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Subject: Investigative activities of EU institutions and GDPR

Dear [...],

We are writing to you in reply to your concerns about economic operators' cooperation with your investigation activities.

1 Problem raised

Since the General Data Protection Regulation (GDPR) 2016/679¹ became applicable on 25 May 2018, several EU institutions, bodies, offices and agencies (collectively: EU institutions) have encountered claims from some economic operators that the GDPR prevents them from cooperating with their investigations. Notably, some economic operators have claimed that:

- the GDPR prevents them from disclosing information (including personal data) to you in reply to requests or during inspections in the exercise of your powers;
- if they were to provide you with personal data in reply to such requests or during inspections, they would always have to inform the data subjects affected;
- the GDPR prevents them from committing to audit/inspection clauses in funding agreements.

The European Commission DGs COMP, TRADE and OLAF, the EIB and the EIF have asked for further guidance on this situation. This letter first provides an overview of your investigation powers before analysing how they interact with GDPR rules in the light of the three claims above.

¹ OJ L 119, 04/05/2016, p. 1

2 EU institutions' investigation powers

By way of example, here are some situations in which EU institutions conduct investigations and are entitled to process information (which may include personal data) from economic operators:

2.1 DG COMP

The European Commission ("the Commission") conducts through DG COMP administrative investigations for the purpose of enforcing the competition rules in accordance with the Treaty² and the secondary legislation adopted for this purpose.³ To that end, it exercises powers of investigation and enforcement (including related operational activities) in the fields of antitrust, merger control and State aid conferred on the Commission by the relevant Union acts. The purpose of DG COMP's investigations under EU competition rules is to ensure the proper functioning of the EU's Internal Market. In the area of EU antitrust rules, investigations are carried out by the European Commission and also by national competition authorities; in the area of mergers, the Commission has exclusive jurisdiction over concentrations falling under the scope of Regulation (EC) No 139/2004; in the area of State aid control, investigations are an exclusive power of the Commission.

For the purpose of its investigation and enforcement activities in the fields of antitrust, merger control and State aid control, the Commission processes information acquired or received *inter alia* from legal persons, natural persons, Member States and other entities (such as National Competition Authorities, regulatory bodies and other public bodies and authorities). Commission investigations and enforcement activities in the competition field target undertakings or Member States which are subject to the competition rules of the Treaty, and not natural persons as such. Nevertheless, during competition investigations inevitably also personal data are being processed. Processing such personal data is necessary to fulfil the tasks assigned to the Commission as public authority enforcing EU competition rules.

In particular, the Council has granted the Commission enforcement powers through Regulation (EC) No 1/2003, in order to conduct **antitrust investigations**. Commission Regulation (EC) No 773/2004 applies to the proceedings conducted by the Commission. The enforcement powers include for example, the right to inspect premises, to request information from undertakings 'by simple request or by decision', and the right to interview legal and natural persons. Moreover, undertakings and natural persons can voluntarily submit information to the Commission relating to an alleged infringement of antitrust rules.

Under Regulation (EC) No 139/2004, DG COMP may acquire or receive information to assess whether concentrations of undertakings with a Community dimension significantly impede effective competition in the common market or in a substantial part of it (**merger control**).⁴ Commission Regulation (EC) No 802/2004 applies to the proceedings conducted by the Commission. Such information includes, among others, the notification forms as annexed to Regulation (EC) No 802/2004 and requests for information.

In the area of **State aid investigations**, the Commission processes information that is provided either by virtue of a legal obligation or voluntarily, on the basis of the Procedural Regulation

² See Articles 101 to 109 Treaty on the Functioning of the European Union.

³ See in particular for Antitrust (Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p.1-25), Merger control (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p. 1-22), and State aid (Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 9).

⁴ OJ L 24, 29/01/2004, p. 1

2015/1589⁵ and its Implementing Regulation 794/2004⁶. For example, this includes formal notifications from Member States to the Commission, on any plans to grant new State aid, and related additional information provided upon the Commission's request. Further examples are complaints or comments on measures under investigation provided by interested parties, Member States, undertakings and associations of undertakings, or information which the Commission collects on-site when verifying compliance with a decision on individual aid, or when conducting inquiries into sectors of the economy or the use of aid instruments.

