



Formal comments of the EDPS on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European public Prosecutor's Office and the effectiveness of OLAF investigations

1. Introduction and background

These formal comments are in reply to a consultation by the Commission on 31 May 2018 of the EDPS in accordance with Article 28(2) of Regulation (EC) No 45/2001¹ on the proposal, adopted by the Commission on 23 May 2018, amending Regulation No 883/2013 (hereinafter, 'the Proposal')².

Our comments focus on aspects that are more directly related to the protection of personal data.

We welcome the consultation of the EDPS, as well as the opportunity to discuss data protection issues related to the Proposal earlier this year at staff level.

The Proposal responds to two main objectives:

a) review, without extending OLAF's powers and mandate, Regulation No 883/2013 (hereinafter, "the OLAF Regulation")³ to **define and articulate the competence, tasks and duties and *modus operandi* of OLAF vis-à-vis the European Public Prosecutor Office (EPPO)**, newly established under Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (hereinafter, "the EPPO Regulation")⁴;

b) **clarify the legal framework applicable to OLAF's external and internal investigations** also enhancing the efficacy of its investigative measures and OLAF's cooperation with national and third Countries' competent authorities.

¹ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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, L8 of 12.1.2001.

² Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European public Prosecutor's Office and the effectiveness of OLAF investigations [COM(2018) 338 final].

³ Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, L248/7 of 18.9.2013.

⁴ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), L283/1 of 30.10.2017.

During the process leading up to the Proposal, on 24 January 2018, the EDPS provided replies to selected questions from the targeted consultation ('survey')⁵ on the review of the OLAF Regulation, having regard in particular to the two issues mentioned above.

2. Comments

2.1. On the relations between OLAF and EPPO

Both OLAF and EPPO are EU bodies specialised in the protection of the Union's financial interests, but they **differ** having regard, among others, to the legal basis, the tasks and powers and the applicable procedural safeguards for the individuals concerned.

Briefly, we point out to the following differences between the two EU bodies:

- a) having regard to **the legal basis**: EPPO is established pursuant to Article 86 TFEU, "*from Eurojust*", as body dealing with police and judicial cooperation in criminal matters; OLAF has been established pursuant to Article 325 TFEU as administrative, anti-fraud body, structurally being part of the Commission, but provided with functional autonomy for the performance of investigations.
- b) **the tasks** of the two bodies reflect the distinction referred to above: administrative tasks, and hence administrative procedures, apply to OLAF⁶; criminal justice tasks and procedure (and hence the guarantees for individuals applicable in case of criminal proceedings) shall come into play for EPPO⁷.
- c) the **investigative powers** of OLAF are defined in the OLAF Regulation, to be applied in conjunction with Regulation 2185/96⁸ and Regulation 2988/95⁹; the **investigative powers** of EPPO for the European Delegated Prosecutors are defined under Article 30(1) of the EPPO Regulation, as possibly complemented by the measures available in similar cases under the national law of the Member State where the investigation takes place [pursuant to Article 30(4)].

We consider that the Proposal takes into account the differences shortly described above. We also acknowledge that these specificities can result in **synergies** between the two bodies (notably, an administrative inquiry by OLAF can lead to the opening of a criminal proceeding by EPPO; OLAF can be invested of the administrative follow up to judicial decisions).

⁵ On this survey, see pages 32-46 of the "Commission Staff Working Document Assessment Accompanying the document Proposal for a Regulation amending Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations {COM(2018) 338 final}. Hereinafter, this document is referred to as "Commission assessment of the Proposal".

⁶ See Article 1(4) of Regulation 883/2013, referring to OLAF competence to "(...) conduct administrative investigations for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the Union".

⁷ According to Article 4(1) of the EPPO Regulation, "The EPPO shall be responsible for investigating, prosecuting and bringing to judgement the perpetrators, and accomplices in, the criminal offences affecting the financial interests of the Union which are provided for in Directive (EU) 2017/1371 and determined by this Regulation (...)."

⁸ Council Regulation (EURATOM, EC) No 2185/96 of 11 November 1996 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, L292/2 of 15.11.96.

⁹ Council Regulation (EC, EURATOM) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, L312/1 of 23.12.95.

The EPPO Regulation contains a specific article (Article 101)¹⁰, specified under Recital 103, on “Relations with OLAF”.

We welcome that the Proposal also deals with the cooperation between EPPO and OLAF inserting in the OLAF Regulation the following new Articles: Article 1(4a)¹¹; Article 12c¹²; 12d¹³; 12e¹⁴; 12f¹⁵.

