

## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Anti-Fraud Office on "Council Regulation (EC) 1469/95"**

Brussels, 20 November 2007 (Case 2007/215)

### **1. Proceedings**

On 27 March 2007, the Data Protection Officer (DPO) of the European Anti-Fraud Office (OLAF) notified to the European Data Protection Supervisor (EDPS) the data processing operations under "Council Regulation (EC) 1469/95" for prior checking.

On 10 May 2007, the EDPS requested further information to which he received the responses on 4 July 2007. On 12 July 2007, the EDPS extended the deadline to issue the opinion for one month due to the complexity of the matter.

On 6 September 2007, the EDPS made a further information request related to the responses received on 4 July from OLAF. He received the responses on 11 October 2007.

On 22 October 2007, the EDPS asked further questions, to which he received the responses on 29 October 2007.

On 30 October 2007, the EDPS sent the draft opinion for comments to the DPO of OLAF. He received the comments on 16 November 2007.

### **2. Examination of the matter**

#### **2.1. The facts**

The object of the present opinion is to examine the reporting and data transfer mechanism between Member States and OLAF, which was established under Council Regulation (EC) No 1469/95 *on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF)*.<sup>1</sup> Under the said Regulation, a reporting mechanism provided by OLAF is implemented for identifying and making known operators presenting a risk of non-reliability to all competent authorities of Member States and to the Commission. The assessment of risk of non-reliability is made on the grounds of experience acquired with operators as regards the proper execution of their previous obligations. The assessment is in connection with tendering procedures, export refunds and sales at reduced prices or intervention products financed by the EAGGF.<sup>2</sup>

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<sup>1</sup> O.J. L 145, 29/06/1995

<sup>2</sup> Article 1(1) of Council Regulation (EC) No 1469/95

Regulation (EC) No 1469/95 applies only to cases of irregularities which concern or would concern, alone or in combination with other irregularities committed by the same operator over a period of one year, an amount exceeding 100,000 Euros.<sup>3</sup>

### ***Description of the identification and notification procedure***

Each Member State should designate a single competent authority to make and receive notifications. The said authority should transmit its notifications to the Commission, in particular to the European Anti-Fraud Office (OLAF)<sup>4</sup>, part of the European Commission, which will transmit them to the competent authorities of the other Member States.<sup>5</sup>

Member States communicate a report of irregularities to OLAF using a specific communication form in their own language (Form "A", see more details below in "Concerned personal data" section). The competent authorities of Member States may send the information to OLAF by various means. They send the information usually by the Anti-Fraud Information System (AFIS) mail or by regular post and are handled by OLAF as follows.

- AFIS mail: Messages are exchanged in free text format among the members of the relevant "Closed User Group". This mail is not registered in Adonis, but it is registered by the "Electronic Courier Registre" and then is provided to Unit C.4 (unit responsible for the processing operation).
- Regular post: Since mid-2003, the staff of OLAF "Archives" registers all incoming mail in Adonis, thereby making it an official Commission document. The document is scanned and assigned to Unit C.04.

Member States have in principle a possibility to send a message by fax or by e-mail. Should they use any of these means in the future, those would be handled in the same manner as a regular mail, i.e. registered in Adonis and assigned to the appropriate service.

Once received by OLAF, the contents are translated into three languages (English, French and German). The completed forms are scanned and registered via *Adonis*<sup>6</sup> and then sent via AFIS mail<sup>7</sup> or by fax to other competent authorities of Member States. Communication form "B" is in use to reply to any action taken by another Member State (for more details see below in "Concerned personal data" section).

The processing operation is named as "blacklist". Until now, very few reports have been made by Member States. OLAF keeps the information in the "system of identification and notification" in order to fulfil its task under Article 6 of Commission Regulation (EC) 745/96: "Once a Member State and the Commission have received a notification within the meaning of Article 5 (2), they shall decide as soon as possible upon the measures to be applied in relation to the operator or operators concerned in respect of those of his or their operations coming under their respective responsibility, taking account of the criteria laid down in Article 3." "Member States shall, in accordance with Article 5, notify the Commission of the

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<sup>3</sup> Article 2(1) of Commission Regulation (EC) No 745/96 laying down detailed rules for the application of Council Regulation (EC) No 1469/95 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF. O.J. L 102, 25/04/1996

<sup>4</sup> The mission of OLAF is to protect the financial interests of the European Union, to fight fraud, corruption and any other irregular activity, including misconduct within the European Institutions.

<sup>5</sup> Article 5 of Commission Regulation (EC) No 745/96

<sup>6</sup> Adonis is a document registration system used by the European Commission.

<sup>7</sup> AFIS Mail is the electronic mail facility of AFIS, which enables the exchange of information in a free format.

steps they have taken. The Commission shall inform the Member State which made the initial notification."

OLAF prepares a summary list of Member States' reports on an excel sheet. This Excel file is based on the "A" forms received from Member States (see its content in the section "Concerned personal data").

