

## **Opinion on a notification for prior checking received from the Data Protection Officer of the European Commission on the management of information sent by OLAF under the Memorandum of Understanding**

Brussels, 23 March 2009 (Case 2009-0011)

### **1. Procedure**

On 6 January 2009 the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Commission a notification for prior checking concerning the management of information sent by OLAF under the Memorandum of Understanding.

On 26 January 2009 the EDPS asked the Commission for some additional information, which was received on 29 January 2009. On 6 March 2009 the draft opinion was sent to the DPO for comment. Comments were received on 20 March 2009.

### **2. The facts**

The Memorandum of Understanding (hereinafter the MoU) on the exchange of information between OLAF and the Commission with respect to OLAF internal investigations in the Commission, adopted on 23 July 2003, provides for information sent by OLAF to the Commission in connection with internal investigations to be passed on to the relevant Commissioners and Directors-General, in confidence and on a need-to-know basis. That information frequently includes personal data.

In the EDPS's opinion on OLAF internal investigations<sup>1</sup>, it is stated that OLAF processes data in the course of internal administrative investigations<sup>2</sup> conducted to determine whether fraud, corruption or any other illegal activity affecting the financial interests of the European Community have occurred, or whether serious matters relating to the discharge of professional duties such as to constitute a dereliction of the obligations of officials and other servants of the Communities liable to result in disciplinary or criminal proceedings have occurred, and if so, to refer the results of OLAF's investigation to the appropriate national or Community authorities for judicial, disciplinary, administrative, legislative or financial follow-up. In the areas mentioned above (Article 1 of Regulation (EC) No 1073/1999), OLAF conducts administrative investigations within the institutions, bodies, offices and agencies (referred to as "internal investigations" in Article 4 of Regulation (EC) No 1073/1999).

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<sup>1</sup> Opinion of 23 June 2006, Case 2005-418, on the EDPS website.

<sup>2</sup> Internal investigations are one of the types of activity conducted by OLAF. The others are described in point 3.3.3.1 of the OLAF Manual and include external investigations, coordination cases, criminal assistance cases, monitoring cases, non-cases (cases set aside without any action being taken after an initial assessment) and *prima facie* non-cases (cases set aside at first sight).

The MoU states that OLAF must inform the General Secretariat (hereinafter GS) of the Commission, in writing, of:

- the opening of an internal investigation;
- OLAF's activities on Commission premises;
- the involvement of an official or other agent in an investigation;
- information obtained in the course of an internal investigation that would suggest that the Commission should consider taking steps to safeguard its interests;
- information passed to national judicial authorities;
- the closure of an investigation (sending the final report).

OLAF sends the information to Unit B4 of the GS.

The Commission does not receive all the data relating to the investigations conducted by OLAF, only those provided for by Regulation (EC) No 1073/1999, as indicated in the MoU adopted in July 2003. The information is summary and does not give full details of investigations, hearings, evidence etc. OLAF retains control of the information it passes to the Commission during an investigation and generally communicates summary information at the start of and during an investigation.

The processing carried out by Unit GS B4 is also covered by Regulation No 1073/1999:

- the Secretary-General, to whom information from OLAF to the Commission is usually addressed, takes any necessary action on it;
- there are assurances that the information will be processed with due regard for the relevant rules and procedures, viz.:
  - protection of personal data
  - protection of presumed innocence
  - protection of ongoing investigations.

This enables the Commission (the Commissioner and the relevant department) to have the information necessary to take precautionary measures to protect the institution's financial interests and reputation in justified circumstances.

Processing is covered by the existing legal framework (relevant Regulation and MoU) and follows procedures to protect data and the confidentiality of any information received (strict observance of the need-to-know principle).