We welcome in particular the objective, pursued by these provisions, of ensuring the absence of **duplication of efforts**¹⁶ (that is, to avoid the conduct of parallel investigations, which would turn into an **unnecessary processing of personal data**¹⁷) by EPPO and OLAF.

We also acknowledge the importance of the efficient **exchange of information** in both ways, i.e. from OLAF to EPPO and *vice-versa*.

Specific provisions of the Proposal [under Article 12g(2)¹⁸], mirroring similar provision under the EPPO Regulation [Article 101(5)], lay down a regime of “indirect access (...) on the basis of a hit/no hit system” from OLAF to EPPO case management system and *vice-versa*.

¹⁰ Article 101 of the EPPO Regulation (“Relations with OLAF”) states:

“1. The EPPO shall establish and maintain a close relationship with OLAF based on mutual cooperation within their respective mandates and on information exchange. The relationship shall aim in particular to ensure that all available means are used to protect the Union’s financial interests through the complementarity and support by OLAF to the EPPO.”

¹¹ Article 1(4a) “The Office shall establish and maintain a close relationship with the European Public Prosecutor's Office (‘the EPPO’) (...). This relationship shall be based on mutual cooperation and on information exchange (...)”.

¹² Article 12c “Reporting to the EPPO of any criminal conduct on which it could exercise its competence”.

“1. The Office shall report to the EPPO without undue delay any criminal conduct in respect of which the EPPO could exercise its competence (...)”.

¹³ Article 12d “Non-duplication of investigations”.

“The Director-General shall not open an investigation in accordance with Article 5 if the EPPO is conducting an investigation into the same facts, other than in accordance with Articles 12.e or 12.f.”

¹⁴ Article 12e “The Office's support to the EPPO”.

“1. In the course of an investigation by the EPPO, and at the request of the EPPO in accordance with Article 101(3) of Regulation (EU) 2017/1939, the Office shall, in conformity with its mandate, support or complement the EPPO's activity in particular by:

(a) providing information, analyses (including forensic analyses), expertise and operational support;
(b) facilitating coordination of specific actions of the competent national administrative authorities and bodies of the Union;
(c) conducting administrative investigations.”

¹⁵ Article 12f “Complementary investigations”.

“1. In duly justified cases where the EPPO is conducting an investigation, where the Director-General considers that an investigation should be opened in accordance with the mandate of the Office with a view to facilitating the adoption of precautionary measures or of financial, disciplinary or administrative action, the Office shall inform the EPPO in writing, specifying the nature and purpose of the investigation.”

¹⁶ As well as into a possible violation of the *ne bis in idem* principle.

¹⁷ The avoidance of parallel investigations on the same facts would be in compliance with the principle of data minimization under Article 4(1), letter (c) of Regulation (EC) No 45/2001 and, more broadly, also reflect the fact that data protection strengthens good public administration.

¹⁸ Article 12g(2) states: “The Office shall have indirect access to information in the EPPO's case management system on the basis of a *hit/no hit system*. Whenever a match is found between data entered into the case management system by the Office and data held by the EPPO, the fact that there is a match shall be communicated to both the EPPO and the Office. The Office shall take appropriate measures to enable the EPPO to have access to information in its case management system on the basis of a hit/no-hit system.”

Having regard to the legal text of the Proposal, as **safeguard for the use** of this ‘indirect access system’ - since the ‘hit/no hit’ information about a person is still personal data under Regulation (EC) No. 45/2001 - we recommend the insertion in the legal text of Article 12g(2) as additional sub-paragraph of the following specification:

“Each indirect access to information in EPPO’s case management system by OLAF shall be carried out only for and in so far as necessary for the performance of OLAF’s functions as defined under this Regulation and shall be duly justified and validated via an internal procedure set up by OLAF.”

Having regard to the practical implementation by OLAF of this provision, we recommend that the justification and validation of each OLAF’s access to EPPO’s case management system shall be **recorded**. This would allow a ‘case by case’ control (by OLAF’s Data Protection Officer; by the EDPS as Supervisory Authority) of the necessity of the access to the data by OLAF.

In this context, we also point out that the Proposal makes specific reference to the hit/no hit access by OLAF to EPPO’s case management system under Articles 12c(4) and 12d for the purpose of applying, respectively, OLAF’s obligation to report to the EPPO of any criminal conduct on which EPPO is competent (Article 12c), and not to open an investigation if EPPO is investigating on the same facts (Article 12d).

