



OPINION OF THE EUROPEAN DATA PROTECTION SUPERVISOR

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

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Articles 7 and 8 thereof,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹,

Having regard to 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 data², and in particular Article 28(2) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. Introduction

1. On 17 March 2011, the Commission adopted a 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 (hereinafter 'the Proposal').

1.1 Consultation with the EDPS

2. The Proposal was sent by the Council to the EDPS on 8 April 2011. The EDPS understands this communication as a request to advise Community institutions and bodies, as foreseen in Article 28(2) of Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of

¹ OJ 1995, L 281/31.

² OJ 2001, L 8/1.

personal data by the Community institutions and bodies and on the free movement of such data (hereinafter 'Regulation (EC) No 45/2001'). The EDPS welcomes the explicit reference to this consultation in the preamble of the Proposal.

3. The Proposal is aimed at amending Articles 1-14 and at deleting Article 15 of Regulation (EC) No 1073/1999. Council Regulation (EURATOM) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) is expected to be repealed.
4. Previously³, before the adoption of the Proposal, the EDPS was given the possibility by the Commission to provide informal comments. The EDPS welcomes the openness of the process, which has helped to improve the text from a data protection point of view at an early stage. Indeed, some of those comments have been taken into account in the Proposal.
5. This new text is the result of a long review process. In 2006, the Commission put forward a proposal to amend Regulation (EC) No 1073/1999. The legislative proposal focused on "*achieving better operational efficiency and improved governance for the Office*".
6. This previous proposal was discussed both in the Council and the European Parliament under the co-decision procedure. The EDPS issued his Opinion in April 2007, including many observations aimed at rendering the text of the proposal more coherent with the data protection rules enshrined in Regulation (EC) No 45/2001⁴. The Parliament adopted a resolution on 20 November 2008⁵ in first reading including approximately one hundred amendments to the proposal.
7. At the request of the Czech Presidency of the Council (January-June 2009), in July 2010 the Commission presented an updated Reflection paper on the reform of the Office to the European Parliament and the Council. In October 2010 the European Parliament welcomed the Reflection paper and asked the Commission to take up the legislative procedure again. On 6 December 2010, the Council adopted its Conclusions on the Reflection paper put forward by the Commission. The Supervisory Committee of OLAF contributed to the discussion with its opinions on the Reflection paper and on the respect for fundamental rights and

³ In January 2011.

⁴ Opinion of the European Data Protection Supervisor 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), OJ C 91, 26.04.2007, p. 1.

⁵ European Parliament legislative resolution of 20 November 2008 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), P6_TA-PROV(2008) 553.

procedural guarantees in investigations by OLAF. The Commission has thereafter presented the new Proposal.

1.2 *The importance of the Proposal and the EDPS advice*

8. The Proposal includes provisions which have a strong impact on individuals' rights. OLAF will continue to collect and further process sensitive data relating to suspected offences, offences, criminal convictions as well as information that would serve to exclude individuals from a right, benefit or contract insofar as such information represents a particular risk to the rights and freedoms of the data subjects. The fundamental right to the protection of personal data is relevant not only for its own sake, but also has strong connections with other fundamental rights, such as non-discrimination and due process of law, including the right of defence in OLAF investigations. The respect of due process has an impact on the validity of evidence and should be considered a priority by OLAF to reinforce its accountability. It is therefore essential to ensure that, in carrying out its investigations, fundamental rights including the rights to data protection and privacy of the persons implicated therein are properly guaranteed.

1.3 *Main elements of the Proposal*

9. The stated aim of the Proposal is to increase the efficiency, effectiveness and accountability of OLAF, while safeguarding its investigative independence. This purpose would be achieved mainly by: (i) increasing the cooperation and information exchange with other EU institutions, offices, bodies and agencies as well as Member States; (ii) fine tuning the *de minimis* approach⁶ to investigations; (iii) strengthening the procedural guarantees for the persons under investigation by OLAF; (iv) including the possibility for OLAF to conclude administrative arrangements to facilitate information exchange with Europol, Eurojust, competent authorities of third countries as well as with international organisations and (v) clarifying the monitoring role of the Supervisory Committee.
10. The EDPS supports the objectives of the proposed amendments and, in this respect, welcomes the Proposal. The EDPS particularly appreciates the introduction of the new Article 7(a) which is dedicated to the procedural guarantees afforded to individuals. In relation to individuals' rights to the protection of their personal data and privacy, the EDPS considers that on the whole the Proposal contains improvements *vis-à-vis* the current situation. In particular, the EDPS welcomes the express recognition of the importance of the