#### Exact data processed by GS B4

Under the MoU concerning a code of conduct in order to ensure a timely exchange of information between OLAF and the Commission with respect to OLAF internal investigations in the Commission, the Commission must be informed when it becomes apparent to OLAF that a member, official or other agent of the Commission may be personally involved in an investigation. When OLAF has to inform the Commission under the MoU, it informs the Secretary-General of the Commission in writing (or, in certain specific cases, the President of the Commission). The information which OLAF must send the Commission is also specified in the MoU and includes:

1. the CMS (Case Management System) reference of the internal investigation in which the person is involved and its opening date;
2. the identity of the person(s) under investigation;

3. a summary of the facts giving rise to the suspicion that the person under investigation may be personally involved;
4. any other case-specific matters, such as:
  - i. whether the person concerned has been informed by OLAF of the allegations against him/her;
  - ii. whether, in accordance with Article 4 of Commission Decision 1999/396/EC, the Commission is asked to agree to defer informing the person concerned, in order not to compromise the internal investigation
  - iii. any relevant Commission or public documents;
  - iv. any other information that may assist the Commission in deciding whether to take measures to protect or preserve its interests or security.

However, the provision of information to the Commission may, exceptionally, be deferred. The following practical arrangements apply where the provision of the above information to the Commission may be deferred in cases where absolute secrecy is needed for the purposes of the investigation or where recourse must be had to means of investigation falling within the competence of a national judicial authority. After consulting the Director of Investigations and Operations, the OLAF adviser in charge of the case must state in writing the reasons for deferral in a note for the file. The resulting document must be placed in the case file. As soon as the specific reasons for deferral cease to exist, the information must be sent to the Commission in accordance with paragraph 1, setting out the reasons for the deferral.

The Commission is also informed when information is forwarded to national judicial authorities within the framework of an ongoing internal investigation. The Commission is usually informed at the same time as the judicial authorities concerned. The decision to inform the Commission must be taken with due regard for confidentiality, the relevant national law and the Commission's interests. The Director-General of OLAF informs the Commission, in accordance with paragraph 1, whenever OLAF forwards information to judicial authorities. The information which OLAF sends includes the first 3 points set out above and any other information that may assist the Commission in deciding whether to take measures to protect or preserve its interests or security. Where, in the specific circumstances of a case, OLAF believes certain measures should be taken by the Commission in order to ensure the efficacy of the investigation, it may submit such recommendations as it deems appropriate to the Commission. The Secretary-General of the Commission will inform OLAF's Director-General, in writing, of any action taken on such recommendations.

The Commission receives the final reports on internal investigations and information about cases closed with no further action being taken.

- conclusions referring by name to a Member, official or servant of the Commission may not be drawn once the investigation has been completed without the interested party's having been enabled to express his views on all the facts which concern him. However, in cases necessitating the maintenance of absolute secrecy for the purposes of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority, compliance with the obligation to invite the person concerned to give his views may be deferred in agreement with the President of the Commission or its Secretary-General

respectively<sup>3</sup>. The following practical arrangements then apply:

- The Director-General of OLAF informs the Commission in writing, in accordance with paragraph 1, of the intention to defer the invitation of the interested party to give his/her views and requests its agreement, giving the reasons for the need to maintain absolute secrecy. The Commission replies promptly.
- Investigation report and action taken following investigations<sup>4</sup>
  - The Director-General of OLAF promptly forwards all final reports of internal investigations and any useful related documents to the Commission in accordance with paragraph 1. The Secretary-General also sends these final reports to any Commissioner or Director-General concerned.

Upon receipt of such reports, the Commission takes any appropriate action and the Secretary-General reports to OLAF's Director-General on any measures taken within the deadline laid down by him.

- Where a case is closed without further action, OLAF informs the Commission in accordance with the previous point.

In order to structure information sent from OLAF to the Commission, forms covering the most frequently-encountered situations (opening/closing investigations etc.) have been introduced in the interests of maintaining consistency between similar items of information. These forms list the information to be supplied.

In addition to these "structured" information flows which represent the majority of data processed by GS B4, OLAF and the Commission also communicate on an ad hoc basis when necessary in a particular case, for example to take stock of the progress of an investigation which has aroused media interest, or when it appears that measures will have to be taken to protect the reputation or financial interests of the Commission. When OLAF believes that the Commission must take measures to ensure the efficacy of an internal investigation, it may make any recommendations it deems appropriate. The Secretary-General of the Commission informs the Director-General of OLAF in writing of any action taken on those recommendations.