Further clarifications (for instance, on the conditions for the ‘hit’; on the possible limitation of the scope of the search on data entity ‘Person’ only to persons subject to an investigation, *etc.*) should be specified (for instance, in the **working arrangements** to be concluded between OLAF and EPPO pursuant to the new Article 12g(1), referred to in the next paragraph of these comments).

The Proposal, also taking into account among others that a different assessment of the offence as administrative irregularity or criminal offence (following a different qualification according to the competent Member State) may be possible (and even a frequent recurrence) and trigger the competence of OLAF instead of EPPO (or *vice-versa*), lays down, under the afore said Article 12g(1)¹⁹, that procedures for swift bilateral consultations between the two bodies should be established under “**working arrangements**”.

These working arrangements should further address both the exchange of information between the two bodies and the definition of *modus operandi*, aiming at increasing the complementary between the two bodies (this would reflect the fact that the relation between EPPO and OLAF has been finally envisaged by the EU legislator as a relation between two autonomous bodies).

The EDPS welcomes this provision and is available to provide an assessment from the data protection viewpoint of the working arrangements (Memorandum of Understanding, administrative agreement) to be stipulated by OLAF and EPPO.

¹⁹ Article 12g(1) states: “Where necessary to facilitate the cooperation with the EPPO as set out in Article 1(4a), the Office shall agree with the EPPO on administrative arrangements. Such working arrangements may establish practical details for the exchange of information, including personal data, operational, strategic or technical information and classified information. They shall include detailed arrangements on the continuous exchange of information during the receipt and verification of allegations by both offices.”.

2.2. On the investigations by OLAF

It is necessary to distinguish between *internal* (within the Union institutions, bodies, offices or agencies)²⁰ and *external* (in the Member States and in third countries or international organizations)²¹ administrative fraud investigations by OLAF.

It is also worth recalling that in the context of his supervision activities, the EDPS has provided detailed guidance on the data protection aspects of OLAF activities for both types of investigations²².

Concerning the **external investigations**, the Proposal modifies Article 3 introducing, under paragraph 7, the differentiation between the case where the economic operators accepts/voluntarily submits' to the on-the-spot checks by OLAF, from the case where the economic operator opposes the OLAF's checks. In this latter case, the competent authority of the Member State where the inspection takes place has the obligation to assist OLAF and the national law of the concerned Member State will be applicable to the enforcement actions²³. This last amendment to the OLAF Regulation, as reported in the Explanatory Memorandum to the Proposal²⁴, is consistent with the ruling by the General Court in case T-48/16²⁵.

We consider that this amendment, incorporating in the legal text consolidated practice in line with the one of other EU institutions (for instance, the Commission Directorate-General for Competition) is a useful clarification.

To take into account the activities, including the processing of personal data, that may be carried out by administrative authorities in the Member States, we consider that Article 1(3), letter (d) of the OLAF Regulation should be completed with reference to the 'GDPR'²⁶ (we propose adding the words "*and Regulation (EU) 2016/679*").

²⁰ See Article 4 of the OLAF Regulation.

²¹ See Article 3 of the OLAF Regulation.

²² See, among others: Opinion of 3 February 2012 on the notifications for prior checking regarding new OLAF investigative procedures (internal investigations, external investigations, dismissed cases and incoming information of no investigative interest, coordination cases and implementation of OLAF recommendations), European Anti-Fraud Office (OLAF) (Cases 2011-1127, 2011-1129, 2011-1130, 2011-1131, 2011-1132) https://edps.europa.eu/sites/edp/files/publication/12-02-03_olaf_investigative_procedures_en.pdf.

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), 26 March 2007 (Cases 2006-544, 2006-545, 2006-546, 2006-547) https://edps.europa.eu/sites/edp/files/publication/07-03-26_olaf_followup_en.pdf.

Opinion on five notifications for Prior Checking received from the Data Protection Officer of the European Anti-Fraud Office (OLAF) on external investigations, 4 October 2007 (Cases 2007-47, 2007-48, 2007-49, 2007-50, 2007-72).

https://edps.europa.eu/sites/edp/files/publication/07-10-04_olaf_external_investigations_en.pdf

²³ As also specified under recitals 17-19 of the Proposal.

²⁴ At page 10.

²⁵ Judgment of the General Court (First Chamber) of 3 May 2018, *Sigma Orionis SA v European Commission*, Case T-48/16, §92 « (...) *les opérateurs économiques visés par une enquête s'opposent à un contrôle ou à une vérification sur place, l'État membre concerné prête aux contrôleurs, en conformité avec les dispositions nationales, l'assistance nécessaire pour permettre l'accomplissement de leur mission de contrôle et de vérification sur place. Selon cette même disposition, il appartient alors aux États membres de prendre, en cas de besoin, les mesures nécessaires, dans le respect du droit national.* ».

²⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), L119/1 of 4.5.2016.

Concerning both **external and internal investigations**, the Proposal, under the new Article 3, paragraph 9, amends the legal text of Article 3, paragraph 5 (on external investigations), inserting the words “*irrespective of the medium on which it is stored*”; in addition, to align OLAF’s powers in internal investigation, it amends the legal text of Article 4, paragraph 2 (on internal investigations), also inserting the words “*irrespective of the medium on which it is stored*”.

In this regard, we observe that, under the Proposal, OLAF’s access “to any relevant information and data” remains subject to the conditions, laid down under the OLAF Regulation, that: (i) the data is **held by the institutions, bodies, offices or agencies**; (ii) is **connected with the matter** under investigation; and (iii) occurs **where necessary in order to establish** the fraud.

The EDPS considers that these conditions for OLAF’s access are key to ensure compliance with the data protection principles of necessity and proportionality pursuant to Article 4(1)(c) of the Regulation (EC) No 45/2001.

However, the EDPS observes that, when accessing information, OLAF should also target, as a rule, the device that is ‘**less privacy-invasive**’ (for example, the personal computer in use at the workplace rather than the personal device of the employee who has enrolled in a ‘bring your own device’ (BYOD) policy)²⁷, and carrying a specific and clear indication of business use.

Hence, we consider that the insertion of the wording “*irrespective of the medium on which it is stored*”, even though proposed “to bring the relevant provisions of the Regulation concerning the conduct of digital forensic operations up to date with technological progress”²⁸, appears as running counter the aforesaid rule (and thus misleading in this respect).

We therefore recommend **deleting** the wording “*irrespective of the medium on which it is stored*” from the proposed new Article 3(9) and 4(2) of the OLAF Regulation, as well as the wording “*irrespective of the medium on which this information or data is stored*” in recital 24 of the Proposal. As alternative, we recommend **clarifying** in the legal text *and/or* under recital 24 of the Proposal that access to information by OLAF will take place in a ‘technologically neutral’ way, while “targeting *first and as a rule* devices having a *clear indication of business use*.”

Concerning a further aspect, not addressed by the Proposal, the EDPS considers, on the basis of his experience on OLAF’s supervision, and as indicated in the reply to the survey on the review of the OLAF Regulation, that it would be useful, to ensure legal certainty and appropriate protection for data subjects, to **clarify -in the legal text of the Regulation-** the conditions of OLAF’s **re-acquisition of computer forensic evidence**²⁹.

²⁷ On forensic analysis by OLAF, see “Guidelines on Digital Forensic Procedures for OLAF Staff”, 15 February 2016, available at: https://ec.europa.eu/anti-fraud/sites/antifraud/files/guidelines_en.pdf.

²⁸ See page 28 of the Commission assessment of the Proposal.

²⁹ In ‘Digital Forensic’, the acquisition is “the acquisition of any data (including deleted data) stored on a digital medium through a **forensic imaging process**”. The latter is described as “the forensic (bitwise) copy of original data contained on a digital storage medium, acquired during a digital forensic operation and stored in binary format with a unique hash value”. Hence, the re-acquisition is the acquisition and examination of a forensic image (copy) taken from the same medium but in the context of a different investigation. See OLAF “Guidelines on Digital Forensic Procedures for OLAF Staff” (referred to at footnote 7 of these comments), which also state, at page 9, Article 10.1: “Before requesting re-acquisition, the investigator must assess on a case-by-case basis the potential relevance of such data taking into consideration the time that has elapsed since the initial acquisition, as

It is also worth pointing out, more in general, that OLAF inspection activities must always fulfil the requirements of lawfulness and fairness of the data processing. To that effect, for each case OLAF shall **delimit the subject-matter and the purpose of the inspection** with a degree of precision sufficient to enable the investigated economic operator to limit its cooperation with OLAF to the concrete matter under scrutiny and to minimize the impact on its employees' privacy and data protection rights. Such an approach, together with the aforementioned safeguards on OLAF's access to devices and on re-acquisition, would contribute at ensuring compliance with the principle, expressed under Article 4(1)(c) of Regulation (EC) No 45/2001, that **personal data must be adequate, relevant and non-excessive** in relation to the purpose for which they are collected and/or further processed.