⁶ That is, OLAF should define and focus on its investigative priorities in order to efficiently use its resources.

rights of the data subjects pursuant to Art. 11 and 12 of Regulation (EC) No 45/2001⁷.

11. However, despite the overall positive impression, the EDPS considers that from the point of view of the protection of personal data, the Proposal could be further improved without jeopardising the objectives that it pursues. In particular, the EDPS is concerned that, because of the lack of coherence on certain aspects, the Proposal may be interpreted as a *lex specialis* regulating the processing of personal data collected in the scope of OLAF investigations, which would take precedence over the application of the general data protection framework contained in Regulation (EC) No 45/2001. Thus, there is a risk that the data protection standards contained in the Proposal could be interpreted *ex contrario* as being lower than those contained in the Regulation, and this is without any apparent justification neither in the Proposal itself nor the Explanatory Memorandum.
12. In order to avoid this outcome, the following sections provide an analysis of the Proposal which, on the one hand, describes its shortcomings and, on the other hand, suggests specific ways to improve upon them. The scope of this analysis is limited to the provisions having a direct impact on personal data protection, particularly Article 1, paragraphs (8), (9), (10), (11) and (12) pursuant to which Articles 7a, 7b, 8, 9 10 and 10a are added or amended.

2. Analysis of the Proposal

2.1 General context

13. OLAF was created in 1999⁸ to protect the EU's financial interests and taxpayers' money against fraud, corruption and any other illegal activity. The Office is attached to the Commission, but it is independent from it. OLAF conducts investigations, which can be external⁹ (in particular, investigations which can take place in the Member States or in third countries) and internal¹⁰ (investigations within the EU institutions, bodies, offices and agencies) with the purpose to fight fraud and illegal activity which might harm the financial interests of the European Union.
14. Furthermore, OLAF can also (i) forward to national competent authorities information uncovered during its external investigations; (ii) forward to the

⁷ See the Proposal, new Art. 7(a) and 8(4).

⁸ Commission Decision 1999/352/EC of 28 April 1999 establishing the European Anti-Fraud Office (OLAF), OJ 1999 L-136/20. See also Regulation (EC) No 1073/1999 of the European Parliament and the Council of 25 May 1999 concerning investigation conducted by the European Anti-Fraud Office (OLAF), OJ 1999, L 136/31.

⁹ See Art. 3, Regulation (EC) No 1073/1999.

¹⁰ See Art. 1 and 4, Regulation (EC) No 1073/1999.

national judiciary bodies information found during internal investigations into matters liable to result in criminal proceedings and (iii) forward to the institution, body, office or agency concerned the information obtained during internal investigations¹¹.

15. OLAF can also closely cooperate with Eurojust¹² and Europol¹³ to carry out its statutory duty to fight against fraud, corruption and any other activity which might affect the financial interest of the Union. In this context, Europol¹⁴ and Eurojust¹⁵ can exchange operational, strategic or technical information with OLAF, including personal data.
16. On the basis of Regulation (EC) 1073/2009, OLAF can also investigate in third countries in accordance with the various cooperation agreements in force between the European Union and these third countries. Fraudulent activities to the detriment of the Union budget may also take place outside the territory of the European Union, for example with respect to foreign aid granted by the European Union to developing countries, candidate countries or other recipient countries, or with regard to violations of customs legislation. In order to effectively detect and tackle these infringements, thus, OLAF needs to carry out on-the-spot inspections and checks in third countries as well. To illustrate the importance of international cooperation and, thus, also of data exchange, currently the European Union has more than 50 agreements on mutual

¹¹ See Art. 10, Regulation (EC) No 1073/1999.