#### Type of processing carried out by GS B4 on the data received

Data transmitted by OLAF are analysed by staff in the unit in charge of cases, who draw up a note. Unit B4's work includes the compilation of work files for each internal investigation, containing all paper documents sent by OLAF as well as the notes which GS B4 sends to OLAF and covering notes under which information is forwarded to the Commissioners and Directors-General, as provided for in the MoU. In view of the large number of investigations and documents, a list of investigations is kept in an Excel table.

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<sup>3</sup> Article 4 of the Inter-institutional Agreement of 25 May 1999 between the European Parliament, the Council and the Commission concerning internal investigations by OLAF and Article 4 of Commission Decision 1999/396.

<sup>4</sup> Article 9(4) of Regulations No 1073/99 and 1074/99.

All this information is circulated under the heading of "inquiries and disciplinary cases" and is stored and handled with due respect for confidentiality. Paper documents are kept under lock and key, electronic documents are stored on a hard disk encrypted using the LanCrypt system.

The note is sent with the information forwarded to the Commissioners and Directors-General concerned, as per the MoU. The MoU states that in normal practice, the Secretary-General or the President will transmit this information to the Commissioner responsible and to the Director-General of the DG or service concerned. The Secretary-General also transmits information provided by OLAF to the Commissioners responsible for Personnel and Administration and for the Budget:

- where the Commission's interest is at stake;
- where information is passed to national judicial authorities in the context of an ongoing internal investigation;
- when the final report on an internal investigation is sent to the Commission.

Data received from OLAF (in paper format) and notes drawn up by GS B4 are archived and stored under lock and key in a locked room, the keys to which are available only to the members of the unit that need to know for the purposes of processing the case. Notes drawn up by GS B4 in electronic format are stored on an encrypted hard disk (LanCrypt) partitioned in such a way that only the persons who need to know have access to the information.

Information forwarded by the Commissioners and Directors-General is processed as follows: the Commissioners and Directors-General are responsible for processing information relating to internal investigations forwarded by GS B4 on the basis of the MoU. They store the information and may use it to take appropriate management decisions. As these documents are marked "Inquiries and disciplinary cases", paper documents must be kept in a locked cupboard (access to the cupboard and the key is controlled) and electronic documents are stored in encrypted format. Electronic documents must be sent via the SECEM system and paper documents are sent by hand in two envelopes.

Notes sent to the Commissioners and Directors-General inform them that they are responsible for ensuring that personal data are forwarded on a restrictive basis, so that the presumption of innocence can be maintained at all times, and used only for the purposes for which they were forwarded. The transfer of personal data to persons who need to know is necessary for the legitimate performance of tasks covered by the competence of the recipient (Article 7 of Regulation No 45/2001).

#### Other information in the notification

The categories of data subjects affected by this processing operation are: staff members and former staff members of the Commission. The controller states that exceptionally, OLAF may notify the GS of the names of whistleblowers.

The categories of data processed are: the name and grade of the person concerned by the investigation and the nature of their relationship with the Commission (statutory, contractual). Data relating to the investigation, as well as identification of the person concerned by the investigation.

As regards data storage, the GS has based its storage limits on those used by OLAF, for reasons of follow-up and consistency. On the basis of the common list for retention of files at Commission level (SEC(2007)970), OLAF's storage time limit (electronic and paper documents) is a maximum of 20 years after the date of closure of the investigation. It should also be noted that to enable comparisons of precedents and preparing statistics, final reports concerning internal investigations may be kept by OLAF, once anonymised, for 50 years.

The data recipients are the Commissioners and Directors-General. The MoU states the Commissioners and Directors-General to which the GS must forward the information. In the case of information on an intervention on the Commission's premises, the file is kept by the GS and not forwarded.

Under no circumstances does the GS provide information to data subjects. The Commission considers it is for OLAF to inform the person concerned by an investigation under and in accordance with Articles 4 and 5 of Decision 1999/396/EC, ECSC, Euratom of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests. That Decision provides that in cases necessitating the maintenance of absolute secrecy for the purposes of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority, compliance with the obligation to invite the Member, official or servant of the Commission to give his views may be deferred in agreement with the President of the Commission or its Secretary-General respectively.

As regards the rights of access and rectification, the Commission considers that OLAF, as the body responsible for internal investigations, is also responsible for these procedures.

Security measures have been taken.