The legislation specifies that once a Member State and the Commission [OLAF] have received a notification, the Member States concerned shall decide as soon as possible upon the measures to be applied in relation to the operator(s) concerned as to operations coming upon their respective responsibility. OLAF does not take any part in determining the measures to be used with respect to operators.

Where the Commission itself awards a contract, it shall as appropriate, take or propose to the Member States one or more measures specified in the Council Regulation.<sup>8</sup>

Member States can take the following measures to deal with operators presenting a risk of non-reliability:

- (a) reinforced checking of all operations performed by the operator, and/or
- (b) suspension, going as far as an administrative determination of the existence of an irregularity or of absence of an irregularity, of payment of amounts relating to current operations, to be determined, and, where appropriate, of release of the guarantee relating thereto, and/or
- (c) their exclusion for a period of time from operations to be determined.<sup>9</sup>

The Member States shall notify the Commission [OLAF] of the steps they have taken, and the Commission [OLAF] shall inform the Member States which made the initial notification.

### ***Individuals concerned***

In general, the *data subjects* are individuals representing the legal entities (Economic operators) as well as self-employed natural persons who present a risk of non-reliability according to the initiative of a Member State.

Article 1(2) of Council Regulation (EC) No 1469/95 defines "*operators presenting a risk of non-reliability*" in the following way: "*natural or legal persons, who: (a) according to a final decision of an administrative or judicial authority have deliberately or through serious negligence committed an irregularity<sup>10</sup> in respect of relevant Community provisions and have unjustly benefited from a financial advantage or attempted to benefit therefrom; (b) have been the subject, in this respect, on the basis of established facts, of a preliminary administrative or judicial report<sup>11</sup> by the competent authorities of the Member State.*"

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<sup>8</sup> Article 3(3) of Council Regulation (EC) No 1469/95.

<sup>9</sup> Article 3(1) of Council Regulation (EC) No 1469/95.

<sup>10</sup> An "irregularity" is defined as: any infringement of a provision of Community law, in the fields referred to in Article 1(1) of Council Regulation (EC) NO 1469/95", "that is the result of an act or omission by an economic operator which is harmful to or may be harmful to the EAAGF Guarantee Section." (Article 1(1) of Commission Regulation (EC) No 745/96)

<sup>11</sup> The "preliminary administrative or judicial report" means "the *first written assessment*, even if only internal, by a competent administrative or judicial authority, concluding on the basis of concrete facts that an irregularity has been committed, deliberately or through gross negligence, without prejudice to the possibility of this conclusion being revised or withdrawn subsequently on the basis of developments in the administrative or judicial procedure." (Article 1(2) of Commission Regulation (EC) No 745/96)

## ***Concerned personal data***

According to the notification form, OLAF collects and forwards personal data to competent authorities in relation to persons who are representatives of the concerned legal entities (economic operators): identification data, contact data, professional data, information on the infringed provisions, sanctions and actions imposed.

1) Commission Regulation (EC) No 745/96 stipulates the main fields which the notifications exchanged between OLAF and the Member States should contain<sup>12</sup>:

- identity of natural or legal persons in respect of whom one or more of the measures have been taken;
- brief indication of the concrete facts which lead to the measure(s), specifying the current state of the inquiry where this has not yet been completed,
- specification of the measure(s) taken by the Member State concerned,
- references to any notifications which have been made already under Council Regulation (EEC) No 1468/81(7)<sup>13</sup>, Council Regulation (EEC) No 595/81(8)<sup>14</sup> or Regulation (EC) No 1469/95.

As stated above, Member State authorities communicate a report of irregularities to OLAF using Communication FORM "A" (black list) in their own language. The contents are translated into three languages (French, German and English) and sent by OLAF to the competent authorities of other Member States. Communication form "B" (black list) is used to reply to any action by another Member State.

2) "*Black list form A*" is the "*Report by a Member State*". It contains information in three languages (English, German and French) on:

- *Identification of the case*: case identification number; competent authority; new case; amendment to a previous report; trader removed from the black list (because suspicion proved unfounded; because period of application of measure has expired);
- *Identification of trader*: a) natural person (surname, first name, place and date of birth, address, registered trading name, usual trading name, trader's identification number), and b) company or legal entity (name of company or legal entity, legal form, address, trader's identification number and identification number(s) of other Regulation 1469/95 reports concerning other traders involved in the same irregularity.
- *Description of irregularity*: type of measure financed by the EAGGF; product; type of irregularity; amount involved in respect of all irregularities over the last 12 months in EUR; period during which the irregularity/ies was/were committed; report(s) of the same irregularity/ties.
- *Qualification of the risk and progress of inquiries*: trader A (final decision); trader B (first report); administrative inquiries under way; administrative inquiries concluded; recovery order; administrative penalty; criminal prosecution under way; criminal sanction; appeal lodged.

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<sup>12</sup> Article 5 of Commission Regulation (EC) No 745/96.

<sup>13</sup> Not in force anymore.

