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Mr Giovanni KESSLER
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(OLAF)
B-1049 Brussels

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Subject: Your letter dated 8 June 2012 concerning OLAF's revised Model Data Protection Clauses to be used in Administrative Cooperation Agreements (ACAs) concluded with third country authorities or international organisations

Dear Mr Kessler,

Thank you for your letter dated 8 June 2012 concerning the follow-up to the EDPS Opinion of 3 April 2012 on OLAF's revised Model Data Protection Clauses to be used in Administrative Cooperation Agreements (ACAs) concluded with third country authorities or international organisations (hereinafter the "Clauses").

The EDPS recognises that OLAF's ability to share information with third country authorities and international organisations is an important element in the fight against fraud activities having an international dimension. He also notes that the Commission's standard contractual clauses were initially drafted for the business sector and need, to a certain extent, to be adapted in order to address the specific requirements of cooperation in the law enforcement field.

This being said, any exchange of personal data has to take place in conformity with the existing legal framework governing trans-border personal data transfers by EU institutions and bodies, namely Article 9 of Regulation (EC) 45/2001 ("the Regulation").

As already highlighted in our letter of 3 April 2012, transfers of personal data to third countries or international organisations not ensuring an adequate level of protection may occur either: (1) on the basis of one of the exceptions laid down under Article 9(6) of the Regulation, if they are occasional as opposed to transfers that are repeated, massive or

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structural; or (2) with the authorisation of the EDPS in the presence of adequate safeguards adduced by the data controller pursuant to Article 9(7). Adequate safeguards should in principle also be used for those transfers covered by the exceptions of Article 9(6) where, having regard to the nature of the data involved (e.g. sensitive data), the purpose of the processing (e.g. investigations which could result in criminal prosecution) or the legal framework in the country of destination (e.g. absence or low level of data protection rules) there are specific risks for the data subjects. As the transfers to be conducted in the context of the present ACAs are likely to fall under one of these categories, the EDPS recommends in principle the adoption of adequate safeguards also for transfers based on the exceptions provided for in Article 9(6).

As you mention in your letter, EDPS and OLAF representatives have discussed the implementation of the EDPS' recommendations in a meeting on 29 May 2012 and reached a preliminary understanding on the implementation of most of the recommendations. On the basis of such discussion, your letter sets out specific proposals in nine points for implementation of the EDPS' recommendations. Following the scheme of your letter, we will set out below our observations concerning each of these proposals.

1) and 4) Introduce a liability provision and a third party rights provision equivalent to Clause III of the Commission's alternative contractual clauses and introduce a provision equivalent to Clause V(c) of the Commission's alternative Clauses concerning compliance with Court decisions

The point of departure of these recommendations (referred to hereinafter as the "Contested Clauses") is the need to ensure the effectiveness of the Clauses and effective redress vis-à-vis the data subjects. In your letter, you point out that these clauses pose significant problems for international organisations and their immunities and privileges regime. As evidence of this, you produced an e-mail exchange between OLAF and the World Bank's Integrity Vice-Presidency (INT) displaying deep concerns about the acceptability of this provision. At the same time, you stress that "*cooperation with third countries and international organisations is a crucial element of OLAF's activities*", particularly in light of the fact that "*fraud and corruption are global phenomena which must be addressed at international level*". The EDPS takes note of your statement that "*[i]n the highly unlikely case that a data subject would be damaged by [a] transfer the Commission on behalf of OLAF could bear the cost of any damages caused by OLAF*".

Should some of OLAF's partners refuse to accept the Contested Clauses, alternative mechanisms should be devised to preserve the effectiveness of the Clauses and data subjects' protection. Data subjects who have suffered damages as a result of a violation by either one of the parties should be able to enforce the Clauses and obtain appropriate redress for the damage suffered. As long as alternative mechanisms ensure this result, they could be considered as adequate alternatives to the Contested Clauses. In order to ensure the effectiveness of the Clauses in the sense highlighted above, the EDPS considers that the following safeguards should be put in place based on a gradual enforcement approach:

- 1) First of all, OLAF should carefully select its partners, by making a preliminary assessment of their capacity and willingness to respect the clauses of the ACA and its annexes (already foreseen in current Clause 3.3);
- 2) OLAF should negotiate with its partners the latter's obligation to adopt internal measures necessary to ensure the practical respect of the ACAs;