### **3. Legal aspects**

#### **3.1. Prior checking**

The prior checking relates to the processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2(a) of Regulation (EC) No 45/2001, hereinafter "the Regulation") in the context of the management of information forwarded by OLAF under the MoU (information sent by OLAF to the Commission in the context of internal administrative investigations conducted by it) (Article 2(b) of the Regulation). The processing is carried out by a European institution in the exercise of activities all or part of which fall within the scope of Community law<sup>5</sup> (Article 3(1) of the Regulation). Those activities constitute manual processing of data which form part of a filing system within the meaning of Article 3(2) of the Regulation. The data processing therefore falls within the scope of Regulation No 45/2001.

Article 27(1) of the Regulation 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) lists the processing operations likely to present such risks. Under Article 27(2)(a) of the Regulation,

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5 The Regulation applies to administrative investigations conducted by OLAF, regardless of the fact that they may lead to criminal investigations conducted by national judicial authorities.

processing of data relating to "*suspected offences, offences, criminal convictions or security measures*" is also subject to prior checking by the EDPS. In the present case this type of data is concerned. The information received is also intended to evaluate personal aspects relating to the data subject, in particular their conduct (Article 27(2)(b)).

In principle, checks by the EDPS should be performed before the processing operation is implemented. As it could not be, the check necessarily has to be performed ex-post. This does not alter the fact that the recommendations issued by the EDPS should be implemented.

The DPO's notification was received on 6 January 2009. In accordance with Article 27(4) of the Regulation, the EDPS should have issued his opinion within two months. Questions were asked on 26 January 2009 and the replies provided on 29 January 2009 (3 days). On 6 March 2009 the EDPS draft opinion was sent to the DPO for his comments, which were received on 20 March (14 days). The EDPS will deliver his opinion by 24 March 2009 at the latest (7 March 2009 + 3 days' suspension + 14 days for comments).

### **3.2. Lawfulness of the processing**

The Commission processes data sent to it by OLAF in the context of internal administrative investigations on the basis of

- Articles 4, 9 and 10 of Regulation (EC) No 1073/1999 of 25 May 1999 concerning investigations conducted by OLAF and
- Articles 4 and 5 of Commission Decision 1999/396 of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests.

Articles 4, 9 and 10 of Regulation (EC) No 1073/1999 provide as follows:

*Article 4(5). Where investigations reveal that a member, manager, official or other servant may be personally involved, the institution, body, office or agency to which he belongs shall be informed.*

*Article 9(4). Reports drawn up following an internal investigation and any useful related documents shall be sent to the institution, body, office or agency concerned. The institution, body, office or agency shall take such action, in particular disciplinary or legal, on the internal investigations, as the results of those investigations warrant, and shall report thereon to the Director of the Office, within a deadline laid down by him in the findings of his report.*

*Article 10(3). Without prejudice to Articles 8 and 9 of this Regulation, the Office may at any time forward to the institution, body, office or agency concerned the information obtained in the course of internal investigations.*

Articles 4 and 5 of Commission Decision 396/1999 contain the following provisions:

#### Article 4

##### *Informing the interested party*

*Where the possible implication of a Member, official or servant of the Commission emerges, the interested party shall be informed rapidly as long as this would not be harmful to the investigation. In any event, conclusions referring by name to a Member, official or servant of the Commission may not be drawn once the investigation has been completed without the interested party's having been enabled to express his views on all the facts which concern him.*

*In cases necessitating the maintenance of absolute secrecy for the purposes of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority, compliance with the obligation to invite the Member, official or servant of the Commission to give his views may be deferred in agreement with the President of the Commission or its Secretary-General respectively.*

#### Article 5

##### *Information on the closing of the investigation with no further action taken*

*If, following an internal investigation, no case can be made out against a Member, official or servant of the Commission against whom allegations have been made, the internal investigation concerning him shall be closed, with no further action taken, by decision of the Director of the Office, who shall inform the interested party in writing.*

The lawfulness of the processing operation must be considered in the light of this legal basis. Article 5(a) of the Regulation stipulates that personal data may be processed only if: "*processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body or in a third party to whom the data are disclosed*".

