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Mr. Jan MULDER
Chairman Committee on
Budgetary Control
European Parliament

Brussels, 19 December 2011
GB/VP/et/D(2011)2316 C 2011-0159

Subject: your request for an Opinion on a new Article and recital in the amended proposal on OLAF Regulation No 1073/1999

Dear Mr. Mulder,

We appreciate your request to hear the opinion of the EDPS on a new Article and recital in the amended Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by OLAF. As you know, the EDPS has already issued a formal Opinion¹ on the Proposal. This new request shows a specific attention to data protection by the European Parliament when introducing new amendments to the original Proposal.

In particular, the Committee on Budgetary Control of the European Parliament asks the EDPS' opinion on the text of a new Article 5a, which concerns access to information of the institutions, bodies, offices and agencies and to their premises by OLAF, both before and after the formal opening of an investigation.

As a preliminary remark, we note that the proposed article would partially repeat the text of the current Article 4 of Regulation (EC) No 1073/1999, related to internal investigations. A better coordination between the texts of the two Articles (4 and 5a) would be desirable in order to prevent interpretative doubts.

¹ See Opinion of 1 June 2011 on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EURATOM) No 1074/1999 (Case 2011-0029), available at www.edps.europa.eu.

In terms of substance, the type of access granted to OLAF by the new article is broad: it is supposed to be immediate and unannounced, and it would encompass any information held by the relevant EU institution, body or agency. Such extensive right will encroach upon the right to the protection of personal data of EU employees and of any natural person whose data are processed by the Institutions. Therefore, we highlight the importance that strong safeguards which guarantee the respect of Regulation (EC) No 45/2001 are reflected in the text of the Article.

We are pleased to note that several elements of the new Article 5a reflect these safeguards: access by OLAF is subject to the respect to the principles of necessity and proportionality; traceability (and, therefore, ex-post verification) of access is mandatory where technically feasible; the scope of the access is limited to the OLAF investigation competence areas, namely irregularities, fraud, corruption and any other illegal activity.

OLAF is also given the explicit power to access information before the opening of the investigation, but in this context the scope of the access is limited to "when it is indispensable in order to assess the basis in fact of allegations". Such specification is important as it excludes that OLAF might engage in access requests which have the purpose to 'explore' the institutions' databases ('fishing expeditions') thereby potentially processing a higher number of personal data without a defined scope.

We also appreciate that the principle of loyal cooperation between OLAF and other institutions is expressly highlighted in the new Article, as it is fundamental to guarantee a smooth implementation of the provision.

From a merely technical point of view, we note that, in paragraphs 1 and 2, the provision uses the expression "*right of access*", as opposed to point 3, which mentions the Office's power to "*obtain*" the relevant information. The first expression is more properly used in data protection law to define the right of access by the data subject to his personal data. It would be therefore advisable to use also in paragraphs 1 and 2 the expression "*right (or power) to obtain access*"². Such modification would have no impact on the substance of the provision and on the type of access available to OLAF, but would ensure a more coherent text from a formal point of view.

Finally, we welcome the last paragraph regarding the obligation for OLAF to transmit to the EDPS an annual report on the various processing operations. This novelty will certainly enhance the transparency and accountability of OLAF in relation to its processing activities. However, we are not convinced that this provision should be located in this article, as it has a more general application and should not be interpreted as only referring to the processing of personal data involved in the type of access regulated by the article. We therefore suggest that this paragraph be separated and moved to a separate, self-standing article of general application.

Overall, we are pleased to notice that this proposed new article seems to include a balanced approach to the investigative needs of OLAF and the necessary data

² See also Article 47 (2) (b) of Regulation (EC) No 45/2001 about a similar provision concerning the EDPS' powers to *obtain* information and access from a controller.

protection safeguards that the EDPS has also already highlighted in precedence in the context of informal contacts.

Yours sincerely,

(signed)

Giovanni BUTTARELLI

cc: Dr. Ingeborg Graessle, MEP