

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Anti-Fraud Office on a Free Phone Service

Brussels, 6 June 2007 (Case 2007-74)

1. Proceedings

On 9 February 2007, the European Data Protection Supervisor (hereinafter "EDPS") received from the Data Protection Officer of the European Anti-Fraud Office ("OLAF") a notification for prior checking regarding the setting up of a Free Phone Service (hereinafter "the FPS").

Complementary information was requested on 13 February 2007. The answers were received on 15 March 2007. On 3 April 2007 the EDPS sent the Draft Opinion to OLAF for comments which were received on 20 April. The comments triggered a follow up information request by the EDPS, who on 25 April requested further clarification of certain points. The explanation was received on 8 May. On 10 May the EDPS asked for confirmation regarding changes in the procedures/data processing operations notified to the EDPS with the 9 May response. The answers were received on 11 May.

Pursuant to Article 27.4 of Regulation (EC) No 45/2001, the two-month period within which the EDPS must deliver an opinion was suspended during the above intervals.

The notification for prior check regarding the FPS is part of a set of prior notifications that OLAF has submitted to the EDPS, according to a planning discussed between the EDPS and OLAF which takes into account the priority areas laid down by the EDPS as well as OLAF specifics.

2. Examination of the matter

2.1 The Facts

The OLAF Free Phone Service is a tool that OLAF uses to obtain information to fight against fraud, corruption and other illegal activities affecting the financial interests of the Community. OLAF has put the FPS at the public's disposal in order to facilitate the collection of such type of information. Obviously, the data processing actions that take place in the context of OLAF Free Phone Service are not stand alone data processing actions but rather a component of OLAF overall investigative activities and procedures.

In the light of the above, before starting the legal analysis of the data processing features of OLAF Free Phone Service it may be useful to recall the main aspects of OLAF investigation activities and procedures. This will show how the Free Phone Service fits within the overall OLAF investigation process. However, the legal analysis in this Opinion will only address those aspects that are exclusively related to the data processing that takes place as a result of

the Free Phone Service; it will not analyse data processing operations that take place in other phases of OLAF investigation procedures.

The Life Span of OLAF Investigatory Procedures and the FPS

OLAF investigations may have various phases. Within the *first stage*, OLAF assessors evaluate the initial sources of information which may have been collected directly by OLAF or provided to OLAF by third parties (witnesses, whistleblowers, informants, etc). This phase is called the "assessment phase". If the initial information does not relate to a matter within OLAF's competence, it is classified as a *prima facie non-case*¹ or as a *non-case*². If OLAF decides that the matter is relevant, the *second phase* takes place during which the investigatory activities *per se* will be carried out. There are two categories of investigations - internal and external - and several other categories of cases - monitoring, coordination and criminal assistance³. At the end of the investigation, OLAF decides whether the case should be closed with or without follow-up actions. In the first hypothesis, the *third phase* starts, during which OLAF's follow-up team carries out various activities designed to ensure that the competent Community and national authorities have executed the measures recommended by OLAF⁴.

The processing operations that take place in the management of FPS generally occur *before* the starting of the first phase, i.e. the assessment phase. As further described below, the processing operations that take place in the context of the FPS constitute a sort of "pre-assessment phase". In particular, in the management of the FPS, OLAF investigators listen to the information left through the Free Phone Service and engage in a preliminary analysis of their relevance. Only if the investigators consider the voice messages to be relevant, will they be further investigated in order for OLAF to decide whether an assessment phase should be opened or whether they should be sent to other Authorities and Member States if the case is relevant for them. The further processing that may occur to decide whether an assessment phase should be opened or whether the information should be sent to other authorities will not be analysed in the context of the present opinion, which as outlined above, will be limited to the analysis that takes place exclusively in the context of the operation and management of the FPS⁵.

¹ *Prima Facie-Non-Cases*: Information clearly and unequivocally does not fall within the competence of OLAF.

² *Non-Cases*: These are the result of considering that EU interests appear not to be at risk from irregular activity or where a Member State is already dealing with a matter in a satisfactory manner.

³ *Monitoring cases*: These are cases where OLAF would be competent to open an external investigation but in which a Member State or other authority is in a better position to investigate. In these cases, there is no OLAF investigation; however, OLAF follows up with the appropriate follow-up team.

Coordination cases: These are cases that could be the subject of an external investigation, but where OLAF'S role is to contribute to investigations being carried out by other national or Community Services, by, *inter alia*, facilitating the gathering and exchange of information. There is no OLAF investigation *strictu sensu* within OLAF.

Criminal Assistance: These are cases within the legal competence of OLAF in which competent authorities of a Member State carry out a criminal investigation and request OLAF'S assistance. There is no OLAF investigation *strictu sensu* within OLAF.

⁴ Some variations to this three step phases may occur.

⁵ The EDPS has issued an opinion of the processing operations that take place during the assessment and investigation phase related to internal investigations, where further processing of messages left in the FPS may take place. See EDPS Opinion of 23 June 2006 on a notification for prior checking on OLAF internal investigations (Case 2005-418). It should also be noted that currently the EDPS is assessing prior checks notifications related to OLAF processing of personal data in the context of, among others, external investigations, *prima facie non cases*, *non cases* and *monitoring cases*.

The Functioning of the Free Phone Service in a Nutshell

OLAF has set up a public phone service, the FPS, to encourage members of the public in general to provide information that may be relevant to counter fraud and corruption. The service is not interactive, i.e. no human being responds to the messages. Instead, the service records the telephone messages left by members of the public. The voice messages are stored in a dedicated server which is separate from the OLAF network.

The Information Services Unit (D8) of OLAF is responsible for the running of the Free Phone Service, however, for some of the data processing, the Information Services Unit (D8) relies on OLAF staff from other Units. The functioning of the FPS, including the data processing operations related to it, are described below.