<sup>14</sup> Council Regulation (EEC) No 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72.

- *Measures taken:* a) type of measure and period of validity: stricter control; audit; operational control; physical checks; suspension of payments; exclusion; other measures<sup>15</sup>; and b) grounds for the action taken.

3) *Black list B* is the "Action taken on a report by another Member State". It contains the following information in three languages:

- *Identification of the case:* case identification number; competent authority; name and trader identified in the reference file.
- *Action taken:* a) No action taken (trader is not operating in the territory of a Member State or trader's operations checked but no irregularity found); b) Measures taken before the report by another Member State was transmitted (yes or no and reference); c) Measures taken in response to the report by another Member State (type of measure and period of validity, stricter control; audit; operational control; physical checks; suspension of payments; exclusion, and d) Grounds for the action taken.

4) *The excel file on the summary list of reports kept by OLAF contains the following columns:* OLAF reference number, Member State, year (of notification), name and legal form of person/operator concerned, address, type of measure financed by the EAGGF, product concerned, type of irregularity, type of measure taken. The excel file contains personal data for the duration of sanctions. Once this period is over, all personal data are removed.

### ***Information provided to data subjects***

The "Privacy Statement for Council Regulation (EC) 1469/95 (black list)" attached to the notification for prior checking contains the following items: general information on the data processing operation under Council Regulation (EC) 1469/95 (black list), *legal basis* (Council Regulation (EC) 1469/95 and Commission Regulation (EC) No 745/96), *data categories* collected, *purpose* of the processing, *technical means of data processing*, *access to information and to whom it is disclosed*, general description on the *protection and safeguarding of information*, *data storage*, *rights of data subjects*, *right of recourse* (in these terms: "You have the right to have recourse to the European Data Protection Supervisor if you consider that OLAF has infringed your rights under Article 286 of the Treaty as a result of the processing of personal data.").

### ***Rights of data subjects***

The Privacy Statement specifies that individuals have a right to access the personal data that OLAF holds regarding them and they can correct and complete them. Exemptions under Article 20(1)(a) and (b) of Regulation 45/2001 however may apply. Upon request, individuals may be sent a copy of their personal data in order to correct and complete them. Any request for access, rectification, blocking and/or erasing personal data should be directed to the delegated data controller of the "Information and Intelligence data pool" [name and email address of the controller is given]. If the personal data for which an application for access has been made have been supplied by a Member State, access shall be permitted only if the supplying partner has been given the opportunity to state its position.

### ***Recipients of information***

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<sup>15</sup> These "other measures" are those deemed necessary by Member States, and may include reinforced on-the-spot controls pursuant to sectoral CAP Regulation such as Council Regulation (EEC) 4045/89.

Council Regulation 1469/95 requires that Member States and the Commission take all necessary precautions to ensure that the information which they exchanged under the Regulation remains confidential. *"Such information may not, in particular, be sent to persons other than those in the Member States or within the Community institutions whose duties require that they have access to it, unless the Member State supplying it has expressly so agreed."*<sup>16</sup> "Information communicated or acquired in any from under the Regulation should be covered by professional confidentiality and protected in the same way as similar information is protected by the national legislation of the Member State that received it and by corresponding provisions applicable to the Community institutions. The information *"may not be used for purposes other than those provided for in this Regulation unless the authorities providing it have expressly agreed and provided that the provisions in force in the Member State in which the authority that has received it is located do not prohibit such communication or use."*<sup>17</sup>

Designated staff of the competent authorities of Member States and of DG AGRI of the European Commission may receive personal data. No general access is granted to DG AGRI or to competent Member States.

When a Member State informs the Commission [OLAF] that a natural or legal person whose name had been notified, has not proven, upon further investigation, to be implicated in the irregularity, the Commission shall without delay relay this fact to the other Member States, which shall in turn immediately inform those to whom they had notified these personal data under Regulation 1469/95.<sup>18</sup>

### ***Storage period and time limit to block data***

Article 7 of Commission Regulation (EC) no 745/96 specifies that the name of the operators will be deleted from the system of identification and notification:

- 1) as soon as the first evaluation (written assessment) proves to be unfounded;
- 2) when a Member State signals that upon further investigation a named person has not been implicated in the irregularity, that person shall no longer be treated as a person implicated on the basis of the first notification
- 3) at the end of the period of application of the measure concerned (reinforced checking, suspension, exclusion).