2.2 DG TRADE

DG TRADE conducts investigations concerning allegations of dumping and subsidised imports from non-EU countries as well as safeguard investigations against dramatic shifts in trade flows in so far as these are harmful to the EU economy.

In the framework of its investigative mandate under Regulations (EU) 2016/1036 (anti-dumping), 2016/1037 (anti-subsidy), and 2015/478 and 2015/755 (safeguards), DG Trade collects information of investigative interest, including personal data. Subject to the requirement to protect confidential information, all information made available by any party to an investigation shall be made available promptly to other interested parties participating in the investigation for their rights of defence.

2.3 OLAF

The European Anti-Fraud Office (OLAF) conducts administrative investigations for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the Union, in the framework of 325 TFEU. It also conducts administrative investigations within the institutions, bodies, offices and agencies of the Union into serious matters relating to the discharge of professional duties. The Office exercises investigative powers conferred by Union law, in particular Regulation (EC) 883/2013.

In order to perform its legal mandate, OLAF collects information (including personal data) from a broad range of sources including public authorities as well as legal and natural persons, including initial information submitted spontaneously which the Office examines to assess whether an investigation should be opened.

During its internal or external investigations, OLAF shall seek evidence for and against the person concerned. To that end, OLAF collects information (including personal data) by, for example, conducting on-the-spot checks, receiving statements, conducting interviews or by receiving written information from natural or legal persons. In particular, Commission Regulation (EC) 883/2013 has entrusted OLAF with conducting on-the-spot checks based on Regulation 2185/1995⁷ at the premises of economic operators.

The investigative powers of OLAF are, in addition, enshrined in a range of other instruments, including the Regulation on the financial rules applicable to the general budget of the Union⁸. In this context, the rules governing the duty to cooperate with the Office have recently been clarified and consolidated for economic operators benefitting from EU funds.⁹ The investigative powers of OLAF may be further spelled out in relevant contractual clauses.

⁵ OJ L 248, 24/09/2015, p.9.

⁶ OJ L 140, 30/04/2004, p. 1, as amended.

⁷ OJ L 292, 15/11/1996, p. 2

⁸ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union OJ L 193, 30.7.2018, p. 1–222

⁹ Recital 62 in conjunction with Article 129 of the new Financial Regulation.

2.4 EIB GROUP

The Fraud Investigations Division within the Inspectorate General of the EIB Group, composed of the European Investment Bank (EIB) and the European Investment Fund (EIF), has the mandate to investigate allegations of prohibited conduct involving the EIB Group's activities, including the financing for investment projects that contribute to EU policy objectives, with a specific focus on SMEs for the EIF.

Under EIB and EIF's Anti-Fraud Policies, the Inspectorate General, through its Fraud Investigations Division (hereinafter IG/IN), shall investigate allegations of prohibited conduct involving EIB Group activities. Prohibited Conduct includes fraud, corruption, collusion, coercion, money laundering and financing of terrorism.

EIB¹⁰ and EIF¹¹ include inspection and integrity clauses in their financing agreements, by virtue of which, IG/IN has the right to visit the project sites, to interview representatives of the EIB Group counterparts and examine and copy all relevant documents of the project-related parties or other EIB Group counterparts and partners, as appropriate.¹²

Under Article 317 TFEU, the Union has to implement its budget 'having regard to the principles of sound financial management'. Under Article 18 of its statute¹³, the EIB 'shall ensure that its funds are employed as rationally as possible in the interest of the Union'; according to Article 2 of the EIF Statutes¹⁴, the 'task of the Fund shall be to contribute to the pursuit of the objectives of the European Union'.

The rules applicable to EIB Group projects financed with funds from the EU budget are spelled out in the New Financial Regulation.

In accordance with Article 74(6) of the New Financial Regulation, EU institutions 'may put in place ex post controls to detect and correct errors and irregularities of operations after they have been authorised. Such controls may be organised on a sample basis according to risk and shall take account of the results of prior controls as well as cost-effectiveness and performance considerations. [...] The rules and modalities, including timeframes, for carrying out audits of the beneficiaries shall be clear, consistent and transparent, and shall be made available to the beneficiaries when signing the grant agreement.'¹⁵

Under Article 129(1) of the new Financial Regulation 'any person or entity receiving Union funds shall fully cooperate in the protection of the financial interests of the Union and shall, as a condition for receiving the funds, grant the necessary rights and access required' for the EU institutions to exert their respective competences. Paragraph 2 of the same Article adds that 'any person or entity receiving Union funds under direct and indirect management shall agree in writing to grant the necessary rights as referred to in paragraph 1 and shall ensure that any third parties involved in the implementation of Union funds grant equivalent rights'.