- The Information Services Unit (D8) is responsible for the management and maintenance of the dedicated server where the voice messages are left. A designated member of the Information Services Unit D8 acts as Administrator of the FPS. The Administrator copies the voice messages to a protected area on the OLAF File System, the management of which also falls under the responsibility of the Information Services Unit (D8). The Administrator maintains a list of all the investigators in charge of listening to the messages, according to a schedule based on language skills. The investigators do not belong to the Information Services Unit (D8) but to the various OLAF investigation units (A1-A4 and B1-B4).
- After listening to the message/s stored in the protected area on the OLAF File System, if the investigator deems it fully improper and pointless, then he/she deletes it immediately. Otherwise, the investigator writes a summary of the voice message in the so-called "free phone screening form", which is saved in the same protected area of the OLAF File System. The application where the free phone screening forms are stored is managed by the Information Services Unit (D8), in particular by the Quality Assurance Team. In the screening form, the investigator must indicate whether the message is relevant. The possible conclusions are: (i) the message is relevant to OLAF work (indicating whether it requires normal or urgent procedures); (ii) the message is irrelevant and outside the competence of OLAF; (iii) the message may be relevant to other authorities (Member States/Commission Services, etc).
- The investigators forward the printed free phone screening form to the Quality Assurance Team. As managers of the application where the free phone screening forms are stored, the Quality Assurance Team has access to both the printed and electronic screening forms. Upon receipt of the printed free phone screening forms, the Quality Assurance Team does the following: (i) If the form is marked *relevant*, it is registered⁶ and forwarded *in paper form* to the appropriate investigative unit (A1, A2, A3, A4, B1, B2, B3 or B4). The matter will be given a case number in the Case Management System (CMS)⁷. The form becomes part of the CMS file. The Investigative Unit decides whether an investigator should be appointed to conduct an assessment, thus initiating the assessment phase. The Investigative Unit may also consider the information as not sufficiently relevant and

⁶ Registration is made in accordance with the rules and procedures laid down by the Commission through the e-domec initiative (Electronic Document Management at the European Commission). Accordingly, the forms are registered in Adonis, a software database used by the Commission to register documents.

⁷ The CMS is a central database which is used to manage all OLAF's operational cases. From the first moment when information about an alleged wrongdoing is discovered or passed on to OLAF for initial assessment, it is assigned a number referred to as Operational File. This number will be attached to the case, through its different phases, assessment, investigation and follow-up.

propose to the Director that the case should be classified as a prima facie non case. In some instances, the matter relates to an already existing file. If so, then it is added to the CMS File for that case. (ii) If the forms are classified as "relevant for Commission/Member State authorities", the Quality Assurance Team sends them to the Operational Intelligence Unit for their assessment and possible transmission to the relevant national authorities. (iii) If the form is marked as *not relevant*, the matter will be forwarded to the internal investigations unit on duty, following a three month-rotation period among the investigative units, for confirmation that the message is not relevant. The Unit creates a new case in the CMS. If the Unit agrees with the investigator's recommendation, it will propose to the Director that the case should be classified as a prima facie non case.

The ***purpose of the processing*** is to obtain information from the public which may reveal the existence of fraud and corruption affecting the financial interests of the Community.

The ***primary responsibility for the data processing*** lies within the Information Services Unit (D8). As described above, this Unit is responsible for most of the data processing actions: (i) managing the dedicated server where the voice messages are left; (ii) copying the voice messages in a protected area of the OLAF file system; (iii) maintaining a list of all the investigators in charge of listening to the messages; and (iv) managing the application where the electronic free phone screening forms are stored. (v) In addition, the Information Service Unit (D8) is responsible for forwarding the relevant printed screening forms to the appropriate investigation units and, (vi) for ensuring the deletion in due time of the voice messages and the screening forms.

However, the Information Services Unit is not responsible for further data processing actions that may take place at later phases of the assessment and investigation process. In particular, as of the moment when the message is transferred to the investigative or operational intelligence Unit, the Information Services Unit ceases to be responsible for the processing⁸.

In the context of the management of the Free Phone Service, one can distinguish between two types of data processing operations, the ***automated processing of voice messages*** and the ***automated processing of written messages*** that reflect the content of the voice messages.

Automated processing of voice messages consists of the following steps: (i) The Free Phone Service records telephone messages left from members of the public. (ii) The voice messages are recorded in a dedicated server which is separated from the OLAF network. (iii) Later on, a copy of such messages is stored in a protected area of the OLAF File System. (iv) At the end of each year, they are copied on CD or DVD and deleted from both the OLAF File System.

Automated processing of written messages consists of the following. (i) Investigators write a written summary of the voice messages in the so-called "free phone message screening forms". The electronic version of such forms is stored in a protected area of the OLAF file system. (ii) The free phone message screening forms are available to the Information Services Unit (D8) which manages the application where the forms are stored. (iii) The free phone message screening forms are maintained for a certain time as described in the section on conservation of data. As further described below, further data processing operations, such as transfers of the screening forms, are carried out manually and are paper based.

⁸ As pointed out in footnote number 8, some of the data processing carried out by the investigation Units have already been the subject of a prior check Opinion from the EDPS and others are currently being analysed

Regarding the **manual processing**, in particular regarding voice messages, the Information Services Unit (D8) deletes immediately the messages that are deemed improper and pointless. Regarding the manual processing of written messages, it should be noted that once the Information Services Unit (D8) has received the free phone message screening forms duly completed by the investigator, the Unit sends a printed copy to the appropriate investigation unit.

The data processing involves the following **types of data subjects**: (i) Callers who choose to leave their personal data (the system is set up in such a way that it is impossible for OLAF to trace back and identify a caller); (ii) Any person named by a caller and, (iii) The OLAF staff members who are responsible for listening to the calls.

Regarding the categories of personal data, the personal data collected from callers include, date and time when the caller left the voice message, the country of origin and the content of the message which may include additional personal information from the caller. In addition, a summary of such content is also kept including a statement regarding its relevance.

The personal data collected may also include the identity of persons named by the callers and other variable information, depending on each voice message. Finally, the personal data processed from OLAF staff responsible to listen to messages include their name, OLAF unit and mother tongue.

Conservation periods vary depending on the categories of data, i.e., the voice messages and written information that reflect and/or complements the content of the voice messages.

Regarding the voice messages, two categories must be distinguished: First, messages that are deemed improper and pointless are deleted immediately.

Second, the rest of the messages. Regarding these messages, the OLAF DPO has informed the EDPS that in order to free space on the protected area on the OLAF file system, at the end of each year, they are copied onto CD or DVD and then deleted from the protected area. Those CD/DVDs are retained in a safe. As of March 2007, the retention period for the messages stored in CD/DVDs has been set at five years.

As to the written messages which reflect and/or complement the content of the voice messages (basically the free phone screening form), the Quality Assurance Team will ensure the retention of the forms in accordance with the retention periods set forth for the different type of cases: internal and external investigations, criminal assistance cases, coordination, monitoring, prima facie non cases and non-cases, as specified in the respective notifications for prior checking.

Regarding **data transfers**, the EDPS notes that the voice messages are not transferred.