The rules and guidelines on the potential length of the measures that can be applied are further stipulated. In regard to exclusion measures, the period of application is a minimum of 6 months, except in duly substantiated exceptional cases, and a maximum is five years.<sup>19</sup>

Data are held no more than four years after the irregularity in question was committed pursuant to Article 8(2) of Regulation (EC) No 745/96. Additionally, the rules established under Council Regulation (EC, Euratom) No 2988/95,<sup>20</sup> concerning the general rules adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law, lay down that the limitation period for proceedings shall be four years from the time when the irregularity was committed. Sectoral

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<sup>16</sup> Article 4(2) second indent of Council Regulation 1469/95

<sup>17</sup> Article 4(2) third and fourth indents of Council Regulation 1469/95

<sup>18</sup> Article 7 (2) of Commission Regulation (EC) No 745/96

<sup>19</sup> Article 3(3) and(4) of Commission Regulation 745/96 and Article 3(1) of Council Regulation (EC) No 1469/95

<sup>20</sup> Official Journal L 312 , 23/12/1995

rules may reduce this period to not shorter than three years. Further details on calculating the deadline is given as to "repeated irregularities" and "multi-annual programmes" and the interruption of that period. The period of implementing the decision establishing the administrative penalty is three years starting to run from the day on which the decision becomes final. Member States may apply a longer period both as to proceedings and to administrative penalties.<sup>21</sup>

The time limit to block data is one month.

## **2.2. Legal aspects**

### **2.2.1. Prior checking**

The processing operation carried out by OLAF related to "Council Regulation (EC) 1469/95" involves the processing of personal data within the meaning of Article 2(a) and 2(b) of Regulation (EC) 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 referred to as "the Regulation" or "Regulation (EC) No 45/2001").

Regulation (EC) No 45/2001 applies to the *"processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law."* The processing operation by OLAF in the context of "Council Regulation (EC) 1469/95" concerns activities falling within the scope of Community law (Article 3(1) of the Regulation). The processing of personal data is done mainly by automatic means but also manually (Article 3(2) of the Regulation). Consequently, Regulation (EC) 45/2001 applies to the present processing operation.

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all *"processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes"*. Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks. These include:

- Article 27(2)(a): *"processing of data relating to (...) suspected offences, offences, criminal convictions (...)"*,
- Article 27(2)(b): *"processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct"*,
- Article 27(2)(d): *"processing operations for the purpose of excluding individuals from a right, benefit or contract"*.

The present processing operation was submitted for prior checking under Articles 27(2)(a), (b) and (d). Information concerning the type of irregularity (fraud), criminal prosecution or any criminal sanction and appeal is included in the report made by a Member State when it notifies OLAF and when OLAF further transfers the translated "Black list form A" to other Member States. Moreover, the type of irregularity is recorded and kept by OLAF in the excel file. Therefore, Article 27(2)(a) of the Regulation applies to the case. Furthermore, the EDPS notes that an evaluation on the risk of non-reliability on the grounds of experience acquired earlier with particular operators regarding proper execution of their previous task involves an evaluation of personal aspects relating to the conduct of the data subject. The assessment itself is performed by the respective authority of Member States, and not by OLAF. However, as the evaluation of personal conduct is the purpose of the processing operation with the role

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<sup>21</sup> Article 3(1) of Council Regulation No 2988/95

of OLAF to act as an "intermediary" of communication between Member States (and the competent DG of the European Commission) in facilitating the evaluation process, Article 27(2)(b) applies to the present case.

Concerning Article 27(2)(d), OLAF does not take part in determining the exclusion measure against an operator. Nevertheless, because the exclusion of non-reliable operators presenting certain risks is one of the purposes of the processing operation itself, Article 27(2)(d) also applies to the case.

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 the processing operation has already been established. The EDPS does not see this fact as an insurmountable problem in the present case, provided that all recommendations made in this Opinion will be fully taken into account.

The EDPS received the notification for prior checking from OLAF's DPO on 27 March 2007. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than 28 May 2007. The procedure has been suspended because of information requests for a period of 55+35+ 7 + 17 (period for comments) days, and for August 2007. In addition, an extension of the deadline for one month means that the opinion should be adopted not later than 20 November 2007.

### **2.2.2. Lawfulness of the processing**

Article 5 (a) of the Regulation stipulates that personal data may be processed only if the *"processing is necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof (...)"*. This Article requires three closely related conjunctive elements: 1) the Treaty or other legal instrument based on the Treaty should foresee the data processing activities, 2) the processing activity should be performed in the public interest, and 3) the processing operation should be necessary for the performance of a public interest task.

1) The EDPS notes that the following provisions constitute the legal basis for the processing operation:

The legal basis for the "black list" itself can be found in Article 1 of Council Regulation (EC) 1469/95, which states: "A Community system is hereby established...". Further, Article 5 of Commission Regulation (EC) 745/96 lays down the implementation of a notification mechanism:

1. "Each Member State shall designate a single competent authority to make and receive notifications within the meaning of paragraph 2. The said authority shall transmit its notifications to the Commission, which will transmit them to the competent authorities of the other Member States.

2. The notifications exchanged in accordance with paragraph 1 shall be confidential and shall cover the following points:

- they shall identify the natural or legal persons within the meaning of Article 1 (4) of this Regulation in respect of whom one or more of the measures under Article 3 (1) of Regulation (EC) No 1469/95 have been taken, specifying whether the operators concerned are A or B,
- they shall give a brief indication of the concrete facts which led to the measure(s), specifying the current state of the inquiry where this has not yet been completed,
- they shall specify the measure(s) taken by the Member State concerned,



- they shall provide references to any notifications which may have been made already under Council Regulation (EEC) No 1468/81 (7), Council Regulation (EEC) No 595/91 (8) or Regulation (EC) No 1469/95.