In this respect, we take note that the OLAF Regulation (not amended on this point by the Proposal) contains in the legal text [under Article 1(3), letter (d), as also specified under recital 35] the reference that the Regulation shall apply “*without prejudice to Regulation (EC) No 45/2001*”. The issue of applicability of the ‘data minimization principle’ can be considered satisfactorily addressed by the legislator via the reference to Regulation (EC) No. 45/2001³⁰.

2.3. Additional comments and recommendations regarding the Proposal

2.3.1. Cooperation of OLAF with Financial Intelligence Units; with the Eurofisc network; with the homologue authorities established in the Member States and in third countries

Further amendments to the OLAF Regulation which are also relevant from the data protection perspective concern:

(i) The possible exchange of information between OLAF and **the Financial Intelligence Units (FIUs)** established pursuant to Directive (EU) 2015/849³¹ [proposed Article 7(3) of the OLAF Regulation].

well as common factors such as subject matter, *modus operandi*, legal and natural persons involved in the investigations.”.

³⁰ Specific references to Regulation (EC) No 45/2001 are made, in the OLAF Regulation, under Article 9(4), on “Procedural guarantees”; and under Article 14(2), on “Cooperation with third countries and international organizations”.

³¹ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, L141/73 of 5.6.2015.

On 5 July 2016, the Commission published the proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC, COM(2016) 450 final. On this proposal, on 2 February 2017 the EDPS has issued his Opinion, available at:

https://edps.europa.eu/sites/edp/files/publication/17-02-02_opinion_aml_en.pdf

The EDPS takes note of the reasons provided by the Commission to justify OLAF's request for bank accounts and records of transactions: “access to bank data, with at least the ability to identify the accounts of persons investigated, is **necessary to identify the money flow in various types of fraud** in both internal and external investigations. This concerns e.g. when the fraud is suspected of being committed by misappropriations of funds, chain of shell companies, or is linked with corruption, or when fraudsters try to divert payments from IBOAs due to contractors by providing the IBOA with a “new” bank account number.” (see pages 12-13 of the Commission assessment of the Proposal).

At the same time, we consider this as a further broadening -already observed by the EDPS in the mentioned Opinion- of the authorities (in this case, OLAF) entitled to receive ‘financial information’, for a purpose (in this case, to counter frauds detrimental to the EU budget) other than the countering of money laundering and terrorism financing.

In this regard, the EDPS notes that in most cases FIUs, contrary to national tax authorities working on administrative cooperation on the fight against VAT fraud, may have a criminal law nature. It is hence of essence, in case of exchange of information pursuant to the proposed new Article 7(3), that OLAF only acts in accordance with its mandate when requesting information on bank and payment accounts.

Besides, we point out that, as highlighted by the Commission assessment of the Proposal³², OLAF's access to information on account holders and on the record of transactions can take place not only through the FIUs, but also with the cooperation of **other authorities** (including the ones having administrative nature) which shall assist OLAF in the Member States pursuant to the proposed new Article 7(3), first subparagraph.

(ii) The exchange of data by OLAF with **the Eurofisc network** established by Council Regulation (EU) No 904/2010³³ [proposed Article 12(5) of the OLAF Regulation].

We take note that the proposed Article 12(5) complements the provisions of the Commission proposal to amend Regulation 904/2010³⁴, which allow for the disclosure of Eurofisc information to OLAF. Hence, the Proposal provides OLAF and Eurofisc with the legal basis for the cross-checking of information at their disposal for the purpose of countering VAT frauds.

(iii) The enhanced cooperation of OLAF with **the homologous authorities established in the Member States and in third countries** [proposed new Articles 12a³⁵ and 12b³⁶].

We point out that for the implementation of these provisions (as well as of the ones on cooperation with FIUs and Eurofisc) OLAF shall **set up specific, adequate and harmonised safeguards** for the protection of personal data (avoiding in particular 'blanket requests'/untargeted collection and processing of personal information) in compliance with Regulation (EC) No 45/2001, in particular with the rules on transfers of personal data³⁷.

³² See page 26.

³³ Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, L 268 of 12.10.2010.

³⁴ Amended proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in the field of value added tax, COM(2017) 706 final, of 30.11.2017. The new Article 36(3) of such amended proposal states: "*Eurofisc working field coordinators may forward, on their own initiative or on request, some of the collated and processed information to Europol and the European Anti-Fraud Office ('OLAF'), as agreed by the working field participants.*".

³⁵ Article 12a "Anti-Fraud coordination services in the Member States".