The summary of the voice message recorded in the Free Phone Service Screening Form may be transferred to the following bodies: (i) To OLAF investigative Units (A1-A4 and B1-B4) if the messages are relevant. (ii) To the OLAF Investigation Unit on duty for confirming that the matter is not relevant. (iii) To the OLAF Operational Intelligence Unit, when the message is relevant to a Member State or to the Commission. The OLAF Operational Intelligence Unit will assess whether the information should be sent to the relevant Member State authorities and/or the Commission. Such onward transfer does not fall within the scope of responsibility of the Information Services Unit (D8) in the context of the management of the FPS. Instead it is the responsibility of the operational intelligence Unit in the scope of its activities and data

processing actions. Thus, as reflected above, no data transfers occur outside OLAF in the context of the operation and management of the FPS.

Regarding the *Data Subjects' Rights to Information*, the prior check notification refers to a privacy statement, intended to provide information to individuals who call the Free Phone Service. The privacy statement has been available on the OLAF internet website as of 4 April 2007, in particular, in a link under "Contact us/To report a suspected fraud" (http://ec.europa.eu/anti_fraud/FreePhone/index_en.html). Its existence is not mentioned in the recorded message to individuals each time they call the Free Phone Service.

The privacy statement contains information on identity of the data controller, the purposes of the processing, the recipients of the data, the existence of a right of access and the right to rectify, including the name of the contact person to exercise such rights. It also contains the time limits for storing the data and the right to have recourse at the European Data Protection Supervisor. The privacy statement does not foresee the possibility, in certain cases, to defer the obligation to provide information to safeguard the investigation.

The notification for prior checking is silent as to providing information to individuals whose names are mentioned by callers who use the Free Phone Service. As explained above, the processing that occurs through the Free Phone Service does not only include those who call the Free phone Service but also those who are named by the callers and OLAF staff. As far as the persons named by the caller are concerned, whereas some of these individuals would receive the information in the context of the investigation or case (if one is opened), no information notice is provided for those individuals who have been named in calls which have been deemed by OLAF as not relevant. The information notice is also silent as to OLAF staff whose information is also processed in the context of the operation of the FPS. However, we note that they already have the information as to the processing of their personal data.

As far as the Free Phone Service callers' *right of access and rectification*, the privacy statement declares that individuals have such rights regarding the information that OLAF holds about them. It gives the name and e-mail of the Head of Unit D8 as the contact person to exercise such rights as well as to answer any further questions regarding the processing of their personal information. The privacy statement does not foresee the possibility, in certain cases, to defer the obligation to provide access/rectification to safeguard the investigation.

The notification for prior checking is silent regarding the right of access/rectification of those who have been named by callers to the Free Phone Service. Whereas some of these individuals will have such rights in the context of the investigation or case, this does not occur regarding individuals named in relation with information that OLAF deems irrelevant.

The EDPS notes that OLAF has implemented *security measures*.

2.2. Legal aspects

2.2.1. Prior checking

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 "Regulation (EC) No 45/2001") applies to the *"processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system"* and to the processing *"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"*⁹.

For the reasons described below, the EDPS considers that all the elements that trigger the application of the Regulation exist in the operation of the Free Phone Service:

Firstly, the EDPS notes that the operation of the Free Phone Service entails the collection and further processing of *personal data* as defined under Article 2(a) of Regulation (EC) No 45/2001. Indeed, as described in the notification for prior checking, personal data of individuals who use the Free Phone Service to leave messages are kept such as the time of the voice message, country of origin and content of message. This information is summarised in a written form, which also includes the same type of personal information. Furthermore, personal information from individuals named by the callers is also collected and reflected in the written summaries. Accordingly, clearly personal data are processed through the Free Phone Service.

Secondly, as described in the notification for prior checking, the personal data collected undergo "automatic processing" operations, as defined under Article 2 (b) of the Regulation (EC) No 45/2001. The mere storage of the voice messages themselves constitutes an automatic data processing operation. An example of a mixture of automatic and not automatic processing operation consists in the listening of the voice messages left through the Free Phone Service and the writing of summaries that reflect the content of the voice messages as well as their subsequent storage through a software application. Non-automatic processing occurs when the printed Free Phone Screening forms are forwarded to the relevant investigative units or to the Operational Intelligence unit.

Finally, the EDPS confirms that the processing is carried out by a Community institution, in this case by OLAF, the European Anti-Fraud Office, which is part of the European Commission, in the framework of Community law (Article 3.1 of the Regulation (EC) No 45/2001). Therefore, clearly all the elements that trigger the application of the Regulation exist with respect to the management of the Free Phone Service.

Assessment of Whether the Data Processing Operations Fall Under Article 27 of the Regulation

Article 27.1 of Regulation (EC) No 45/2001 subjects to prior checking by the EDPS "*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.

The EDPS considers that the Free Phone Service notification submitted to the EDPS for prior checking clearly falls under the hypothesis foreseen by Article 27.2. of Regulation (EC) No 45/2001.

In the first place, in the EDPS' opinion, such data processing operations fall under Article 27.2(a) of Regulation (EC) No 45/2001, which establishes that processing operations relating to "*suspected offences, offences, criminal convictions or security measures*" shall be subject to prior checking by the EDPS. In the case in point, by setting up the Free Phone Service, the OLAF Information Services Unit (D8) will process information which may relate to allegations of fraud and other serious irregularities which have an impact on the EU budget as

⁹ *Ex* Article 3.2 of Regulation (EC) No 45/2001.

well as allegations of corruption and other serious misconduct on the part of members or staff of European institutions. As a matter of fact, the Free Phone Service is a tool for OLAF to discover such irregularities and misconduct, and thus will, in some instances, collect information related to offences.

The EDPS considers that the notification also falls under Article 27.2(b) of the Regulation (EC) No 45/2001 which stipulates that data operations which "*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, all sort of aspects related to data subjects are evaluated, from an evaluation of the caller to the evaluation of the conduct of individuals which are named by the call, thus triggering the application of Article 27.2(b).

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 operations have already been established. This is not a serious problem as far as any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 9 February 2007. Complementary information was requested on 13 February 2007. The answers were received on 15 March 2007. Pursuant to Article 27.4 of Regulation (EC) No 45/2001, the two-month period within which the EDPS must deliver an opinion was suspended during such interval. The procedure was suspended again on 3 April 2007 until 20 April 2007 to allow comments from the DPO on the EDPS Draft Opinion and on 25 April until 8 May to seek further clarification. On 10 May the EDPS asked for confirmation regarding changes in the procedures/data processing operations presented to the EDPS with the 8 May response. The answers were received on 11 May. The Opinion will therefore be adopted no later than 11 June (deadline 10 April plus 61 days of suspension).