The Commission shall agree with the Member States a standard form for these notifications to be used by the competent authorities.

3. Each notification shall be made as soon as possible. It shall be supplemented by the competent authority which has made it when, with a view to the application of Article 6, the Commission or the competent authority of another Member State, through the Commission, requests additional information or where new significant facts or changes need to be notified."

2) The aim of the reporting mechanism provided by OLAF is to facilitate the exchange of notifications on irregularities with regard to certain beneficiaries of operations financed by the EAGGF, for the purpose of preventing the risk of further irregularities committed by that operator. The processing operation should therefore be regarded as serving public interest.

3) The system of identification and notification in abstracto can help to protect the Community's financial interest. On the other hand, the EDPS emphasizes that the real "necessity" of the personal data processing must be analysed in concreto at the handling of each and every particular notification. The particular data processing should be proportionate to the aims pursued by the processing operation. This proportionality requirement should be evaluated on a case-by-case basis.

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

The prior checking notification states that none of the data fields concerned fall under the category of special data (Article 10 of Regulation (EC) 45/2001). The EDPS notes that while no data falling under Article 10(1) are processed (data revealing racial or ethnic origin, political opinion, religious or philosophical beliefs, trade-union membership, data concerning health or sex life), data related to offences and criminal convictions are indeed processed by OLAF.

According to Article 10(5) of the Regulation: Processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof (...)". In the present case, the processing of these special data is expressly authorised by Article 1 of Council Regulation (EC) 1469/95 and by Article 5 of Commission Regulation (EC) 745/96 as it is described above in Part 2.2.2 of the opinion. Therefore, Article 10(5) of the Regulation is complied with.

### **2.2.4. Data Quality**

According to Article 4(1)(c) of the Regulation personal data must be "adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed."

The EDPS is satisfied that the adequacy and relevance of data is ensured by the fact that black list form "A" and "B" follows the structure of the main data fields required by Commission Regulation (EC) No 745/96. Having closely examined the data fields in form "A" and "B", the EDPS does not find those excessive.

Data should also be accurate and where necessary kept up to date. (Article 4(1)(d) of the Regulation).

The particularity of the identification and notification system is that competent national authorities send notifications to OLAF and OLAF further transfers them to competent authorities of other Member States and to the competent DG of the Commission. In order to enhance effectiveness of the notification system, the accuracy of personal data exchanged is a key element. In addition, the accuracy of the information notified to OLAF and by OLAF to other Member States' authorities and to the competent DG of the Commission can have further reaching effect on the individual concerned: reinforced checking, suspension of payments and exclusion for a period of time from certain operations in another Member State. In this regard, the EDPS finds positive the legal requirement of Article 7(2) of Commission Regulation (EC) No 745/96 demanding that "When a Member States informs the Commission that a natural or legal person whose name had previously notified to it under Article 5(1) has proved, upon further investigation, not to have been implicated in the irregularity, the Commission shall without delay relay this fact to the other Member States, which shall in their turn immediately inform those to whom they had notified these personal data under Regulation 1469/95."

OLAF should therefore take every reasonable step to ensure that the information contained in the notification coming from national authorities and further transferred and kept by OLAF are accurate and updated. Part of this requirement concerns swift transfer of information to those competent authorities of the Member States which have received the previous already outdated information.

Further, the EDPS recalls that "every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed are erased or rectified." This principle is connected to the right of access and rectification and will be therefore examined in part 2.2.7 of this Opinion.

Data must also be "processed fairly and lawfully" (Article 4(1)(a) of the Regulation). The question of lawfulness has already been considered in part 2.2.2. Fairness relates to the information given to the data subjects and therefore will be examined in part 2.2.8 of this Opinion.

### **2.2.5. Conservation of data/ Data retention**

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

In the present case, Commission Regulation (EC) No 745/96 lays down the statutory limits for data retention. Considering the differentiated approach prescribed by law, the EDPS concludes that the time limits are reasonable under Article 4(1)(e) of the Regulation.

The EDPS is also satisfied by the handling of the excel file containing the summary list of reports kept by OLAF. Once the duration of a sanction is over, all personal data are removed from the excel file, the identification of the data subjects are no longer possible.

### **2.2.6. Transfer of data**

Articles 7, 8 and 9 of the Regulation set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules differ depending on whether the transfer is made *ex* Article 7 within or between Community institutions or bodies, *ex* Article 8

to recipients subject to Directive 95/46/EC or to other recipients outside of this scope *ex* Article 9 of the Regulation.

In the present case, OLAF transfers personal data A) to DG AGRI and B) to designated staff of competent authorities of Member States of the EU respectively. Therefore, Articles 7 and 8 apply to the case.