Article 5(b) of the Regulation states that personal data may be processed only if "*processing is necessary for compliance with a legal obligation to which the controller is subject*". As the instruments referred to above demonstrate, OLAF's provision of information to the Commission in the context of its administrative inquiries is a task carried out in the public interest and is a legitimate exercise of official authority (Article 4 of Regulation (EC) No 1073/1999) and is thus complying with the Commission's legal obligation to investigate matters within its remit.

From the description of the processing operation provided, the EDPS understands that it may also involve sensitive data within the meaning of Article 10 of the Regulation.

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

Article 10(5) stipulates that: "*[p]rocessing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor*". In this case, the processing operation which the Commission may conduct is authorised by the legislative acts referred to in point 3.2.

Furthermore, Article 10(1) of the Regulation states that the processing of special categories of data (i.e. "*personal data revealing racial or ethnic origin, political*



*opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life") is prohibited. Certain exceptions are made in Article 10(2). However, it seems highly probable that if any exceptions were to apply, only points (b) (processing necessary for the purposes of complying with the specific rights and obligations of the controller) and (d) (processing necessary for the establishment, exercise or defence of legal claims) would be concerned.*

In any case, Article 10(4) should also be taken into account: *"[s]ubject 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".*

The kinds of data described in Article 10(1) will be processed only as an exception. However, it may happen that, for instance, when GS B4 or the Commissioners or Directors-General are processing data, information revealing the data subject's political opinions or data concerning his health will come to light. If this happens, the general rule established in Article 10(1) must apply, or the "need" for an exception examined restrictively. At all events the staff of GS B4 responsible for the files must not lose sight of this rule and must avoid including special categories of data unless one of the circumstances provided for in Article 10(2) (assessed restrictively as stated above) is present or it is necessary to apply Article 10(4).

### **3.4. Data quality**

Under Article 4(1)(c) personal data must be *"adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed"*.

The EDPS would point out that the purpose of the processing done by the Commission differs from that of the processing done by OLAF. The purpose of the Commission's processing is specific. It is to enable the Commission, through its Commissioners and Directors-General via the General Secretariat, to take the measures necessary to protect its financial interests and reputation. As such, this prior checking is valid.

The EDPS considers that to allow data concerning whistleblowers is excessive in relation to the purpose of the processing operation. GS B4 does not need to know the names of these persons in order to take any necessary precautionary measures to protect the institution's financial interests and reputation. The EDPS recommends that GS B4 inform OLAF that it does not need to receive the data on whistleblowers.

While certain standard information such as the data subject's name, grade, nature of relationship to the Commission (statutory, contractual) and identity will always feature in cases relating to internal investigations, the exact content of the information transmitted to the Commission will naturally differ from case to case, as a summary of the facts and any other case-specific information is attached to the file which the Commission receives. Nevertheless, there need to be guarantees to ensure that the principle of data quality is adhered to. Those guarantees could take the form of a general recommendation to the persons dealing with the files reminding them of the rule and recommending that they comply with it.

According to Article 4(1)(d) of the Regulation, personal data must be *"accurate and, where necessary, kept up to date"* and *"every reasonable step must be taken to ensure*

*that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified".* This principle is closely connected to the exercise of the right of access, rectification, blocking and erasure (see point 3.8 below).

Data must also be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). The question of lawfulness has already been considered (see point 3.2 above). As for fairness, considerable attention must be paid to this in the context of such a sensitive subject. It concerns the information given to the official who is the subject of an investigation and other data subjects (see point 3.9 below).

### **3.5. Data storage**

Personal data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. The Community institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific use should be kept either in anonymous form only or, if that is not possible, only with the identity of the data subjects encrypted. In any event, the data shall not be used for any purpose other than for historical, statistical or scientific purposes*" (Article 4(1)(e) of the Regulation).

The Commission uses the same data storage period as OLAF, i.e. 20 years. In opinion 2005-418 of 23 June 2006<sup>6</sup>, the EDPS suggested that when OLAF had been in existence for 10 years an initial assessment should be made of the need for a 20-year period with reference to the purpose of this storage period. A second assessment would be conducted when OLAF had been in existence for 20 years. The EDPS would make the same recommendation in this case. The EDPS also pointed out in that opinion that where a case was "closed without further action", the period of 20 years was excessive as it was not necessary for the purpose of judicial or disciplinary investigations. Consequently, in the cases referred to the storage period should be reduced to the period during which actions for liability against whistleblowers, informers or witnesses could be brought.