2.2.2. Lawfulness of the Processing

Personal data may only be processed if legal grounds can be found in article 5 of Regulation (EC) No 45/2001.

As pointed out by the notification for prior checking, of the various grounds listed under Article 5 of Regulation (EC) No 45/2001, the processing operation notified for prior checking fall under Article 5 a), pursuant to which data may be processed 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*".

In order to determine whether the processing operations comply with Article 5 a) of Regulation (EC) No 45/2001, three elements must be taken into account: First, whether either the Treaty or other legal instruments foresee the data processing operations carried out by OLAF; second, whether the processing operations are performed in the public interest; and third, whether the processing operations are necessary. Obviously, the three requirements are closely related.

Relevant Legal Grounds in the Treaty or in Other Legal Instruments

In ascertaining the legal grounds in the Treaty or in other legal instruments that legitimise the processing operations that take place in the context of the management of the Free Phone Service, the EDPS takes note of the following:

First, in indicating the legal basis for the processing that takes place through the Free Phone Service, the prior check notification explains that the processing is part, often the first step, of the collection of information that may lead to the opening of an investigation. Thus, the prior check notification explains that the legal grounds that justify the data processing that occurs during the investigation also justify the data processing that occurs prior to the investigation phase, i.e. particularly during the pre-assessment phase, in this case the processing that occurs through the FPS. As far as internal investigations are concerned, as pointed out in the EDPS Opinion on OLAF internal investigations¹⁰, the legal grounds are mainly Article 4 of Regulation 1073/1999 concerning investigations conducted by OLAF¹¹. Also relevant is Article 2 of Commission Decision 1999/352 establishing OLAF¹². As far as external investigations are concerned, there are a variety of legal sources. For example, the processing that takes place when OLAF engages in horizontal anti-fraud investigations covering Community expenditure, both direct and indirect and income collected directly on behalf of the Communities (traditional own resources) is based on Article 2 of Council Regulation No 2185/96¹³ in conjunction with Article 3 of Regulation No 1073/99 concerning investigations conducted by OLAF¹⁴. In addition, there are a number of sectoral legal instruments that legitimise the data processing in specific sectors, which are referred altogether by Article 9(2) of Council Regulation 2988/95 on the protection of the European Communities financial interests enabling the Commission to "*carry out checks and inspections on the spot under the conditions laid down in the sectoral rules*". Other legal grounds apply regarding other types of cases.

Second, the EDPS notes the existence of the above legislation enabling OLAF to engage in investigations (of different categories), of alleged fraud, corruption and other serious irregularities affecting the Community. The EDPS concurs with OLAF that these legal instruments also constitute an appropriate legal basis *ex* Article 5 a) to legitimise the collection and further processing of personal data through the FPS. As pointed out in the prior check notification, the processing that takes place through the FPS "*is part of the initial information gathering which may lead to the opening of an investigation*". Taking into

¹⁰ Prior check Opinion of 23 June 2006 on OLAF internal investigations (Case 2005-418).

¹¹ The relevant part of Article 4 of Regulation 1073/1999 stipulates the following: "1. In the areas referred to in Article 1, the Office shall carry out administrative investigations within the institutions, bodies, offices and agencies (hereinafter "internal investigations"). (...) 2. Provided that the provisions referred to in paragraph 1 are complied with: (...),- the Office may request oral information from members of the institutions and bodies, from managers of offices and agencies and from the staff of the institutions, bodies, offices and agencies. 3. (...) The Office may, moreover, ask any person concerned to supply such information as it may consider pertinent to its investigations.

¹² This Article establishes the following: "(...) The Office shall be responsible for carrying out internal administrative investigations intended: (a) to combat fraud, corruption and any other illegal activity adversely affecting the Community's financial interests, (b) to investigate serious facts linked to the performance of professional activities which may constitute a breach of obligations by officials and servants of the Communities likely to lead to disciplinary and, in appropriate cases, criminal proceedings or an analogous breach of obligations by Members of the institutions and bodies not subject to the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the Communities. (...)".

¹³ Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ L 292, 15.11.1996, p. 2. Article 2 states: "The Commission may carry out on-the-spot checks and inspections pursuant to this Regulation:- for the detection of serious or transactional irregularities or irregularities that may involve economic operators acting in several Member States, or- where, for the detection of irregularities, the situation in a Member States requires on-the-spot checks and inspections to be strengthened in a particular case in order to improve the effectiveness of the protection of financial interests and so to ensure an equivalent level of protection within the Community, or- at the request of the Member States concerned."

¹⁴ "The Office shall exercise the powers conferred on the Commission by Regulation (Euratom, EC) No 2185/96 to carry out on- the- spot inspections and checks in the Member States and, in accordance with the cooperation agreements in force, in third countries".

account that OLAF is under an obligation to investigate serious irregularities, it seems appropriate for it to employ tools such as the Free Phone Service, which facilitates the disclosure of information to OLAF by informants, and thus may ultimately assist OLAF in the overall purpose of fighting fraud, corruption and other irregularities.

Processing Operations are Carried out in the Public Interest

The EDPS notes that OLAF carries out the processing activities in the legitimate exercise of its official authority. Indeed, Articles 9 and 10 combined with Articles 4 and 5 of Regulation (EC) No 1073/1999 and Commission Decision 1999/352 establishing OLAF confer upon OLAF the competence and the obligation to engage in investigations and ensure the effective implementation of their findings in cooperation with relevant national and Community authorities.

Necessity test

According to Article 5 a) of Regulation (EC) No 45/2001, the data processing must be "*necessary for performance of a task*" as referred to above. It is therefore relevant to assess whether the data processing that occurs in the context of the FPS is pertinent for the performance of a task.

In doing so, in the first place, one must assess whether the setting forth of the Free Phone Service *as such* can be deemed as necessary to perform a task. To answer this question, it is helpful to recall that OLAF's core competence or task consists of carrying out investigations to combat various types of wrongdoings that may affect the Community financial interests. The EDPS understands that OLAF's effectiveness to perform its task relies, among others, on its ability to gather and receive information that may reveal the existence of wrongdoings. The EDPS also understands that this applies throughout the life of a possible investigation, i.e. from the pre-assessment phase to the follow up phase. Hence, the EDPS views the Free Phone Service in itself as a necessary instrument that helps OLAF in the initial information gathering phase. The Free Phone Service can be considered to be equivalent to other tools that also serve to report suspected frauds, and to this extent, it is as necessary as the other tools, which are described in OLAF's Web site, including the possibility for the public in general to send e-mails and correspondence to inform OLAF about the existence of a potential wrongdoing.