¹² Eurojust was set up by Council Decision 2002/187/JHA (subsequently amended by Council Decision 2003/659/JHA, and Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust) as a body of the European Union with legal personality to stimulate and to improve coordination and cooperation between competent judicial authorities of the Member States. In particular, Art. 26.4 of such decision established that "*OLAF may contribute to Eurojust's work to coordinate investigations and prosecution procedures regarding the protection of the financial interests of the Communities, either on the initiative of Eurojust or at the request of OLAF where the competent national authorities concerned do not oppose such participation*". In 2008, Eurojust and OLAF concluded an administrative agreement (Practical agreement on arrangements of cooperation between Eurojust and OLAF of 24 September 2008) which is aimed at enhancing the cooperation between the two entities and includes specific provision on the transfer of personal data.

¹³ Europol is the European Law Enforcement Agency which aims at improving the effectiveness and co-operation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of organised crime. Art. 22 of Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA) provides that "*In so far as it is relevant to the performance of its tasks, Europol may establish and maintain cooperative relations with [...] OLAF*". The article also provides that Europol can, before the entry into force of agreements or working arrangements with the various EU entities with which Europol is called to cooperate, "*directly receive and use information, including personal data from the entities [...] in so far as that is necessary for the legitimate performance of its tasks, and it may [...] directly transmit information, including personal data, to such entities, in so far as that is necessary for the legitimate performance of the recipient's task*".

¹⁴ See Art. 22 of Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121 15.5.2009, p. 37.

¹⁵ See Art. 1(26) of Council Decision 2009/426/JHA of 16 Dec. 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA.

administrative assistance in customs matters, including with large trading partners such as China, the United States of America, Japan, Turkey, the Russian Federation and India.

17. The implementation of Regulation (EC) No 45/2001 in the activities of OLAF has been the object of a number of interventions by the EDPS in the recent years. In relation to the focus of the Proposal (OLAF investigations), it is worth noting the Opinion of 23 June 2006 on a notification for prior checking on OLAF internal investigations¹⁶; Opinion of 4 October 2007 on five notifications for prior checking on external investigations¹⁷ and the Opinion of 19 July 2007 on a notification for prior checking on regular monitoring of the implementation of the investigative function¹⁸, which relates to the activities of the Supervisory Committee.

2.2 *Privacy and impact assessment*

18. Neither the Proposal nor the Explanatory memorandum attached to it refers to the impact of the Proposal on the data protection rules. Nor does it refer to a privacy and data protection impact assessment. An explanation of how the impact on data protection has been dealt with would certainly increase the transparency of the overall assessment of the Proposal. The EDPS is surprised that the Explanatory Memorandum completely lacks any chapter on "Results of consultations with the interested parties and impact assessments".

2.3 *Application of Regulation (EC) No 45/2001*

19. As mentioned in the previous Opinion on the 2006 proposal¹⁹, the EDPS welcomes the Proposal's recognition that Regulation (EC) No 45/2001 applies to all data processing activities carried out by OLAF. In particular, the new formulation of Art. 8(4)²⁰ clearly mentions the role of the Regulation in the context of OLAF's various activities. This constitutes an update of the text of Regulation 1073/1999, which only mentioned Directive 95/46/EC as a reference for the data protection obligations.

¹⁶ Case 2005-418, available at www.edps.europa.eu .

¹⁷ Cases 2007-47, 2007-48, 2007-49, 2007-50, 2007-72, available at www.edps.europa.eu .

¹⁸ Case 2007-73, available at www.edps.europa.eu .

¹⁹ EDPS Opinion on the Proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ C 91, 26.4.2007, p. 1.

²⁰ *"The Office shall process only such personal data as necessary to fulfil its tasks under this Regulation. Such processing of personal data shall be done in conformity with Regulation (EC) No 45/2001, including the provision of relevant information to the data subject required by articles 11 and 12 of that Regulation. Such information may not be communicated to persons other than those within the institutions of the Union or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity. (...)"*.

20. The last sentence of Art. 8(4) introduces the implementation of the requirement to appoint a data protection officer: "*The Office shall appoint a Data Protection Officer in accordance with Article 24 of Regulation (EC) No 45/2001*". This insertion, which formalises the actual appointment of the OLAF DPO, is also welcomed by the EDPS.
21. However the EDPS is concerned that the implementation of the data protection standards in the proposed text is not completely in conformity with the requirements of the Regulation, and this might raise concerns as regards its coherence. This aspect will be analyzed in detail below.