### **Transfer within Community institutions and bodies covered by Article 7 of the Regulation**

OLAF can transfer Form "A" (Report by a Member State) to the competent DG of the European Commission, notably to DG AGRI. Council Regulation 1469/95 requires that the information transferred "*may not, in particular, be sent to persons other than those in the Member States or within the Community institutions whose duties require that they have access to it, unless the Member State supplying it has expressly so agreed.*"<sup>22</sup> The EDPS recalls the requirements of Article 7 of the Regulation which lays down that "*personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipients.*"

The EDPS notes that there is a contradiction between Council Regulation 1469/95 and Regulation 45/2001. The former allows the transfer of information to recipients other than those whose duties require having access to it if the supplying Member State agrees to it whereas the latter prohibits such transfer. The EDPS is of the view that Regulation 45/2001 prevails upon Council Regulation 1469/95 in the light of its superior status as Regulation from the Parliament and the Council and the principle pursuant to which '*lex posterior derogat legem anteriorem*'. Therefore, for the purpose of this Opinion, in order for data transfers to be lawful, they will need to be in compliance with Article 7, 8 and 9 of Regulation 45/2001.

In order to comply with Article 7(1) of the Regulation in sending personal data, OLAF must ensure that (i) the recipient has the appropriate competence and (ii) the transfer is necessary. Whether a given transfer meets such requirements should be assessed on a case-by-case basis. Accordingly, OLAF agents should apply this rule for each and every particular data transfer. Doing so will avoid unnecessary transfers of information as well as transfers of information to parties that do not have the appropriate competences. As outlined above, reports by Member States can not be transferred to recipients that do not have the appropriate competence, even if the Member State supplying it allows it.

Article 7(3) of the Regulation requires that "*the recipient shall process personal data only for the purposes for which they were transmitted.*" In order to ensure the best application of this rule, the EDPS recommends including at the end of forms "A" and "B" a clause recalling this principle.

### **Transfers to competent Member State authorities subject to Directive 95/46/EC *ex* Article 8 of Regulation (EC) No 45/2001**

The identification and notification mechanism put in place functions with the role of OLAF receiving and further transferring notifications arriving from EU Member States to other Member States via AFIS mail. Designated staff of the competent authorities of Member States will become recipients of data contained in form "A" and "B".

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<sup>22</sup> Article 4(2) second indent of Council Regulation 1469/95

Two scenarios can be observed in Member States: (A) those Member States where the national data protection law adopted for the implementation of Directive 95/46/EC covers all sectors, including police and judicial authorities in criminal matters; and (B) those Member States where the national data protection law adopted for the implementation of Directive 95/46/EC does not cover police and judicial authorities in criminal matters.

As to scenario (A), Article 8 of the Regulation should be recalled by OLAF: *"Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC (a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, (...)."*

Article 8(a) of the Regulation specifies that it is up to the recipient to establish the interest and necessity to receive the information. Each and every time that OLAF sends personal information to competent national authorities in response to a request, OLAF should confirm that the data are necessary for the performance of a task carried out in the public interest. This is an assessment that OLAF agents must carry out each time that they transfer personal information. OLAF agents responsible for data transfers under the identification and notification system should be made aware of this rule.

Compliance with Article 8(a) of the Regulation requires the addressees of the information to use the data to perform a task in the public interest. The EDPS considers that the sending of the personal data contained in form "A" and "B" *in abstracto* can be seen to fulfil the conditions of Article 8(a) insofar as the national authorities to whom the information is sent are authorities of Member States that are competent for carrying out the purposes of the processing. Such authorities will use the data to perform tasks in the public interest, notably to take certain measures (reinforced checking, suspension of payment, exclusion from operations) to deal with operators presenting a risk of non-reliability or replying to any action taken on a report of another Member State.

As to scenario (B): for those Member States that have not extended their implementation of Directive 95/46/EC to police and judicial authorities in criminal matters, Article 9 of the Regulation applies. Council of Europe Convention 108, which for the matter under analysis can be considered as providing an adequate level of protection, is in any case applicable to those authorities.

### **2.2.7. Right of access and rectification**

Articles 13 and 14 of the Regulation provides for a right of access and rectification of personal data. These rights of the data subjects ensure that the file can be as complete as possible, and meanwhile ensure data quality. The right to rectify one's inaccurate or incomplete data is of key importance in order to ensure the quality of the data processed.

Due to the specificity of the identification and notification system, the individuals whose data are processed can have an access/rectification request submitted:

- A) to the national authorities, which are subject to national data protection law, and
- B) to OLAF concerning the data processed by OLAF, which is subject to Regulation (EC) 45/2001.

The privacy statement annexed to the notification for prior checking specifies that the concerned individuals have a right of access to the personal data OLAF holds regarding them

and they can correct and complete those data. Exemptions under Article 20(1)(a) and (b) of Regulation 45/2001 may apply. The privacy statement explains that the rights of access, rectification, blocking and erasure can be exercised upon request by contacting the delegated data controller. If the personal data with respect to which an access request was made had been supplied by a Member State, access shall be permitted only if the supplying Member State has been given the opportunity to state its position.

