

Opinion on the notification for prior checking from the Data Protection Officer of the European Anti-Fraud Office (OLAF) regarding the processing of personal data in relation to complaints under Article 90a of the Staff Regulations

Brussels, 16 July 2012 (case 2012-0274)

1. Proceedings

On 21 March 2012, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Anti-Fraud Office (OLAF or the "Office") a notification for prior-checking relating to the processing of personal data in relation to requests and complaints under Article 90a of the Staff Regulations. Together with the notification the DPO also filed the privacy statement relating to the processing.

The EDPS requested OLAF to provide some complementary information on 14 May 2012 and 27 June 2012. The answers were received on 22 June 2012 and 3 July 2012.

2. Facts

The present notification deals with the processing of personal data by OLAF in the handling of requests and complaints under Article 90a of the Staff Regulations. Article 90a provides that *'[a]ny person to whom these Staff Regulations apply may submit to the Director of OLAF a request within the meaning of Article 90(1), asking the Director to take a decision relating to him in connection with investigations by OLAF. Such person may also submit to the Director of OLAF a complaint within the meaning of Article 90(2) against an act adversely affecting him in connection with investigations by OLAF'*. The procedures laid down in Article 90 of the Staff Regulations concerning requests and complaints by EU staff to the appointing authority therefore apply to requests and complaints by EU staff to OLAF Director General under Article 90a of these Regulations.

In handling requests and complaints under Article 90(a), OLAF creates a paper file, prepares a memorandum analysing the complaint and all relevant documentation gathered from the responsible case handler/investigator and from the case file. The memorandum and the documentation may be submitted to the Commission's Legal Service for consultation. Upon receiving the opinion of the Commission's Legal Service, OLAF prepares a response to the complainant. All documents related to the complaint are thereafter retained in the complaint file. In its reply of 22 June 2012, OLAF clarified that only the formal complaints and replies provided under Article 90a are included in the relevant investigation file in the CMS and are kept as long as the case file is kept.¹

¹ This corrects point 7) of the notification stating that *"[a]ll documents related to the complaint are thereafter retained in the complaint file and in the case file of the case concerned"*.

The data subjects concerned by the present processing activity are likely to be the same as those concerned by the underlying investigation, i.e. the complainants, that is to say the investigated persons, all persons who provide information concerning the complaint (this may include whistleblowers, informants and witnesses), OLAF's staff in charge of the complaint handling and of the relevant investigation, staff of the Commission's Legal Service, any other persons whose names may appear in the relevant documentation/file, and any person in relation to a follow-up action brought about by the complainant (e.g. staff of the Ombudsman, EDPS and EU Courts).

The categories of data concerned are identification and contact information of the complainant and other data subjects involved (name, address, e-mail, telephone, fax), professional and case involvement data, as well as information relating to the complaint. In exceptional circumstances, also special categories of data pursuant to Article 10 of Regulation (EC) No 45/2001 (the "Regulation") may be included.

OLAF informs complainants, witnesses and any other person who provides information by sending them a personalised privacy statement by using standard data protection clauses in communications with the latter. Furthermore, OLAF published a general privacy statement on its Europa website.

According to the privacy statement, data subjects are able to request access to their personal data held by OLAF and to correct, block or delete them by applying to the dedicated mailbox of the controller. The privacy statement specifies that exceptions under Article 20(1)(a) and (b) of the Regulation may apply.

The following categories of recipients will or may have access to the data: OLAF's staff members who are responsible for dealing with the complaints and their hierarchy, members of the relevant investigation unit, the Director General, staff of the Commission's Legal Service and, where applicable, any persons in relation to follow-up actions brought about by the complainants (staff of the relevant authorities to whom follow-up complaints or applications are lodged, such as for example Ombudsman, the EDPS and EU Courts).

The files and related personal data are retained for a maximum of 10 years after the response has been sent, in line with the policy of the Commission in relation to Article 90 complaints. Where relevant, data that are included in the investigation file (the formal requests and complaints and replies provided under Article 90a) are kept in the related investigation file for up to 20 years in line with the general retention policy relating to OLAF investigations.