To be noted that Article 57 of the New Financial Regulation explicitly sets out that personal data, in accordance with Regulation (EC) No 45/2001, may be transferred for audit purposes including the purposes of safeguarding the financial interests of the Union to internal audit

¹⁰ https://www.eib.org/attachments/strategies/anti_fraud_policy_20130917_en.pdf

¹¹ https://www.eif.org/attachments/publications/about/Anti_Fraud_Policy.pdf

¹² The processing of personal data in the context of EIB and EIF's investigations of Prohibited Conduct was notified to the EDPS

¹³ Protocol No 5 to the Treaties

¹⁴ https://www.eif.org/attachments/publications/about/EIF_Statute.pdf

¹⁵ Under Article 60(3) of the old Financial Regulation (OJ L 298, 26/10/2012, p. 1), EU institutions had to 'carry out, in accordance with the principle of proportionality, ex ante and ex post controls including, where appropriate, on-the-spot checks on representative and/or risk-based samples of transactions, to ensure that the actions financed from the budget are effectively carried out and implemented correctly'.

services, to the Court of Auditors or to OLAF and between authorising officers of the Commission, and to entities listed in Articles 69 to 71 of the Financial Regulation. In any call made in the context of grants, procurement or prizes implemented under direct management, potential beneficiaries, candidates, tenderers and participants shall, in accordance with Regulation (EC) No 45/2001 be informed about these possible transfers.

Furthermore Article 75 of the new Financial Regulation confirms that authorising officers may keep personal data contained in supporting documents, when those data are necessary for budgetary discharge, control and audit purposes¹⁶.

The EIB's¹⁷ and EIF's¹⁸ anti-fraud policies spell out the obligations following from this in further detail.

3 No substantial changes in the legal situation with GDPR

GDPR is an evolution of the earlier Directive 95/46/EC¹⁹, further developing rights and obligations created under that Directive; it does, however, not radically change the approach taken there. The conclusions of the analysis under GDPR to follow below would not have been different under Directive 95/46/EC.

The EU institutions are also required to observe a high standard of data protection on the basis of a specific Regulation applicable to the EU institutions, which is Regulation (EC) 45/2001 (the Regulation)²⁰ as referred to in Article 2(3) GDPR. The Regulation is modelled on Directive 95/46/EC. A new Regulation for data protection in the EU institutions²¹ will become applicable in December 2018.

You may want to continue explaining this situation to economic operators who have reservations about making personal data available to non-GDPR controllers such as the EU institutions.

As a first preliminary remark, please note that the EDPS has no supervisory powers over economic operators established in the EU Member States. Their data protection compliance is supervised by our colleagues in the national data protection authorities. The analysis below is based on the equivalent provisions in the old and new Regulations for data protection in the EU institutions. We will therefore also bring your concerns to the attention of the European Data Protection Board (EDPB).

As a second remark, some of the points below will also apply *mutatis mutandis* to your cooperation with competent authorities in the Member States.

3.1 GDPR is not an obstacle to disclosing personal data

Some economic operators believe that GDPR stops them from disclosing personal data to EU institutions with investigation/audit/inspection powers and within their sphere of competences.

This is to be seen under two different angles: the conditions under which EU institutions are entitled to collect and further process personal data and the conditions under which economic operators are allowed, or even obliged, to disclose personal data to you.

¹⁶ In line with Article 57 of the New Financial Regulation such data should nevertheless be deleted, where possible if they are not necessary for budgetary discharge, control and audit purposes. Article 37(2) of Regulation (EC) No 45/2001 shall nevertheless apply to the conservation of traffic data.