The EDPS notes that the right of access and rectification to one's own personal data should be provided to the data subjects as a general rule unless the access and rectification could be harmful to certain interests stipulated in Article 20 of the Regulation and under the conditions laid down in that provision. The EDPS recalls that Article 20(1)(a) and (b) of the Regulation provides for certain restrictions to the right of access and rectification, notably where such a restriction constitutes a necessary measure to safeguard (a) *"the prevention, investigation, detection and prosecution of criminal offences"* and (b) *"an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters."* For example, OLAF may suspend access for the prevention or prosecution of a criminal offence. Any such exception or restriction can be applied only on a case-by-case basis and never in a systematic fashion.

Therefore, if OLAF uses an exception to suspend access or the right to rectification, it should take into account that the restriction to a basic right can not be applied systematically. OLAF must assess in each case whether the conditions for the application of one of the exceptions mentioned above apply. The restriction measure has to be "necessary". This requires that a "necessity test" has to be conducted on a case-by-case basis. For example, if OLAF wishes to rely on an exception under Article 20(1)(b) of the Regulation, it must assess whether it is necessary to suspend access in order to safeguard an important economic or financial interest of the European Communities. In making such an assessment, OLAF must establish a clear link between the need to suspend access and the safeguarding of an economic or financial interest. Furthermore, OLAF should also recall that the exceptions to the data protection rights can only apply temporarily.

In any case, Article 20(3) of the Regulation has to be respected by OLAF: *"If a restriction provided by paragraph 1 is imposed, the data subject shall be informed, in accordance with Community law, of the principal reasons on which the application of the restriction is based and of his or her right to have recourse to the European Data Protection Supervisor."* Article 20(5) allows for deferring of that information *"for as long as such information would deprive the restriction imposed in paragraph 1 of its effect."* This necessity to determine such a deferral must be decided on a case-by-case basis. In order to give effect to this latter provision, the EDPS considers it a good practice and therefore suggests to the controller to document the principal reasons of restricting the data subject's right. At the end of the period during which the data subject's right was deferred, the person concerned should receive the information on the restriction of his/her right and of the fact that he/she can have recourse to the European Data Protection Supervisor.

The information can be obtained directly by the data subject (this is the so-called "direct access") or under certain circumstances by a public authority (this is the so called "indirect access", normally exercised by a Data Protection Authority, being the EDPS in the present context). The controller should recall Article 20(4) of the Regulation which stipulates that *"if a restriction provided for by paragraph 1 is relied upon to deny access to the data subject, the European Data Protection Supervisor shall, when investigating the complaint, only inform him or her of whether the data have been processed correctly and, if not, whether any necessary corrections have been made."* This indirect right of access then has to be

guaranteed. Indeed, this provision will play a role, for instance, in those cases where the data subject has been informed about the use of the reporting mechanism by a Member State or has the knowledge of it, but the right of access is still being restricted under Article 20 of the Regulation. Article 20(5) permits deferring the provision of information on a case-by-case basis for as long as such information would deprive the restriction imposed of its effect.

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

The Regulation requires that the data subjects are informed about a number of items under Article 11, where the data have been obtained directly from the data subject and under Article 12 where the data have not been obtained from the data subject. Pursuant to these two articles, those who collect personal data are required to inform the individuals to whom the data refers of the fact that their data are being collected and processed in order to ensure fairness of the processing of personal data.

The EDPS considers that the information OLAF foresees to provide to the persons concerned as described in the privacy statement is in general in line with the requirements of Article 12. Nevertheless, the EDPS requests to include a small additional precision regarding the "right of recourse" section. It would be appropriate not only to mention Article 286 of the Treaty but also to add a more specific reference as to Regulation (EC) 45/2001: "You have a right to have recourse to the European Data Protection Supervisor if you consider that OLAF has infringed your rights under Article 286 of the Treaty *and of Regulation (EC) 45/2001* as a result of the processing of personal data."

***Regarding the manner in which information must be provided***, the EDPS considers that the provision of the privacy statement through the OLAF Europa website (<http://ec.europa.eu/dgs/olaf/data/pst/1469-95.pdf>) is a positive step towards complying with Article 12 of the Regulation and it is a measure to enhance transparency regarding the data processing operations in which OLAF is engaged.

However, the EDPS is concerned by the fact that many data subjects which are concerned by the measures taken may not visit the OLAF website, and thus, may never have access to such information. Moreover, operators facing exclusion from certain operations have a right to a prior hearing under Article 4 of Commission Regulation 745/96 before the Commission decides on their exclusion<sup>23</sup> and under Article 4(1)(a) of Council Regulation (EC) No 1469/95 when it is a Member State determining the measure imposed.<sup>24</sup> This emphasizes the need to supplement the publication on the Europa website of OLAF with personalised information notices addressed to individuals. As to the timing of providing such personalised notices and the actor who should provide that information, see next section.