After having examined the necessity for the Free Phone Service as such, it is important to stress that the "necessity" of the data processing also has to be analysed *in concreto*, for each particular case, here, for each specific use of the FPS. From this perspective, it has to be borne in mind that the processing of personal data to be conducted in the context of the processing of the information received from the FPS has to be proportional to the general purpose of processing (combat fraud, corruption, etc) and to the particular purpose of processing in the context of the case under analysis. Thus, the proportionality has to be evaluated on a case-by-case basis. For example, information that obviously falls outside the competence of OLAF and which would not help OLAF to pursue its goals should not be retained.

2.2.3. Processing of Special Categories of Data

Taking into account that the purpose of the Free Phone Service is to facilitate the receipt of information about alleged wrongdoings affecting the Community financial interests, it is expected that in a number of cases this information will be related to offences, criminal

convictions or security measures. In this regard, the EDPS recalls the application of Article 10.5 of Regulation (EC) No 45/2001 which establishes 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 the present case, processing of the mentioned data is authorised by the legal instruments mentioned in point 2.2.2 above.

As far as special categories of data are concerned, Article 10.1 of Regulation 45/2001 establishes that "*the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and of data concerning health or sex life, are prohibited*".

The notification for prior checking states that no data falling under the categories of data referred to in Article 10.1 are processed in the context of the Free Phone Service. Taking into account the overall purpose pursued by OLAF when it engages in data processing operations, the EDPS understands that the collection of special categories of data is not OLAF's main goal.

However, the EDPS considers that in the context of the Free Phone Service, OLAF may become, perhaps involuntarily, in possession of special categories of data, which will often be of no interest/relevance to the investigation. In this regard, the EDPS recalls the application of the data quality principle, according to which data must be adequate, relevant and not excessive in relation to the purposes for which collected and/or further processed (Article 4.1.c). Pursuant to this principle, if special categories of data that clearly are not relevant for the purposes of investigating fraud and other wrongdoings affecting the Community financial interests are collected through the Free Phone Service, they should be not be reflected in the free phone screening form. Investigators in charge of listening to voice messages should be made aware of this rule.

2.2.4. Data Quality

Pursuant to Article 4.1.c of Regulation (EC) No 45/2001, personal data must be "*adequate, relevant and not excessive in relation to the purposes for which collected and/or further processed*". This is referred to as the data quality principle.

The EDPS notes that it is up to individuals who use the Free Phone Service to decide which information they want to provide to OLAF. They may provide adequate and relevant information but they may also provide information that is completely irrelevant for the purposes sought by the Free Phone Service and overall OLAF competences. On the other hand, OLAF has the means to avoid or minimise this outcome in different ways. For example, OLAF may indicate the type of information that is relevant and which falls within the scope of its competences. In this regard, the EDPS observes that the section of the OLAF Web site dealing with the use of the Free Phone Service to report a suspected fraud indicates clearly the scope of OLAF competences "*allegations of fraud and other serious irregularities which have an impact on the EU budget; corruption and other serious misconduct on the part of members or staff of European institutions*" and it provides some useful examples of facts that would be covered and others that would not.

If individuals leave voice messages with information that is pointless for the purposes at stake, such information should not be retained. In this regard, the EDPS welcomes OLAF's practice consisting in deleting immediately improper and pointless voice messages. It is also

positive that these messages are not either reflected in free phone screening forms. Irrelevant messages that constitute later on prima facie non cases should also be deleted as soon as possible. Furthermore, the personal data processed within the scheme should be limited to the data which is strictly and objectively necessary to verify the allegations made. OLAF investigators should be made aware of this rule. Also, the section of the OLAF Manual that deals with the Free Phone Service must be updated to reflect the current practice of the operation of such service consisting in the immediate deletion of information that is deemed improper and/or pointless.

In addition to the above, it is important to recall the application of Article 4.1(d) of the Regulation (EC) No 45/2001 requires that 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.*” From a managerial and IT point of view, the Information Services Unit (D8) should ensure that personal data kept in the context of the Free Phone Service are accurate and complete. This must be implemented. This principle is very much connected to the exercise of the right of access, rectification, blocking and erasure (see point 2.2.8 below). Obviously, if efforts have been put to ensure the accuracy and the update of personal data, there are likely to be fewer requests for rectification.

Guarantees for whistle blowers and informants: Community legislation does not set forth a legal framework for informants, which in principle do not enjoy the same guarantee as EU Officials and other EU Staff if they come forward to OLAF with information. In this context, OLAF has adopted a policy consisting in making an effort to guarantee the confidentiality of the informants until the information is passed to national judicial authorities where no guarantee for confidentiality is given. As to the right to confidentiality that applies to EU Officials and Staff, the EDPS observes that the EU legal framework is not crystal clear: the right to confidentiality is addressed in a Commission Communication which provides for specific measures to ensure a maximum of protection for staff making proper use of the whistle blowing procedures, one of them being that “[i]nformation relating to the identity of the whistleblower will be treated in confidence”¹⁵. However, such right has not been enshrined in binding legislation. As it was stated in the EDPS Opinion on internal investigations¹⁶, the EDPS considers that the confidentiality of whistle blowers and informants should be guaranteed throughout the life span of a case, from the pre-assessment to the assessment and investigations phases in as much as this would not contravene national rules regulating judicial procedures. Towards this end, in its Opinion on the Proposal for a Regulation amending Regulation (EC) No. 1073/1999 concerning investigations conducted by OLAF¹⁷, the EDPS recommended that the Proposal should include a new paragraph guaranteeing the confidentiality of whistleblowers.

2.2.5. Conservation of Data/ Data Retention

Pursuant to Article 4 (1) e) of Regulation (EC) No 45/2001, personal data may be kept in a form which permits the identification of data subjects for “*no longer than is necessary for the purposes for which the data were collected and/or further processed*”.

¹⁵ (SEC/2004/151/2) of 6 February 2004 from Vice-President Kinnock.

¹⁶ Opinion on a notification for prior checking received from the Data Protection Officer of the European Anti-Fraud Office (OLAF) on internal investigations, 23-June 2006 (Case 2005-418).