³⁶ Article 12b "Coordination activities".

³⁷ These are Articles 8 and 9 of Regulation (EC) 45/2001, to be amended by the Proposal for Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, COM(2017) 8 final. Article 49 of this proposal states: "In the absence of a decision pursuant to Article 45(3) of Regulation (EU) 2016/679, a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.

2. The appropriate safeguards referred to in paragraph 1 may be provided for, without requiring any specific authorisation from the European Data Protection Supervisor, by:

(a) a legally binding and enforceable instrument between public authorities or bodies; (...)".

2.3.2. OLAF's obligation to designate 'its own' Data Protection Officer (DPO)

The Proposal amends Article 10(4) of the OLAF Regulation replacing the word “*may*” [designate a Data Protection Officer in accordance with Article 24 of Regulation (EC) No 45/2001] with the word “*shall*”.

This article shall be interpreted taking into account the fact that, although enjoying a high degree of autonomy, OLAF is part of the Commission. In the absence of this provision, OLAF would have the choice to designate its DPO or to be ‘covered’ by the DPO of the Commission. Further enhancing OLAF’s autonomy, the Proposal lays down that OLAF shall have its *own* DPO.

The EDPS welcomes this amendment, due to the special institutional position of OLAF³⁸ and in the light of the specificities, also from a data protection point of view, of OLAF’s activities. We also note that this amendment ‘codifies’ the standing practice by OLAF, who has always designated its own DPO.

2.3.3. Considerations with regard to the Proposal for Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (hereinafter, ‘the new Regulation 45’)

Finally, we would like to take this occasion to highlight the key importance of the processing of personal data triggered by the newly established (and presumably structurally steady and frequent) functional relations between OLAF and EPPO.

In this regard, we understand that the new Regulation replacing Regulation 45/2001 will **not** apply (exception made for the ‘administrative data’) to EPPO until the EPPO Regulation is adapted in accordance with Article 70b of the new Regulation 45.

The inclusion of EPPO under the scope of the new Regulation 45 [under Chapter VIIIa on ‘operational data’ of the ‘compromise proposal’ of 1 June 2018] would facilitate the exchange of personal data between EPPO and OLAF, since the two EU bodies would ultimately fall under the same/‘unified’ legal framework.

3. Conclusion and recommendations

The EDPS welcomes the Proposal since it completes the legal framework on the functioning of EPPO and OLAF and provides useful clarifications on OLAF’s internal and external investigations.

To further improve **the legal text** of the Proposal having regard to the protection of personal data, we recommend the following:

1. The introduction in the text of Article 12g(2), as safeguards for the use of the indirect access system, of the following **specification**:

³⁸ See Article 17(3) of the OLAF Regulation, on the independence of OLAF’s Director-General [“shall neither seek nor take instructions from any government and any institution, body, office or agency in the performance of his duties (...)”].

“Each indirect access to information in EPPO’s case management system by OLAF shall be carried out only for and in so far as necessary for the performance of OLAF’s functions as defined under this Regulation and shall be duly motivated and validated via an internal procedure set up by OLAF.”.

2. Article 1(3), letter (d) of the OLAF Regulation should be completed by making reference to the ‘GDPR’ (we propose **adding** the words “*and Regulation (EU) 2016/679*”).

3. We recommend **deleting** the wording “*irrespective of the medium on which it is stored*” from the proposed new Article 3(9) and 4(2) of the OLAF Regulation, as well as the wording “*irrespective of the medium on which this information or data is stored*” in recital 24 of the Proposal. **As alternative**, we recommend clarifying in the legal text *and/or* under recital 24 of the Proposal that access to information by OLAF will take place in a ‘technologically neutral’ way, while “*targeting first and as a rule devices having a clear indication of business use.*”.

4. Clarifying in the legal text of the Regulation the conditions of OLAF’s **re-acquisition of computer forensic evidence**.

Moreover, we recommend that OLAF, following approval of the revised OLAF Regulation:

1. Promptly start the development of **working arrangements** with EPPO that should further address both the exchange of information between the two bodies and the definition of *modus operandi*, aiming at increasing the complementary between the two EU bodies.

2. **Set up - under legally binding and enforceable instruments between public authorities or bodies** (for the cooperation with FIUs; with the Eurofisc network; with the homologue authorities established in the Member States and in third countries) - **specific, adequate and harmonised safeguards** for the protection of personal data to ensure compliance with the rules on transfers of personal data under Regulation (EC) No 45/2001 (as amended).

Brussels, 23 July 2018