- 3) In exchanging personal data with third countries, OLAF should respect the principles of lawfulness, necessity, proportionality and data quality. In particular, OLAF should only transfer personal data that are adequate, relevant and limited to the minimum necessary in relation to the purposes for which they are processed and to the extent that the purpose cannot be fulfilled without processing personal data;
- 4) OLAF should put in place the necessary measures to verify, to the extent possible, the correct implementation of the agreement by its ACA partners and periodically report to the EDPS on the implementation of the agreement, including on the number of transfers, their nature, subject matter and recipients, etc.;
- 5) In case a problem arises, OLAF and its partners should make their best efforts to solve it, including - where appropriate and necessary - by providing specific solutions to data subjects (already foreseen in current Clause 6);
- 6) In cases where these best efforts fail, OLAF should bear responsibility in accordance with Article 32 for any damage suffered by the data subject as a result of a violation of the Clauses, including for violations committed by its partners in cases where the data subject was not able to reasonably obtain redress from the latter. The EDPS invites OLAF to expressly include such a provision in the Clauses.

The EDPS therefore recommends that OLAF puts in place the necessary measures, including where necessary by modifying the Clauses, in order to ensure that the above conditions are respected

2) Reintroduce provisions equivalent to Clauses II (c), (d) and (e) of the Commission's alternative contractual clauses concerning, respectively, local laws, the legal authority of the counterparty, and the contact point for enquiries

Clause II (c) provides the partner's obligation to warrant that it has no reason to believe, at the time of entering the agreement, the existence of any local laws that would have the substantial adverse effect on the guarantees provided for under the Clauses. Your revision of the clause essentially coincides with the text of Clause II (c). The only difference would be that OLAF's obligation to notify the EDPS, if the partner becomes aware of the existence of any such laws, would be provided for in OLAF's Data Protection Guidelines.¹

The EDPS notes that this proposal sufficiently implements the recommendation.

Clause II (e) concerns the appointment of a contact point. You underline that this obligation is already provided for in the main body of the model ACA.

Having seen a copy of this document, the EDPS agrees that there is no need to add this provision in the Clauses.

3) As regards onward transfers, introduce in Clause 2.4 of the new Clauses the obligation for the third party recipient to undertake in writing to respect the data protection principles in the annex

In your reply, you underline that paragraph 3.1.3 of the main body of the ACA and Paragraph 2.3 of the Clauses already subject onward transfers to the condition that the partner provides

¹ Data Protection Guidelines are internal instructions to staff containing the practical directions to be followed by OLAF staff when handling their cases, for the practical implementation of data protection requirements.

its express agreement. In addition, you agree to specify in the Data Protection Guidelines, that each time OLAF is asked to agree to an onward transfer, it will do so only following receipt of a written undertaking to respect the data protection principles listed in the appendix to the Clauses and following an assessment of the government authority recipient's capacity to respect those principles. The Guidelines will also specify that each onward transfer will be recorded in the Data Protection Module.²

The EDPS notes that this proposal sufficiently implements the recommendation.

5) Introduce a clause obliging the parties to record transfers made in pursuance of the ACA in a central register in line with Clause VIII of the Commission's alternative contractual clauses

You point out that OLAF has a system in place for recording third country and international organisation transfers in its Data Protection Module, which will also be reflected in the Data Protection Guidelines. To the extent that onward transfers made by a partner will also be registered by OLAF, the EDPS considers that this proposal sufficiently implements the recommendation.

6) Specify in Clause 7 that the ACA can be terminated by any of the parties or the competent supervisory authority if one of the conditions foreseen under Clause VI(b)(i), (iii) and (iv) of the Commission's alternative contractual clauses is fulfilled

Your letter mentions that Paragraph 6.1 of the main body of the ACA already contains a broad termination clause by each partner by means of a written notice. Accordingly, you propose to specify in the Data Protection Guidelines that OLAF can terminate the part of the ACA which provides for the transfer of personal data, and will inform the EDPS thereof, in case "(i) the transfer has been temporarily suspended for more than one month; (ii) the partner is in substantial or persistent breach; or (iii) an EU Court or the EDPS rules that there has been a breach of the clauses by either party."

The EDPS considers that this proposal sufficiently implements the recommendation.