¹⁷ Opinion of 27 October 2006 on the Proposal for a Regulation amending Regulation (EC) No. 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

In addressing the conservation/retention question regarding the Free Phone Service, one must distinguish between the written summaries of the voice messages left through the FPS and on the other hand the voice messages left on the OLAF dedicated server.

Concerning written information gathered in the context of the Free Phone Service, by letter of 15 March 2007 and e-mail of 8 May 2007, the OLAF DPO informed the EDPS of certain changes in OLAF's retention practices. According to the new retention policy, the data controller, in particular the Quality Assurance Team of Unit (D8), will retain the free phone screening forms in accordance with the retention periods set for investigations, monitoring cases, criminal assistance cases, non-case or prima facie non-cases, mutual assistance or irregularities. The time limits are as follows: (i) 20 years if it is relevant to an OLAF investigation, (ii) 10 years if it is exchanged with a Member State under Mutual Assistance, (iii) 3 years if it is exchanged with Member States under irregularities and (v) 5 years if it is clarified as a non-case or prima facie non case.

Regarding these retention periods, the EDPS has the following comments:

First, the information left in the Free Phone Service independently of whether it is deemed "relevant" or "relevant for Commission/Member State authorities" or "irrelevant" it will be transferred to the appropriate Units for their further assessment and potential opening of an investigation. The matter will be given a case number in the Case Management System (CMS) and the form will become part of the CMS (unless it already has a number because it is linked to an existing investigation). Under these circumstances, the retention period for the information at stake will be governed by the type of case (internal or external investigations, coordination cases, etc or prima facie non-cases).

The data processing that occurs in the context of the investigations, including the data retention periods implemented by the relevant Unit in charge of the case, falls outside the scope of the processing that takes place through the Free Phone Service. These are further processing operations for which Units other than the Information Services Unit (D8) are responsible as data controllers. Accordingly, the present Opinion will not address the adequacy of such data retention/conservation periods. The EDPS has analysed or will analyse the data retention periods of the processing operations undertaken by the investigative Units in different Opinions. For example, the EDPS has issued opinions commenting on the data retention periods used for internal investigations as well as follow up cases¹⁸.

Second, the retention periods that are relevant in the context of the Free Phone Service relate only to the conservation of the summaries of the calls made through the free phone screening forms, by the Information Services Unit (D8). In this regard, the EDPS notes that the Quality Assurance Team of Unit D8 will retain the free phone screening forms for a period in accordance to its relevance (i.e., using the retention periods set for investigations, monitoring cases, criminal assistance cases, non-case or prima facie non-cases, mutual assistance or irregularities). The EDPS questions the necessity for the Quality Assurance Team of the Information Services Unit (D8) to keep the information at all. Particularly, if the same information has been transferred to the competent Units to carry out the necessary assessments and investigations, and if the information is also recorded in CMS, it seems superfluous and unnecessary for the Assurance Team of Unit D8 to retain additional copies.

¹⁸ See EDPS Opinion of 23 June 2006 on a notification for prior checking on OLAF internal investigations (Case 2005-418) and Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Anti-Fraud Office on "follow-up" data processing operations (disciplinary, administrative, judicial, financial) Brussels, 26 March 2007 (Cases 2006/0543, 2006/0544, 2006/0545, 2006/0546, 2006/0547).

In sum, if the purpose and usefulness of keeping such information is lacking, there is contravention of Article 4 (1) e) of Regulation (EC) No 45/2001.

As far as the voice messages are concerned, the EDPS considers positive the practice consisting in deleting immediately the messages that the investigator deems fully improper and pointless. The section of the OLAF Manual that deals with the Free Phone Service must be updated to reflect this practice.

As far as the rest of the messages are concerned, OLAF DPO has informed the EDPS that in order to free space on the protected area on the OLAF file system, at the end of each year, they are copied onto CD or DVD and they are deleted from the protected area. Those CD/DVDs are retained in a safe. As of March 2007, the retention period for the messages stored in CD/DVDs has been set for five years. This practice seems very long regarding messages that are deemed irrelevant and which become *prima facie* non-cases.

2.2.6. Transfer of Data

Articles 7, 8 and 9 of Regulation (EC) No 45/2001 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 to Community institutions or bodies, *ex* Article 8 to recipients subject to Directive 95/46 or to other types of recipients *ex* Article 9.

The facts described in the notifications for prior checking reveal that the transfer of the information collected through the Free Phone Service is limited to other Units within OLAF. Indeed, the Information Services Unit (D8) as data controller of the data collected through the Free Phone Service sends the information collected (a summary of it) to (i) OLAF's Investigative Units (A1, A2, A3 or A4 or relevant investigative units in Directorate B) for their further analysis and (ii) to the Operational Intelligence Unit if they are deemed as relevant for other Community or national bodies.

The OLAF Investigative Units mentioned above will engage in in-depth assessments of the information received from the Information Services Unit (D8) in order to determine whether an investigation should be opened, establishing the category of investigation (internal, external) or case (monitoring, coordination, criminal cases). Alternatively, these Units may confirm that the matter is irrelevant and should be considered as a Non-Case or *Prima facie* non-case. In the case that the Operational Intelligence Unit confirms that the matter is relevant for national bodies, it will forward the matter to the national authorities.

In the context of the further processing of the information, OLAF Investigative Units and the Operational Intelligence Units will send the information to third parties, including Community institutions and bodies as well as recipients subject to Directive 95/46 or to other types of recipients *ex* Article 9. The EDPS considers that such onward transfers must be considered as taking place outside the scope of the data processing that occurs within the Free Phone Service, hence, they do not fall within the scope of responsibility of Information Services Unit (D8). These onward transfers take place in the context of the data processing operations for which these other Units are responsible. Such data processing operations have been or are in the process of being prior checked by the EDPS and will be taken into account in such contexts¹⁹.

¹⁹ For example, such transfers may occur in the context of internal investigations, which were the subject of an EDPS Opinion on internal investigations, 23 June 2006 (Case 2005-418). Others may occur in the framework of external investigations or monitoring cases, both currently under analysis by the EDPS following the submission by OLAF DPO of their respective notifications for prior check.

2.2.7. Information to the Data Subject

Pursuant to Article 11 and 12 of Regulation (EC) No 45/2001, those who collect personal data are required to inform individuals to whom the data refers of the fact that their data are being collected and processed. Individuals are further entitled to be informed of, *inter alia*, the purposes of the processing, the recipients of the data and the specific rights that individuals, as data subjects, are entitled to.