[...]

3. Legal aspects

3.1. Prior checking. This prior check Opinion relates to the processing of personal data in the context of OLAF's Article 90a cases. The processing activity is carried out thus by a European institution, in the exercise of activities which fall within the scope of EU law (Article 3.1 of the Regulation). The processing of personal data is done, at least partly, by automatic means (Article 3.2 of the Regulation). As a consequence, the Regulation is applicable.

Article 27.1 of the Regulation subjects to prior check by the EDPS all '*processing operations likely to present specific risks to the rights and freedoms of data subject 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. Article 27.2(b) of the Regulation

stipulates that operations intended to "*evaluate personal aspects relating to the data subject, including his or her (...) conduct*" shall be subject to prior checking by the EDPS. In the case under analysis, the conduct of the officials is analysed by OLAF because it concerns the handling of applications and complaints relating to an internal investigation conducted by OLAF.² Furthermore, under Article 27.2(a) of the Regulation, processing operations relating to "*suspected offences, offences, criminal convictions or security measures*" shall be subject to prior checking by the EDPS. In the present case, the processing of data carried out by OLAF under its investigation procedures is at stake, which may relate to suspected offences. The processing in this case could therefore relate to both processing operations described under Article 27.2(a) and (b).³

The prior checking pursuant to Article 27 of the Regulation should in principle take place before the processing has initiated. In this case, Article 90a has been introduced in the Staff Regulations by Council Regulation (EC, EURATOM) No 723/2004 of 22 March 2004, which entered into force in May 2004. The EDPS therefore regrets in the present case that the notification has not been submitted to him prior to the start of the processing operations.

The notification of the DPO was received on 21 March 2012. According to Article 27(4) the present Opinion must be delivered within a period of two months. The EDPS requested OLAF to provide additional information on 14 May 2012 and 27 June 2012. The answer was received on 22 June 2012 and 3 July 2012, respectively. The procedure was therefore suspended during 45 days.

The procedure was further suspended for 9 days to allow for the provision of comments on the draft Opinion. Therefore, the present Opinion must be delivered no later than 16 July 2012.

3.2. Lawfulness of the processing. The processing falls within the scope of Article 5(a) of Regulation 45/2001, as it is considered necessary for the performance of a task carried out in the public interest (the handling of requests and complaints against the decisions of OLAF's Director General) and there is a legal basis for the processing (Article 90a of the Staff Regulations).

3.3. Processing of special categories of data. According to Article 10.1 of the Regulation, the processing of special categories of data (that is "*data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life*") is prohibited. The Regulation foresees certain exceptions in Article 10(2). However, it seems most likely that, if any exception would apply, only those of sub-paragraph (d) would possibly be relevant. In certain cases, consideration may also be given to Article 10(4) of the Regulation if necessary, which stipulates that: "*[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 notification states that special categories of data pursuant to Article 10 of Regulation (EC) No 45/2001 (the "Regulation") may be processed in exceptional circumstances. In the event that this happens, it has to be evaluated whether the application of an exception is "necessary".

² See EDPS Opinion on OLAF internal investigations of 23 June 2006 (case 2005-0418), EDPS Opinion on OLAF external investigations of 4 October 2007 (Case 2007-0047); EDPS Opinion on OLAF new investigative procedures of 3 February 2012 (Cases 2011-1127 and others), available on EDPS website.

³ *Ibidem*.

As the processing of sensitive data is to be considered as an exception rather than the rule, the necessity criterion here has to be applied in a restrictive manner.

Whenever the investigator comes accidentally across sensitive data not falling under one of the exceptions foreseen by Article 10(2) or Article 10(4), the files in question have to be deleted or blocked so as to be made unreadable.

3.4. Data quality. Pursuant to Article 4(1)(a), (c) and (d) of Regulation 45/2001, personal data must be processed fairly and lawfully, be adequate, relevant and not excessive in relation to the purpose for which they are collected and further processed, as well as accurate.