3. Specific comments

3.1 OLAF and the respect of fundamental rights, including data protection principles

22. OLAF investigations can have a serious impact on the fundamental rights of individuals. As indicated by the Court of Justice in the *Kadi* judgement²¹, these rights are protected by the Community legal order. More precisely, in the *Schecke* judgement²², the Court, by reference to the Charter of Fundamental Rights of the European Union ('Charter')²³, and in particular to Articles 8 and 52 thereof, highlights that any limitation to the right to the protection of personal data can be justified only if it is provided by law, if it respects the essence of the right, and if it is subject to proportionality and meets the objectives of general interest of the European Union. The EDPS places great weight on the respect of fundamental rights in the area of activity of OLAF.
23. Recital 13 of the Proposal clarifies that the fundamental rights of the persons concerned by an investigation should be respected at all times, and in particular when information about ongoing investigations is provided. The recital then highlights the need to respect confidentiality of investigations, the legitimate rights of the persons concerned, the national provisions governing judicial proceedings and, ultimately, the Union's legislation on data protection. It is

²¹ Judgement of 3 September 2008 in joined cases C-402/05 P and C-415/05 P, *Kadi v. Council of the European Union and Commission of the European Communities*, para 283: "[...] fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance." See also para 304.

²² Judgement of 9 November 2010 in joined cases C-92/09 and C-93/09, *Volker und Markus Schecke*, paragraph 44 et seqq.

²³ After the entry into force of the Lisbon Treaty, the ECHR is applicable to all areas of activity of the European Union.

specified that the exchange of information should be governed by the proportionality and need-to-know principles.

24. This recital seems to introduce a limitation to the applicability of fundamental rights both *ratione personae* (limited to persons concerned by the investigation) and *ratione materiae* (limited to exchange of information). This could lead to an incorrect interpretation of the text according to which fundamental rights in the area of OLAF's activities would be applied in a "restrictive" way.²⁴
25. The EDPS therefore suggests modifying the text of the recital in order to avoid possible misinterpretations: the recital mentions that the fundamental rights of "persons concerned by an investigation" should be respected at all times. As OLAF not only deals with persons concerned by an investigation ("suspects") but also with informants (persons providing information about the fact of a possible or actual case), whistleblowers²⁵ (persons within the EU institutions who report to OLAF facts related to a possible or actual case), and witnesses, the provision should more broadly define the categories of "persons" who enjoy the fundamental rights.
26. Furthermore, Recital 13 concerns respect for fundamental rights in particular in the context of the "exchange of information". The recital mentions, besides fundamental rights and confidentiality, that "*Information forwarded or obtained during investigations should be treated in accordance with the Union legislation on data protection*". The location of this sentence might be confusing and it should be placed in a separate recital to clarify that respect for data protection legislation is separate and self-standing and is not only related to exchange of information.
27. The EDPS welcomes the fact that Article 7(a) is specifically dedicated to procedural guarantees during investigations. This new provision is in line with the stated purpose of the Proposal to reinforce the accountability of OLAF. The Article also refers to the Charter, which includes provisions that are relevant in relation to OLAF's investigations, namely Art. 8 ("Protection of personal data") and the entire Chapter VI ("Justice").
28. Article 7(a)(1) of the Proposal requires the Office to seek evidence for and against the person concerned, and recalls the duty to carry out investigations objectively and impartially. These principles have a positive impact on the "data

²⁴ See also paragraph 36 below.

²⁵ See Opinion on a notification for prior-checking received from the Data Protection Officer of the European Anti-Fraud Office (OLAF) on OLAF internal investigations, 23 June 2006, Case 2005/0418, available at www.edps.europa.eu.

quality"²⁶ principle established in Art. 4 of Regulation (EC) 45/2001, in as much as the criterion requires the data to be accurate, conform to objective reality and be complete and up-to-date. The EDPS therefore welcomes the insertion of this paragraph.