In assessing whether the data controller for the case in point provides information to individuals, one must distinguish between three different types of data subjects: First, the individuals, callers who call the Free Phone Service and choose to leave their personal data; second, any person named by a caller, and third, the OLAF staff members who are responsible for listening to the calls.

Information Provided to Callers who Call the Free Phone Service and Choose to Leave their Personal Data: In response to a request for further information, the OLAF DPO has explained to the EDPS that a privacy statement has been posted in OLAF Internet website, in the section dealing with the Free Phone, in particular, under "Contact us/To report a suspected fraud" (http://ec.europa.eu/anti_fraud/FreePhone/index_en.html). The privacy statement is intended to provide information to individuals who call the Free Phone Service, i.e. the first category of data subjects. The EDPS notes that OLAF uploaded the privacy statement onto its internet site as of 4 April 2007.

Regarding the choice of using a privacy statement in the section "To report a suspected fraud", the EDPS finds it appropriate for various reasons. First, because in many instances individuals will use the OLAF website to identify the phone number where to contact OLAF. Thus, it seems appropriate to use the same channel to communicate the privacy statement. Second, the choice of placing the statement in the above mentioned section is correct insofar as this is the section that individuals will visit if they want to contact OLAF. In this regard, the EDPS advises OLAF to post the privacy policy either in a page through which visitors who want to call the Free Phone Service must necessarily go through or alternatively in a very prominent way, immediately after or before the information on the Free Phone Service.

The EDPS has also checked the content of the information provided in the privacy statement and considers it to be in line with the requirements of Article 11 and 12 of Regulation (EC) No 45/2001. Indeed, it contains information on the identity of the data controller, the purposes of the processing, the recipients of the data, the existence of a right of access and the right to rectify, including the name of the contact person to exercise such rights. It also contains the time limits for storing the data and the right to have recourse at the European Data Protection Supervisor. The EDPS however reminds OLAF that this statement should be amended to include the changes regarding retention periods as well as the treatment of messages deemed irrelevant as *prima facie* non cases. These changes were decided by OLAF in April 2007, after OLAF had submitted to the EDPS the privacy statement and therefore they do not fully reflect the aspects mentioned above.

Also, although the provision of information through the privacy statement placed in the website is positive, for the reasons explained below, the EDPS considers that it needs to be supplemented. The EDPS is concerned that in some instances individuals will use the Free Phone Service to contact OLAF without visiting OLAF web site, thus, bypassing the OLAF privacy statement. This outcome could be easily avoided if when accessing the Free Phone Service individuals were provided either with a short version of the privacy statement or with an indication of its existence and its location in the Web site. In this way, individuals who

obtained OLAF Free Phone Number from sources other than the OLAF website would be provided with the relevant information. For this reason, the EDPS advises OLAF to make the necessary arrangements to introduce such information.

Information Provided to any Person Named by a Caller to the Free Phone Service: As explained above, the processing that occurs through the Free Phone Service does not only include those who call the Free phone Service but also those who are named by the callers. The EDPS observes that the prior check notification is silent as far as detailing how information is provided to those individuals whose names are mentioned by callers who use the Free Phone Service. The EDPS infers that those individuals are not notified.

The EDPS recalls that *ex* Article 12 of Regulation (EC) No 45/2001 individuals whose names are mentioned by callers who use the Free Phone Service have the right to receive information about the processing of their data. The existence of a similar obligation under the Data Protection Directive was highlighted by the Article 29 Working Party in its Opinion on whistleblowing schemes²⁰: "*The person accused in a whistleblower's report shall be informed by the person in charge of the scheme as soon as practicably possible after the data concerning them are recorded*". OLAF should implement such an obligation.

The same Opinion recognises that "*where there is substantial risk that such notification would jeopardise the ability of the company to effectively investigate the allegation or gather the necessary evidence, notification to the incriminated individual may be delayed as long as such risk exists. This exception to the rule provided by Article 11 is intended to preserve evidence by preventing its destruction or alteration by the incriminated person. It must be applied restrictively, on a case-by-case basis, and it should take account of the wider interests at stake*". Similar type of exceptions, subject to similar conditions, exist under Article 20 of Regulation (EC) No 45/2001. In particular, this Article provides for certain restrictions to the right of information notably where such a 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."

In the case in point, the application of Article 20 of Regulation (EC) No 45/2001 enables OLAF to defer the provision of information to safeguard the interests mentioned in subsections (a), (b) and (c). In practical terms this means that when the information is deemed to be (i) relevant and (ii) "relevant for Commission/Member State authorities", OLAF will have to assess whether the provision of information to the person named by the caller would jeopardise the values mentioned above under subsections (a), (b) and (c) of Article Regulation (EC) No 45/2001, in which case the provision of information may be deferred. Particularly, if the matter is deemed relevant, in some cases, OLAF is likely to be able to rely on section (a) of Article 20 of Regulation (EC) No 45/2001. When the information is deemed to be irrelevant, in most cases, the EDPS questions the use of the exception (a) and (b) of Article 20 of Regulation (EC) No 45/2001. Under these circumstances, in principle, there will be neither an investigation *per se* to protect nor a financial interest at stake. Yet, OLAF may rely on section (c) if it considers that deferring the information is necessary in order to

²⁰ Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime, WP 117, adopted on 1 February 2006. According to the Article 29 Working Party, the individual must be informed about "[1] the entity responsible for the whistle blowing scheme, [2] the facts he is accused of, [3] the departments or services which might receive the report within his own company or in other entities or companies of the group of which the company is part, and [4] how to exercise his rights of access and rectification".

safeguard *"the protection of the data subject or of the rights and freedoms of others"*, for example, if it considers that the disclosure of information may reveal the identity of the whistleblower or informant which may be the case in a number of instances. In deciding whether OLAF is under the obligation to provide information or whether an exception applies, OLAF must engage in a case-by-case assessment of the circumstances of the particular data processing at stake.

