other national or Community services 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 question carried out on the basis of Regulation (EC) No 1073/1999 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 (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."*

Coordination cases may concern the exchange of information on criminal data and suspicions. The case involvement data certainly concern evaluation of individual conduct as to the breach of 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 mutual assistance exchanges, criminal assistance cases, intelligence activities and transfers by OLAF to a third country are closely related to "coordination cases", those data processing operations are examined in separate cases.<sup>4</sup>

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 22 November 2007. According to Article 27(4) the present opinion must be delivered within a period of two months. The procedure was suspended for a period of 74 days. Thus, the opinion should be issued no later than the 7 April 2008, the 5 April 2008 being Saturday.

### 3.2. Lawfulness of the processing

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) N°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) N°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.<sup>5</sup> More specifically, Article 18 of Title III "Relations with the Commission" of Council Regulation (EC) No 515/97

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<sup>4</sup> Cf. intelligence cases: 2007-027 and 2007-028, third country data transfers: 2005-154 and 2006-493, mutual assistance exchanges: 2007-202, criminal assistance cases: 2007-203.

<sup>5</sup> 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 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](http://www.edps.europa.eu)

provides the basis for OLAF to exchange information with the competent authorities of Member States and receive personal data from them.

Article 18(4) of Council Regulation N°515/97 lays down the main rule when OLAF initiates an enquiry and that 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.

- Council Regulation (EC) N°1258/99 of 17 May 1999 on the financing of the common agricultural policy lays down the rules concerning the cooperation between the Commission and the national authorities in the field of agricultural policy. Article 9 regulates the coordination policy in respect of inspections and enquiries.

- Council Regulation (EC) N°595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field. Article 6 states that "*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 earliest opportunity, hold an inquiry in which officials of the Commission may take part (...).*" The Member State(s) concerned should as soon as possible communicate their findings to the Commission.

- Council Regulation (EC) N°1260/99 of 21 June 1999 laying down general provisions on the Structural Funds. Articles 38(2) and (3) of Regulation states that:

*"2. The Commission in its responsibility for the implementation of the general budget of the European Communities shall ensure that Member States have smoothly functioning management and control systems so that Community funds are efficiently and correctly used.*

*To that end, without prejudice to checks carried out by the Member States in accordance with national laws, regulations and administrative provisions, Commission officials or servants may, in accordance with arrangements agreed with the Member State in the framework of cooperation described in paragraph 3, carry out on-the-spot checks, including sample checks, on the operations financed by the Funds and on management and control systems with a minimum of one working day's notice. The Commission shall give notice to the Member State concerned with a view to obtaining all the assistance necessary. Officials or servants of the Member State concerned may take part in such checks.*

*The Commission may require the Member State concerned to carry out an on-the-spot check to verify the correctness of one or more transactions. Commission officials or servants may take part in such checks.*

*3. The Commission and the Member States shall on the basis of bilateral administrative arrangements cooperate to coordinate plans, methods and implementation of checks so as to maximise the usefulness of those carried out. They shall immediately exchange the results of the checks carried out."*

2) The aim of coordination of cases is to ensure operational synergy among the relevant national and Community services by facilitating the gathering and exchange of information. The processing operation should therefore be regarded as serving the *public interest*.

3) The exchange of information in the context of coordination cases by OLAF and the national authorities *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 information 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.

### **3.3. Processing of special categories of data**

OLAF noted that, in principle, no data falling under Article 10(1) of the Regulation are processed in coordination cases.

The EDPS is however concerned that special categories of data might appear during the coordination cases, 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, 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 will be analysed below, it is a requirement of the data quality principle that no special categories of data should be exchanged unless they 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 described above in point 3.2 of the opinion.

### **3.4. 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 during coordination cases 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 fields" 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 (point 3.3), 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 suspected irregularity or fraud under investigation.

OLAF should therefore pay special attention in safeguarding the quality of data in its role as a case coordinator. To this aim, the EDPS suggests developing 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 coordination cases is that competent national authorities send information to OLAF and OLAF can also transfer information to national authorities with the aim of ensuring the appropriate conduct of the national investigations and any follow-up of them. In order to enhance effectiveness of coordination, the accuracy of personal data exchanged is a key element. This is particularly so even in those cases where "unconfirmed seizures" and "suspicions" relates to personal data. Therefore, OLAF should take every reasonable step to ensure that the information coming from national authorities and then forwarded to national authorities are accurate and updated.

To achieve this end, the EDPS recommends that OLAF establish internal guidelines, assisting OLAF agents on the ways to ensure that personal data kept in OLAF case 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 point 3.7 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 point 3.2. Fairness relates to the information given to the data subjects and therefore will be examined in point 3.8 of this opinion.

### **3.5. Conservation of data**

Personal data can be kept in a form which permits identification of the data subjects for no longer than is necessary for the purposes for which the data are collected and/or further processed (Article (4)(1)( e) of the Regulation).