7) Include an accountability clause stating that OLAF and the counterparty should be obliged to provide upon request (i.e. to the EDPS, an arbitrator or to the competent Court) sufficient evidence of compliance (including the need to demonstrate the effectiveness of measures taken)

In your letter, you propose to modify paragraph 2.5 of the Clauses as follows:

"2.5. Upon request, each of the partners shall provide to the other partner, an independent or impartial inspection agent or auditor, which the inspecting partner selects and which is not reasonably objected by the inspected partner, or to the competent court, as the case may be, sufficient evidence of compliance, and shall demonstrate the effectiveness of the measures taken."

Furthermore, you propose stating in the Data Protection Clauses that, whenever OLAF receives such information and evidence, it will pass it on to the EDPS.

² The Data Protection Module is a system integrated in OLAF's Case Management System, which details for each case all main data processing operations carried out on a specific case, such as information to data subjects, transfers, access requests, complaints, etc.

The EDPS notes that this proposal sufficiently implements the recommendation.

8) Publish in a dedicated section of OLAF's website the ACAs entered into with third country authorities and international organisations

You propose to implement this recommendation by publishing the list of ACAs already signed together with the Model text and CC. This is to avoid undermining OLAF's negotiating position in future negotiations.

The EDPS considers that this proposal sufficiently implements the recommendation.

As to the separate issue of whether the transfer may be based on Article 9(6) exceptions or rather Article 9(7), we would like to point out that this assessment can only be made on the basis of the reality of OLAF's data transfer practices. In your letter, you state that "*OLAF's data transfers to third country authorities and international organisations are limited, as also reflected in OLAF's DPO's report on 21 March 2012 [...] i.e. around 30 transfers per year*" and that you do not expect a "significant increase" in the future as a result of the ACAs. On the basis of these figures, it appears that the transfers with a specific international partner do not have a repeated, massive or structural character. Accordingly, they could be based on Article 9(6) of the Regulation. Should the frequency of exchanges with specific partners significantly grow in the future, Article 9(7) will need to be used and the EDPS notified accordingly.

Conclusions

The EDPS notes that the proposals contained in your letter dated 8 June 2012 sufficiently implement the recommendations included in the EDPS' letter of 3 April 2012, provided that the following recommendations are complied with by introducing the necessary amendments to the Clauses and/or the Data Protection Guidelines:

- 1) OLAF should carefully select its partners, by making a preliminary assessment of their capacity and willingness to respect the clauses of the ACA and its annexes (already foreseen in current Clause 3.3);
- 2) OLAF should negotiate with its partners the latter's obligation to adopt internal measures necessary to ensure the practical respect of the ACAs;
- 3) In exchanging personal data with third countries OLAF should respect the principles of lawfulness, necessity, proportionality and data quality. In particular, OLAF should only transfer personal data that are adequate, relevant and limited to the minimum necessary in relation to the purposes for which they are processed and to the extent that the purpose cannot be fulfilled without processing personal data;
- 4) OLAF should put in place the necessary measures to verify, to the extent possible, the correct implementation of the agreement by its ACA partners and periodically report to the EDPS on the implementation of the agreement, including on the number of transfers, their nature, subject matter and recipients, etc.;

- 5) In case a problem arises, OLAF and its partners should make their best efforts to solve it, including - where appropriate and necessary - by making specific concessions to data subjects (already foreseen in current Clause 6);
- 6) In cases where these best efforts fail, OLAF should bear responsibility in accordance with Article 32 for any damage suffered by the data subject as a result of a violation of the Clauses, including for violations committed by its partners in cases where the data subject was not able to reasonably obtain redress from the latter. The EDPS invites OLAF to expressly include such a provision in the Clauses.

The proportion in which the exchanges with a particular partner are to be based on Article 9(6) or Article 9(7) cannot be determined a priori by the EDPS, but has to be assessed on the basis of OLAF's actual practice. Should OLAF consider that the frequency of exchanges with specific partners increases in the future, triggering the use of the regime established under Article 9(7) of the Regulation, the EDPS will have to be promptly notified.

The EDPS therefore recommends that OLAF adopts the necessary measures to ensure compliance with Regulation (EC) 45/2001 in the light of the above conclusions, and subsequently provide him within three months with all relevant documents evidencing proper implementation.

Yours sincerely,

(signed)

Giovanni BUTTARELLI

Cc: Ms Laraine LAUDATI, Data Protection Officer OLAF