Right of information, access and rectification

29. The following paragraphs of Art. 7(a) concern the different steps of OLAF's investigations. These steps can be summarized as follows: (i) interviews with witnesses or persons concerned (paragraph 7(a)(2)); (ii) person found to be concerned by the investigations (paragraph 7(a)(3)); (iii) conclusions of the investigation referring to the name of a person (paragraph 7(a)(4)).
30. The EDPS notes that the obligation to provide the information pursuant to Art. 11 and 12 of Regulation (EC) No 45/2001 is mentioned (only) in relation to step (iii) above. The EDPS is pleased that the Proposal has integrated the EDPS' recommendations provided in his legislative Opinion of 2006²⁷.
31. However, such a selective mentioning of the rights of the data subject in relation to a single procedural stage may be interpreted in a way that the same information should not be granted to the data subject (witness or person concerned) when he or she is invited to an interview or when the staff member is informed that he or she may be concerned by the investigation. For reasons of legal certainty, the EDPS therefore suggests that the reference to the relevant articles should be inserted in relation to all of the three situations mentioned in points (i), (ii) and (iii) above. However, once the information related to Art. 11 or 12 of Regulation (EC) No 45/2001 has been provided to the data subject, it will not be necessary to provide the same information in the following steps.
32. Furthermore, the text does not introduce any specification as regards the data subjects' rights of access and rectification of the data pursuant to Art. 13 and 14 of Regulation (EC) No 45/2001. These rights are protected by Art. 8(2) of the Charter and therefore have a special prominence among the rights of the data subject. The EDPS had already asked²⁸ for the insertion of a clearer specification of the rights of access and rectification of the data subject in order to avoid the risk of interpreting the text as introducing a special "lower standard"

²⁶ See Opinion on a notification for prior-checking received from the Data Protection Officer of the European Anti-Fraud Office (OLAF) on OLAF internal investigations, 23 June 2006, Case 2005/0418, available at www.edps.europa.eu

²⁷ Opinion of the European Data Protection Supervisor 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), OJ C 91, 26.4.2007, p. 1, paragraph 14 et seqq.

²⁸ In its Opinion of 2006, see footnote 19 above.

data protection regime for the persons concerned by OLAF investigations. The EDPS regrets that these aspects are not addressed in the Proposal.

33. The EDPS would also like to point out the possibility to limit the rights of information, access and rectification in specific cases, as provided for by Art. 20 of Regulation (EC) No 45/2001. OLAF's compliance with the data protection rules can therefore coexist with the necessity to preserve the confidentiality of its investigations. This aspect will be further developed in the paragraphs below.

Confidentiality of the investigation and rights of the data subject

34. As a general remark, the EDPS acknowledges that the investigative role of OLAF requires the ability to protect the confidentiality of its investigations with the purpose of effectively tackling the fraud and illicit activities that it is required to pursue. The EDPS however highlights that this ability has an impact on certain rights of data subjects, and that Regulation (EC) No 45/2001 establishes specific conditions under which such rights can be restricted in this context (Art. 20).
35. According to Art. 20 of Regulation (EC) No 45/2001, the rights provided by Articles 4 (data quality) and 11 to 17 (information to be supplied, right of access, rectification, blocking, erasure, right to obtain notification to third parties) can be restricted so long as this is necessary to safeguard, among others: "*(a) the prevention, investigation, detection and prosecution of criminal offences*" or "*(b) economic and financial interests of Member States or of the European Communities*" and "*(e) a monitoring, inspection [...] task connected with the exercise of official authority in cases referred to in points (a) and (b) above*". The same Article provides that the principal reasons why a restriction is imposed should be communicated to the data subject and that the subject should be made aware of the possibility to have recourse to the EDPS (Art. 20(3)). Furthermore, Art. 20(5) provides that such communication may be deferred for as long as providing the information to the data subject would deprive the restriction imposed of its effect.
36. The text of the Proposal essentially introduces exceptions to the rights of data subjects for reasons of confidentiality of the investigations. Art. 7(a)(4) provides that "*Without prejudice to Articles 4(6) and 6(5)*"²⁹, no conclusions referring by