¹⁷ https://www.eib.org/attachments/strategies/anti_fraud_policy_20130917_en.pdf

¹⁸ https://www.eif.org/attachments/publications/about/Anti_Fraud_Policy.pdf

¹⁹ OJ L 281, 23/11/1995, p. 31

²⁰ OJ L 8, 12/01/2001, p. 1

²¹ Procedure reference 2017/0002(COD)

From your perspective, collecting and further processing personal data that are necessary and proportionate for the exercise of your powers (see above) means -provided you also comply with the rest of the Regulation- that the processing will be lawful under Article 5(a) of the Regulation (necessity for performance of a task in the public interest assigned by law – equivalent to Article 6(1)(e) GDPR).

From the perspective of the economic operator, **two situations can be distinguished.**

- a) **if they are under an obligation to provide information to EU institutions, which may include personal data** (e.g. under Article 20(2) of Regulation 1/2003), **then this is a legal obligation on them as initial controller** (to the extent that the disclosure is necessary to comply with that obligation, see Article 6(1)(c) GDPR).
- b) **if they voluntarily provide information to EU institutions, which may include personal data, in order for the EU institutions to perform their tasks carried out in the public interest** (e.g. whistleblowing to OLAF about suspected abuse of EU funds), then from their perspective, this **may be in their legitimate interest** (Article 6(1)(f) GDPR)²². The further processing by EU institutions of data obtained that way can be lawful under Article 5(a) of the Regulation (necessity for task in the public interest, equivalent to Article 6(1)(e) GDPR).

The provision of the personal data of an individual cannot be denied on the basis of a lack of consent of the data subject because consent does not provide the legal basis for processing activities related to investigations). In that aspect there are no changes introduced by the GDPR.²³

3.2 GDPR allegedly always requiring individual notification to the data subject

Some economic operators claim that Article 14 GDPR *always* requires individual notification of people concerned by the investigation (data subjects), including about the fact that their personal data have been made available to your services for the purpose of an investigation. Your services fear that such information may “tip off” suspects or may delay and thus impact the investigation.

Article 14(1)(e) GDPR indeed obliges controllers (here: the economic operators) to inform data subjects about the ‘recipients or categories of recipients’ of their personal data.

However, Article 14 GDPR has to be read together with the definition of the term ‘recipient’ in Article 4(9) GDPR, which reads (emphasis added):

“‘recipient’ means a natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not. However, public authorities which may receive personal data in the framework of a particular inquiry in accordance with Union or Member State law shall not be regarded as recipients; the processing of those data by those public authorities shall be in compliance with the applicable data protection rules according to the purposes of the processing;”

Recital 31 GDPR further explains this carve-out (emphasis added):

‘Public authorities to which personal data are disclosed in accordance with a legal obligation for the exercise of their official mission, such as tax and customs authorities, financial investigation units, independent administrative authorities, or financial market

²² See recital 50, second subparagraph, sentence 3 GDPR for an example of disclosures to public authorities that can always be based on legitimate interest of the initial controller. While not identical to the case at hand, it stands to reason that the outcome of the legitimate interest assessment will be similar in the cases at hand.

²³ Pre-GDPR: national legislation transposing Article 7(1)(e) of Directive 95/46/EC; from the perspective of the EU institutions for their own processing: Article 5(a) of the Regulation.

authorities responsible for the regulation and supervision of securities markets should not be regarded as recipients if they receive personal data which are necessary to carry out a particular inquiry in the general interest, in accordance with Union or Member State law. The requests for disclosure sent by the public authorities should always be in writing, reasoned and occasional and should not concern the entirety of a filing system or lead to the interconnection of filing systems. The processing of personal data by those public authorities should comply with the applicable data-protection rules according to the purposes of the processing.’

This carve-out already existed in Article 2(g) of Directive 95/46/EC and in Article 2(g) of the Regulation.²⁴

When exercising their powers under Union law (see above), your services may qualify as ‘independent administrative authorities’ which may ‘receive personal data in the framework of a particular inquiry in accordance with Union law’ here. **In those cases, these disclosures do in our view not fall under the information to be provided about recipients of data under Article 14(1)(e) GDPR. Thus, economic operators subject to a particular inquiry or voluntarily cooperating with the EU institutions with a view to carrying out a particular inquiry do not have a legal obligation to inform people about the disclosure of their personal data to EU institutions.**