If OLAF uses an exception to defer the provision of information, it should take into account that the restrictions to a fundamental right can not be applied systematically. OLAF must assess in each case whether the conditions for the application of one of the exceptions, for example, Article 20.1.a or 20.1 c may apply. In addition, as foreseen in Article 20 of the Regulation, the measure has to be "necessary". This requires that the "necessity test" has to be conducted on a case-by-case basis. For example, if OLAF wishes to rely on the exception of Article 20.1. (b) it must assess whether it is necessary to suspend giving information in order to safeguard an important economic interest. In making such an assessment, OLAF must take into account that an economic interest at stake in itself does not justify a need to suspend giving information. In other words, there must be a clear link between the need to suspend giving information and the safeguard of an economic interest. If OLAF uses an exception, it must comply with Article 20.3 according to which *"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"*. However, OLAF may avail itself of Article 20.5 to defer the provision of this information as set forth in this Article: *"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."*

Information Provided to OLAF Staff Members who are Responsible for listening to the Calls: As described above under section 2.1, on the processing of data related to the operation and management of the Free Phone Service, it also includes data from OLAF staff members who are responsible for listening to the calls. The prior check notification does not specify whether information is provided to those individuals. The EDPS notes that the information kept about those individuals is very limited (their name, OLAF unit, and mother tongue) and the purposes for which the information is used are also very narrow (to allocate the calls). The EDPS considers that as a result of these individuals' participation in the listening of the Free Phone Service, they are already made aware of the processing of the limited amount of information related to them. By the same token, these individuals become aware of the identity of the controller, the purposes of the processing, recipients, etc.... i.e. all the information to which they are entitled under Article 11 of Regulation (EC) No 45/2001. As stated under Article 11 the Regulation (EC) No 45/2001, the data controller shall provide information except where the data subject already has it, as the case in point.

2.2.8. Right of Access and Rectification

The right of access is the right of the data subject to be informed about any information relating to him or her that is processed by the data controller. According to Article 13 of Regulation (EC) No 45/2001, the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source. The information can then be obtained directly by the data subject (this is the so-called "direct access") or, under certain circumstances, by a public authority (this is the so-called "indirect access", normally exercised by a Data Protection Authority, being the EDPS in the present context).

As pointed out above regarding the right of information, in assessing whether the data controller for the case in point grants these rights to individuals, one must distinguish between three different types of data subjects: first, the individuals, callers who call the Free Phone Service and choose to leave their personal data, second, any person named by a caller, and third, the OLAF staff members who are responsible for listening to the calls.

As to the Free Phone Service callers' right of access and rectification, the privacy statement declares that individuals have such a right regarding the information that OLAF holds about them. It gives the name and e-mail of the Head of Unit D8 as the contact person to exercise such rights as well as if individuals have further questions regarding the processing of their personal information. The practice as described in the privacy statement is in line with Article 13 of Regulation (EC) No 45/2001. The privacy statement does not foresee the possibility, in certain cases, to defer the obligation to provide access/rectification to safeguard the investigation. However, as further described below, in some instances OLAF may be able to rely on some of the exceptions to Article 20 of Regulation (EC) No 45/2001 to defer such a right.

The prior check notification is silent regarding the right of access/rectification of those who have been named by callers to the Free Phone Service. The EDPS reminds that under Article 13 of Regulation (EC) No 45/2001, such persons have the right of access and rectification and can call upon OLAF to implement such rights. However, such rights may be deferred if one of the conditions of sections (a), (b) and (c) of Article 20 (EC) Regulation No 45/2001 are present. The Article 29 Working Party's Opinion on Whistleblowing stressed that these rights "may be restricted in order to ensure the protection of the rights and freedoms of others involved in the scheme", which is the hypothesis foreseen under subsection (c) of Regulation (EC) No 45/2001.

In the context of exercising the right of access, the EDPS would like to stress the Article 29 Working Party's recommendations pursuant to which *"Under no circumstances can the person accused in a whistleblower's report obtain information about the identity of the whistleblower from the scheme on the basis of the accused person's right of access, except where the whistleblower maliciously makes a false statement. Otherwise, the whistleblower's confidentiality should always be guaranteed"*.

In order to ensure compliance with the above, the EDPS recommends that when access is granted, personal information of third parties, such as informants or whistleblowers, be deleted. If providing access, even if the personal information is deleted, may reveal personal details of third parties such as whistleblowers and informants, access should be deferred.

The prior check notification does not describe the rights as far as OLAF staff members are concerned. The EDPS confirms that under Article 13 of (EC) Regulation No 45/2001 they have such rights.

2.2.9. Security Measures

The EDPS notes that OLAF has implemented certain security measures to prevent unauthorised disclosure and access, destructions, loss and unlawful processing. 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.

3. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations in this Opinion are fully taken into account. In particular, OLAF must be aware of the following:

- If special categories of data left in the FPS, that are clearly not relevant for the purposes of investigating fraud and other wrongdoings affecting the Community financial interests, are collected through the Free Phone Service, they should not be reflected in the free phone screening form. OLAF investigators in charge of listening to voice messages should be made aware of this rule.
- If individuals leave voice messages with information that is irrelevant for the purposes at stake, such information should not be reflected in the Free Phone Screening Form. OLAF investigators should be made aware of this rule. Also, irrelevant message that constitute later on prima facie non cases should be deleted as soon as possible.
- The section of the OLAF Manual that deals with the Free Phone Service must be updated to reflect the current practice of the operation of such service consisting in the immediate deletion of information that is deemed improper and/or pointless.
- From a managerial and IT point of view, the Information Services Unit (D8) should ensure that personal data kept in the context of the Free Phone Service are accurate and complete.
- To the extent possible, the confidentiality of informants should be guaranteed throughout the life span of a case in as much as this would not contravene national rules regulating judicial procedures.
- The EDPS questions the necessity for the Quality Assurance Team of the Information Services Unit (D8) to keep copies of the Free Phone screening forms once they have been passed on to the appropriate investigative units and inserted in the CMS and asks for a reconsideration of this policy.
- The EDPS considers too long the 5 years storage period for voice messages that are deemed irrelevant and which become prima facie non-cases, and asks the Quality Assurance Team of the Information Services Unit (D8) to reconsider this practice.
- The privacy statement should be amended in order to reflect the changes regarding data retention periods as well as the treatment of messages deemed irrelevant as prima facie non cases. These changes were decided by OLAF in April 2007 and must therefore be reflected in the privacy statement.
- The EDPS calls upon OLAF to ensure the right to information to those people who have been named by callers who use the Free Phone Service, subject to the application of the exceptions of Article 20 of Regulation (EC) No 45/2001. OLAF must decide on a case-by-case basis whether the exceptions apply.
- The EDPS suggests that a voice recording providing a short version of the privacy statement or its location on the website is included in the FPS.

- The EDPS calls upon OLAF to ensure the right of access and rectification to those people who have been named by callers who use the Free Phone Service. The EDPS recalls that in some cases, the exceptions of Article 20 of Regulation (EC) No 45/2001 may apply.

Done at Brussels, 6 June 2007

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