OLAF keeps both electronic and paper files related to coordination cases for up to 20 years after the date on which the case was closed.

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

The EDPS stresses that personal data permitting the identification of the data subjects in the files kept by OLAF should not be kept longer than it is necessary for the purpose for which those are collected and processed. The EDPS suggests, as he did in his previous opinions<sup>6</sup> that when OLAF has experienced 10 years of existence a preliminary evaluation of the necessity

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<sup>6</sup> Cf. Opinion of 23 June 2006 on a notification for prior checking on OLAF internal investigations (Case 2005-418).



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.

### **3.6. 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 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 coordination cases, 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 anti-fraud 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 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 they transfer personal information. OLAF agents responsible for coordination cases 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 the context of coordination cases *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 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 anti-fraud 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, is 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 the case 2005-154.

### **3.7. 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 the processing, the individuals whose data are processed can have an access/rectification request submitted:

- A) to the national authorities - these situations are governed by national data protection law, and also
- B) to OLAF concerning the data processed by OLAF - these situations fall 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 case of the scenario "B)" above).

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 provided. 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 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 suggest that the controller 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 has to be guaranteed. Indeed, this provision will play a role, for instance in those cases where the data subjects have been informed about the existence of a coordination case 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.

### **3.8. Information to the data subject**

The Regulation requires that the data subjects be 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 the processing, 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 them. 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.

In particular, 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 persons concerned in more detail. For practical reasons, it would be useful to provide the contact information of the EDPS ([edps@edps.europa.eu](mailto: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. 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 (cf. point 3.7).

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 who are concerned by the OLAF coordination cases may not visit the OLAF website, and thus, may never have access to such information.

Article 12 of the Regulation allows an 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

Regulation<sup>7</sup> 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, this general information should in no way prejudice the right of data subjects to receive from OLAF the information listed in Articles 11 and 12, where applicable. 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). Besides, many persons concerned in the case coordinated by OLAF will not have received the information foreseen in Article 43a of the Implementing Rules. Therefore, 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. 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]*".

This exception, though, can be relied on taking into account other aspect of the processing operation. In coordination cases, as information regarding data subjects has, for a large part, been uploaded by the national authorities, it appears more appropriate and straightforward for them to ensure the provision of data protection information. Indeed, in such cases, national authorities are in more direct contact with such individuals with whom they are also more likely to share the language.

In any case, the situation where individuals are not informed either because OLAF relies on national authorities or vice versa should be avoided. In order to address this concern, OLAF has proposed to the EDPS to implement the arrangement described under section 2 (paragraph dealing with information to the data subjects). Indeed, OLAF has suggested that relevant national authorities include in their privacy statement addressed to data subjects a paragraph informing them of this possibility for their personal data to be transferred to OLAF for coordination purposes. Because individuals will have been informed of the transfer of their personal data to OLAF by relevant national authorities, it would not be necessary for OLAF to provide such information again. In order to ensure the effectiveness of this arrangement, OLAF proposes entering into an agreement with relevant national authorities pursuant to which they would agree to inform data subjects that their data will be transferred to OLAF for coordination purposes. The EDPS agrees that, if the agreements are implemented, this is in line with Articles 11 and 12 of Regulation 45/2001 which requires the data controller to provide the information to the data subject "*except where he or she already has it*".

The EDPS understands that given the limited role that OLAF plays in coordination cases and the potential interference with Member State proceedings, it may not be appropriate for OLAF to provide information notices directly to individuals who are the object of a coordination case. The EDPS considers that the arrangement that OLAF has proposed may be an effective way of providing the information to data subjects as requested under Article 11 and 12 of Regulation (EC) No 45/2001 while avoiding interfering with the national proceedings. Accordingly, the EDPS calls upon OLAF to enter into such agreements with Member States.

However, if the relevant national or Community authorities do not enter into an agreement with OLAF or if the data are uploaded directly by OLAF, there is a need to supplement the

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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)

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. The EDPS therefore calls OLAF to develop guidelines in providing personalised information to the individuals concerned to the degree it is appropriate in the context of case coordination and inform the EDPS about such guidelines. In developing the guidelines, OLAF could take into account the need to be consistent with national rules 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.

### **3.9. 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 provided 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 pay special attention to the data quality principle in its role of case coordinator. 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.
- reconsider the reasons for keeping the electronic and paper documents for a 20 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 coordination cases 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 in the point 3.8 above.
- make the necessary arrangements with the national or Community authorities to notify the data subjects that their data will be transferred to OLAF for coordination purposes.
- in absence of such arrangements or when data are directly uploaded by OLAF, develop practices in providing personalised information to the individuals concerned to the degree it is appropriate in the context of coordination of cases and consult the EDPS about such guidelines.

Done at Brussels, 7 April 2008

(signed)

Joaquín BAYO DELGADO  
Assistant European Data Protection Supervisor