However, please note that this carve-out only applies when data is processed for the purpose of starting/carrying out a ‘particular inquiry’. The EDPS has interpreted the carve-out in Article 2(g) of the Regulation as not applying to general processes such as auditing. A (financial) audit as a standard process does not aim to investigate particular individuals or particular conduct, but rather examine systems and risks related to them on a more general level.²⁵

Applying this distinction to the situations your services mentioned means that **EU institutions can only rely on this carve-out for ‘particular inquiries’**, such as an internal and external investigation by the European Anti-Fraud Office OLAF or case-related inquiries by the Directorate General for Competition. **Standard financial verifications and checks** (e.g. checking eligibility of declared expenses as part of standard ex-post controls), on the other hand, **do not qualify as ‘particular inquiries’**. **In those cases, EU institutions have to inform data subjects up front about the processing, for example using the data protection notice for grant management or other relevant procedures.**

To do this, it is not necessary for the EU institutions to individually contact each and every staff member of an economic operator receiving EU funding (see Article 12(2) of the Regulation on excessive effort). In line with Article 57 of the New Financial Regulation, EU institutions should, as part of any calls launched under direct management, inform potential beneficiaries, candidates, tenderers and participants about possible financial verifications and the associated disclosures of personal data. This should also be recalled in contracts, grant agreements or other legally binding documents signed with economic operators, instructing them to inform their personnel. At the latest when launching financial verifications, EU institutions should instruct economic operators to inform their staff about the verification (by forwarding the data protection notice). **That way, the data subject ‘already has’ this information (see Article 12(1) of the Regulation / Article 14(5)(a) GDPR) and does not need to be informed individually again by your institution.**

Summarising, compared to the earlier rules in the national transpositions of Articles 2(g) and 11 of Directive 95/46/EC, **Article 14 GDPR introduced no fundamental changes in the information obligations of economic operators.**

²⁴ Article 11 of Directive 95/46/EC already contained a conditional obligation to inform about recipients.

²⁵ See letter in case 2006-0298, available here: https://edps.europa.eu/sites/edp/files/publication/06-10-31_letter_ias_en.pdf as well as Article 57 of Regulation (EU, Euratom) 2018/1048.

Finally, please note also that Article 23 GDPR allows Member States to introduce restrictions to data subjects' rights e.g. to information by national legislation. You may want to check with your counterparts on Member State level to see how far Member States have made use of this possibility.

3.3 GDPR allegedly precluding committing to audit/inspection clauses

Some economic operators claim that GDPR prevents them from committing to audit/inspection clauses in funding agreements.

Ensuring sound financial management of their funds is a legal obligation for the EU institutions. (see Art. 317 TFEU and also case T-234/12, §14). In that sense and provided the other obligations of the Regulation are complied with, **such financial verifications can be lawful under Article 5(a) of the Regulation** (the counterpart to Article 6(1)(e) GDPR).

Including corresponding provisions in the funding agreements can help to ensure economic operators' cooperation in carrying out these tasks.

On how to inform data subjects in this case, please see section 3.2 above.

While it is true that using the data for financial verifications and audits is a change of purpose compared to the purpose of their initial collection, this change does not appear incompatible and in any case is based on Union law (see Article 6(4) GDPR in connection with the Financial Regulation). To give an example, timesheets serve in the first place to prove eligible costs under a funding agreement; using them in an audit or investigation is a different purpose, but does not appear to be incompatible and is foreseeable when receiving public funding.

4 Conclusion

To summarise, in our view the GDPR is not an obstacle to obtaining the personal data you need for your tasks. As set out in more detail above:

- The GDPR does not prevent the submission of information containing personal data to EU institutions, either in response to a legal obligation to do so or on a voluntary basis, as long as you act within your powers and sphere of competences.
- Economic operators do not have the legal obligation to inform people about the disclosure of their personal data to EU institutions in case such data is submitted to your services with a view to carrying out a particular inquiry within their powers under Union law.
- GDPR is not an obstacle to auditing / financial verification clauses.

For easier reference, we will publish this letter on the EDPS website.

As the economic operators themselves are supervised by the national data protection authorities in the Member States regarding their data protection compliance, we will also mention this issue to the European Data Protection Board (EDPB). We will work with the EDPB to address this issue.

Yours sincerely,

[signed]

Wojciech Rafał WIEWIÓROWSKI

CC: [...], DPC, DG COMP, European Commission
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