***Regarding the moment in time when the information should be provided***, the EDPS recalls that under Article 12 of the Regulation, the individuals concerned should be informed at the

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<sup>23</sup> Article 4 of Commission Regulation 745/96 reads as follow: "*The exclusion of an operator thus decided upon by the Commission shall be subject to the same rules as those applicable to the measures referred to in point (c) of Article 3(1) of Regulation (EC) No 1469/95 decided on by a Member State. As regards the operator's prior hearing, the Commission shall give him the opportunity of making any comments he considers useful within a maximum period of two months.*"

<sup>24</sup> Article 4(1)(a) of Council Regulation reads as follow: "*The measures referred to in Article 3 shall comply with the following principles, in accordance with the national law of the Member States: (a) prior hearing and right of appeal by the operator concerned in respect of the measures referred to in Article 3(1)(c)[referring to their exclusion from operations] and, where appropriate (b)[referring to suspension of payment and release of guarantee relating to current operations].*"

time of the recording of the data, or if a disclosure to a third party is envisaged not later than the time when the data are first disclosed.

Ideally, this would mean with regard to the identification and notification system maintained by OLAF that the information should be provided by OLAF A) either at the time when OLAF receives the report from an authority of a Member State or B) when OLAF further transfers the translated notification to competent authorities of other Member States or to the Commission. It is fair to take into account the interest of the Member State, for example in investigating a case.

There is shared responsibility between the competent authority of a Member State and OLAF in supplying the information. In the first phase of the processing operation, authorities of a Member State are responsible for respecting and ensuring their national data protection rules. In the second phase of the processing operation, OLAF should ensure that the data protection requirements laid down in Regulation 45/2001 are respected.

Due to the specific nature of the identification and notification system, the EDPS finds it a particularly important element that the concerned individuals receive additional information on the fact that once a Member State has made a report to OLAF, OLAF will further transfer that information to competent authorities of other Member States and to the Commission. As indicated above, OLAF may provide this information directly to individuals. Alternatively, this information about the existence and functioning of the identification and notification system could be supplied by national authorities as an extension to the information which they are obliged to provide to individuals under national data protection legislation. To this end, OLAF should make appropriate arrangements with Member States that this information is supplied in a more personalised form to data subjects (for example, in the document informing the operator concerned about a prior hearing, a link could be provided to OLAF's Europa website).

In any event, the situation where individuals are not informed either because OLAF relies on Member States or vice versa should be avoided. Accordingly, the EDPS calls upon OLAF to make the necessary arrangements with the Member State authorities to make a commitment to notify the data subject in accordance with the requirements of their national data protection legislation.

***Exceptions, in accordance with Article 20(1) of the Regulation***, from the right to receive the list of information stipulated in Article 12 (1) of the Regulation may apply. However, in those cases, the data subject should receive appropriate information of the principal reasons on which the application of the restriction is based and his/her right to recourse to the EDPS (Article 20(3) of the Regulation). Information can be deferred under Article 20(5) of the Regulation for as long as such information would deprive the restriction imposed by paragraph 1 of its effect.

### **2.2.9. Security measures**

In order to ensure a consistent approach to OLAF security measures, the EDPS has decided to analyse the security measures in a horizontal way, rather than doing it in the context of each particular prior checking notification. Accordingly, this Opinion will not deal with security measures and the analysis will be carried out in a different Opinion which will address security issues only.

### 3. Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the considerations above are fully taken into account. In particular, OLAF should:

- establish internal guidelines, assisting OLAF agents on the ways to ensure that personal data received and forwarded by OLAF and kept in OLAF's excel file are accurate and updated. This also includes an assurance of swift and prompt forwarding of updated information to other Member States.
- ensure that whenever an Article 7(1) data transfer takes place, OLAF makes sure that (i) the recipient has the appropriate competence and (ii) the transfer is necessary. It should be assessed on a case-by-case basis.
- include at the end of the report forms "A" and "B" a clause recalling the principle embodied in Article 7(3) of the Regulation.
- establish each and every time that OLAF sends personal information to competent authorities of Member States in response to a request, that the data are necessary for the performance of a task carried out in the public interest. This is an assessment that OLAF agents must carry out each time that they transfer personal information. OLAF agents responsible for data transfers under the identification and notification system should be made aware of this rule.
- respect the conditions of Article 20 whenever a restriction on the right of access, rectification or right to receive information is applied. Rights can not be restricted systematically, but only on a case-by-case basis, where such a restriction is necessary for safeguarding an interest specified in Article 20. Restrictions can apply only temporarily. The principal reasons of restricting the right of access and rectification must be documented by OLAF.
- revise the "right to recourse" section of the Privacy Statement as recommended above.
- ensure that data subjects receive appropriate "personalised" information either directly or through Member States, pursuant to adequate arrangements to this end.

Done at Brussels, 20 November 2007

(signed)

Peter HUSTINX  
European Data Protection Supervisor