The EDPS considers that this long-term storage period should also be accompanied by appropriate guarantees, as they remain personal data even when put into long-term storage.

The storage period should also be reassessed in the light of developments in the case, particularly whether OLAF reaches a positive or a negative conclusion (e.g. dropping legal proceedings).

### **3.6. Transfer of data**

The processing operation should be examined in the light of Article 7(1) of the Regulation, which concerns transfers of personal data within or between Community institutions or bodies "*if necessary for the legitimate performance of tasks covered by the competence of the recipient*".

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6 See footnote on page 1.

In this case, the data are sent by the GS to the Commission's Commissioners and/or Directors-General, as set out in the MoU. Personal data may not be transferred within an institution unless they are necessary for the legitimate performance of tasks covered by the competence of the recipient. Transfer to the recipients mentioned above is consistent with the legitimate performance of the various parties' tasks.

It is possible that in exceptional cases data might be sent to the Internal Audit service, the European Ombudsman and the EDPS. These transfers would be legitimate as they would be necessary for the legitimate performance of tasks covered by the competence of the recipient.

Article 7(1) of Regulation (EC) No 45/2001 has been complied with.

Lastly, Article 7(3) of the Regulation stipulates that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". It should be remembered that no-one receiving and processing data in the context of the operation discussed here may use that data for other purposes. A recommendation to this effect could be made in a letter from the Secretary-General to all Directors-General.

### **3.7. Processing including a personal number or other identifier of general application**

The personal number of an official under investigation appears in the final report which is sent to the Commission. The use of a personal number may have consequences such as the interconnection of data that are processed in different contexts. The EDPS will not here determine the conditions under which a personal number may be processed, as provided for in Article 10(6) of the Regulation, but wishes to draw attention to the implications of this rule in the context of the Regulation. In the present case, use of the personal number is reasonable because it is done for the sole purpose of identifying the person concerned. The EDPS considers that the number can be processed in this case.

### **3.8. Rights of access and rectification**

According to Article 13 of the Regulation, the data subject has the right to obtain from the controller, without constraint, communication in an intelligible form of the data undergoing the processing and any available information as to their source. Article 14 of the Regulation gives the data subject the right to rectify inaccurate or incomplete data.

The Commission considers that these procedures are the responsibility of OLAF, as the body carrying out the internal investigations. The EDPS does not share that view. The processing in this case concerns a separate processing operation with a purpose different from that of the processing conducted by OLAF. The Commission must therefore provide for the right of access and rectification of data processed. If the data processed by GS B4 and the decisions taken by the Commissioners/Directors-General refer explicitly to a data subject it must be possible to access and rectify them if necessary. For that reason the EDPS recommends that the Commission make provision for the rights of access and rectification provided for in Articles 13 and 14 of Regulation No 45/2001.

The right of access must also be extended to persons referred to in the files being processed, if they contain information relating to them. This would be the case where

whistleblowers, informants or witnesses demand access to the data relating to them in relation to a decision taken further to an investigation into another person.

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

Restrictions on the rights of access provided for in Article 20 of the Regulation may constitute a measure necessary to safeguard "*(a) the prevention, investigation, detection and prosecution of criminal offences; (b) an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters; (c) the protection of the data subject or of the rights and freedoms of others.*" Moreover, in certain cases it may be necessary not to allow the data subject direct access in order not to compromise the investigation, even though it is not a criminal investigation within the meaning of Article 20 of Regulation (EC) No 45/2001, but a pre-disciplinary or pre-criminal investigation (OLAF administrative investigation). In this case these restrictions must be decided on a case-by-case basis, and the data subjects must be informed as provided for under Article 20(3) of the Regulation: "*If a restriction provided for by paragraph 1 is imposed, the data subject shall be informed, in accordance with Community law, of the principal reasons on which the application of the restriction is based and of his right to have recourse to the European Data Protection Supervisor.*"

Account should also be taken of Article 20(4): "*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 the necessary corrections have been made.*" The right of indirect access must then be guaranteed. This provision will come into play, for instance, in cases where the data subject has been informed of the existence of the processing, or has knowledge of it, but his right of access is restricted under Article 20.