The lawfulness of the data processing has been already discussed (cf. point 3.2), whereas its fairness has to be assessed in the context of information provided to data subject (cf. point 3.8). The proportionality of the data processed is in principle ensured as long as they may be considered relevant for the purpose of handling Article 90a applications and complaints. Obviously, it is for OLAF to assess necessity and proportionality on a case by case basis in relation with the specific needs of each inquiry.

Due to the fact that the data are normally provided by data subjects who can also modify or delete them at any time, subject to the applicability of restrictions pursuant to 20.2(a) and (b) of the Regulation, the accuracy of the data processed seems to be also guaranteed.

3.5. Data retention. The general retention period, which is 10 years after a response has been sent, in line with the policy of the Commission in relation to Article 90 complaints, does not appear to be excessive for the purposes of Article 4(1) (e) of the Regulation. The notification specifies that, where relevant, data held as part of an investigation file (i.e. formal requests and complaints and replies under Article 90a) are kept for up to 20 years. With regard to the latter, the EDPS refers OLAF to the analysis and recommendations made in his prior-check opinions on OLAF internal and external investigations and OLAF new investigative procedures.⁴

3.6. Transfer of data. As indicated above, the following categories of recipients have or may have access to the data: OLAF's staff members who are responsible for the dealing with the complaints and their hierarchy, members of the relevant investigation unit, the Director General, staff of the Commission's Legal Service and, where applicable, any persons in relation to follow-up actions brought about by the complainants (staff of the relevant authorities to whom follow-up complaints or applications are lodged, such as for example Ombudsman, EDPS, EU Courts).

Given that these transfers are considered as necessary for the performance of the tasks relating to the handling of Article 90a of the Staff Regulations, compliance with Article 7 of Regulation 45/2001 seems to be ensured. Nevertheless, it is for OLAF to evaluate and ensure the respect of Articles 7-9 of the Regulation on a case by case basis in relation with the specific needs of each procedure.

3.7. Rights of access and rectification. As indicated above, the data subjects will be able to access, modify and delete the data processed in the context of the processing under consideration. With regard to applicability of restrictions pursuant to 20.2(a) and (b) of the Regulation, the EDPS refers OLAF to the analysis and recommendations made in his prior-check opinions on OLAF internal and external investigations and OLAF new investigative procedures.⁵

⁴ *Ibidem.*

⁵ *Ibidem.*

3.8. Information to the person concerned. OLAF will inform complainants, witnesses and any other person who provides information by means personalised privacy statements. These are included in standard data protection clauses enclosed in communications with these persons. The EDPS highlights that these personalised data protection clauses have to be compliant with the requirements laid down in Article 11 and 12 of the Regulation, as applicable. He also recommends including a reference to the more detailed privacy statements published on Europa website.

OLAF published a general privacy statement on its Europa website. Having regard to the privacy statement, the EDPS notes that the identity of the controller pursuant to Article 11(1)(a) is not clearly mentioned although OLAF mentions a functional mailbox to which all requests concerning access, rectification, blocking or erasure can be addressed. The EDPS assumes that unless a different conclusion is to be found on the basis of concrete elements, the controller is to be considered as OLAF as a whole, represented by its Director. The EDPS recommends that OLAF further specifies the scope of the following categories of recipients: case handlers, controllers and any person in relation to follow-up action.

3.9. Security measures.

[...]

4. Conclusion

The proposed processing operation does not appear to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. In particular, OLAF should:

- assess necessity and proportionality of the processing on a case by case basis in relation with the specific needs of each inquiry;
- assess and ensure respect of Articles 7 to 9 of the Regulation when transferring personal data to the categories of recipients included in the notification;
- as regards the applicability of exceptions under Article 20 of the Regulation, apply the recommendations made in prior-check opinions on OLAF internal and external investigations and OLAF new investigative procedures;
- amend the privacy statement published on Europa website by further specifying the scope of the following categories of recipients: case handlers, controllers and any person in relation to follow-up action;
- insert in the personalised privacy statement a reference to the privacy statement published on OLAF Europa website.

Done at Brussels, 16 July 2012

(signed)

Giovanni BUTTARELLI
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