As for the right of rectification, it is crucial in guaranteeing the quality of data used which in this case is related to the right of defence. Any restriction under Article 20 of the Regulation must be applied in the light of what has been said above on the right of access.

### **3.9. Information to be given to the data subject**

The Regulation states that the data subject must be informed where his or her personal data are being collected and lists a number of obligatory points to be included in the information, in order to ensure that the data are processed fairly. Article 11 of the Regulation (*Information to be supplied where the data have been obtained from the data subject*) and Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) are thus both applicable in this case. This means that the relevant information must be supplied either at the time of collection (Article 11), or when the data are first recorded or disclosed (Article 12), unless the data subject already has the information. This may be the case, *inter alia*, if the same information has been supplied before.

The Commission considers that it is up to OLAF to inform data subjects involved in an investigation. Here again, the EDPS does not share that view. While it is true that

OLAF informs the data subject of data processed in the course of an investigation concerning him, it is not responsible for informing the data subject of processing carried out by a recipient of those data. The Commission must itself inform the data subject of the specific purpose of the processing it conducts.

Article 20 of the Regulation provides for certain restrictions on the right to information, including instances where the restriction constitutes a necessary measure to safeguard "*(a) the prevention, investigation, detection and prosecution of criminal offences; (b) an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters; (c) the protection of the data subject or of the rights and freedoms of others.*" It may be necessary in certain cases not to inform the data subject, in order not to compromise the investigation, even though it is not a criminal investigation within the meaning of Article 20 of the Regulation. The interpretation of this Article as regards the right of access in pre-disciplinary or pre-criminal investigations must be extended to the right to be informed.

Furthermore, Article 20(5) of the Regulation will have to be applied in specific circumstances: "*Provision of the information referred to under paragraphs 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect*". (Paragraph 3 provides for the right of the data subject to be informed of the reasons why a restriction has been imposed as well as his right to have recourse to the EDPS; paragraph 4 provides for the indirect right of access via the EDPS and for the results of such access to be provided to the data subject).

The EDPS recommends that arrangements be made for the data subject to be provided with the information and of any restrictions that might be imposed.

### **3.10. Security measures**

Article 22 of the Regulation provides for the controller to implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. These security measures must, in particular, prevent any unauthorised disclosure or access.

The technical and organisational measures taken in relation to this processing are described in detail.

On the basis of the information available, the EDPS has no reason to believe that the Commission has not complied with the security measures required under Article 22 of the Regulation.

### **Conclusion**

The proposed processing does not appear to involve breaches of the provisions of Regulation (EC) No 45/2001 provided that the above comments are taken into account. This means, in particular, that the Commission should:

- inform its staff of the provision in Article 10(1) of the Regulation concerning special categories of data, even though such data are only processed exceptionally;

- inform OLAF that it has no need to receive data on whistleblowers;
- ensure compliance with the principle of data quality. This could be effected by a general recommendation to staff handling files, reminding them of the principle and asking them to ensure that they comply with it;
- make an initial assessment, after 10 years, of the need for a 20-year storage period in view of the purpose of such storage. A second assessment should be made after 20 years;
- ensure that there are appropriate guarantees surrounding the long-term storage of data;
- ensure that the length of storage is reassessed in the light of developments in a case, in particular whether OLAF concludes the case positively or negatively (for instance by dropping legal proceedings);
- reduce the length of the data storage period in cases in which no further action is taken;
- introduce a notice to the recipient informing him that personal data may be processed only for the purposes for which they were transmitted, in accordance with Article 7(3) of the Regulation;
- make arrangements for exercise of the rights of access and rectification as provided for in Articles 13 and 14 of the Regulation;
- mention in the file if a restriction on the rights of access and rectification has been imposed under Article 20;
- provide the data subject with the information required under Article 20(3) and (4) where appropriate;
- make arrangements for the data subject to be informed in accordance with Articles 11 and 12 of the Regulation and told of any possible restrictions that might be imposed.

Done at Brussels, 23 March 2009

(Signed)

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