²⁹ Article 4(6) - "Internal investigation" - reads as follows: "*Where investigations reveal that a member or staff member may be concerned by an internal investigation, the institution, body, office or agency to which he belongs shall be informed. In exceptional cases where the confidentiality of the investigation cannot be ensured, the Office shall use appropriate alternative channels of information*". Article 6(5) - "Investigations procedure" - reads as follows: "*Where investigations show that it might be appropriate to take precautionary administrative measures to protect the financial interests of the Union, the Office shall, without undue delay, inform the institution, body, office or agency concerned of the investigation in progress. The information supplied shall include the following: (a) the identity of any*

name to a person concerned may be drawn "once the investigation has been completed without that person being given the opportunity to comment on facts concerning him or her in writing or at an interview [...] and being provided with the information required by Articles 11 and 12 of Regulation 45/2001". The text seems therefore to suggest that, in the cases provided by Art. 4(6) and 6(5), the right to be heard and the right to information of the data subject could be limited.

37. The Proposal further establishes that, if necessary to preserve the confidentiality of the investigations and in cases entailing the use of investigations falling within the remit of a national judicial authority, the Director General of OLAF may decide to defer the possibility for the person to make her or his view known. The text does not specify whether in this context also the information required by Articles 11 and 12 of Regulation (EC) 45/2001 should be deferred.
38. The formulation of the text is unclear. First, the connection between the possible limitations of the rights of the person under investigation in relation to conclusions connected to his/her name and the type of information that OLAF should communicate to the relevant EU entity in the actual investigation are far from clear. Second, it is not clear which categories of the rights of the data subject are the object of a potential restriction. Third, the Article fails to insert the necessary safeguard of Art. 20(3) of Regulation (EC) 45/2001.
39. The consequence could be that individuals in some cases could be faced with conclusions on the investigation without having been aware of being subject to the investigation and without receiving any information on the reasons why their rights to be heard and rights of information pursuant to Art. 11 and 12 of Regulation (EC) 45/2001 have been restricted.
40. If Art. 20(3) and (5) of Regulation (EC) 45/2001 are respected such a scenario would not be *per se* in conflict with the Regulation. However, the absence of a clear reference to the articles of the Regulation in the text does not appear to be consistent with the purpose of the Proposal to reinforce the procedural guarantees in favour of persons concerned by OLAF investigations and to enhance OLAF's accountability.
41. The EDPS therefore suggests that a possible limitation of the right of the data subject within the meaning of Art. 20 of Regulation (EC) No 45/2001 should be

member or staff member concerned and a summary of the facts in question; (b) any information that may assist the institution, body, office or agency in deciding whether it is appropriate to take precautionary administrative measures in order to protect the financial interests of the Union; (c) any special measures of confidentiality recommended in particular in cases entailing the use of investigative measures falling under the competence of a national judicial authority or, in the case of an external investigation, under the competence of a national authority, in accordance with the national provisions applicable to investigations. [...]", emphasis added.

introduced explicitly. In addition, the procedural safeguards of Art. 20(3) should be mentioned in the text, as well as the possible exception of Art. 20(5). Such a clear provision would enhance the legal certainty for the data subject and the accountability of OLAF.

42. In conclusion, in order to establish a clear set of rights for the data subject and to introduce possible exceptions due to confidentiality of the investigations compliant with Art. 20 of Regulation (EC) No 45/2001, the EDPS suggests that the text should clearly indicate:

- the information to be supplied to the data subject in order to comply with data protection legislation (art. 11 and 12 of Reg. 45/2001) in the context of the various steps of OLAF's investigations³⁰: (i) interviews (paragraph 7(a)(2)); (ii) provision of information when a person may be concerned by the investigation (paragraph 7(a)(3)) and (iii) at the end of the investigation (paragraph 7(a)(4));
- the type of information that could be deferred by OLAF for reasons of confidentiality of the investigation, establishing clearly the conditions and the categories of data subjects concerned by the deferral;
- the information that should be supplied to the data subject in order to comply with data protection legislation in case the communication pursuant to art. 11 or 12 is deferred or if the rights of access and rectification are limited (namely, the information pursuant to Art. 20(3) of Reg. 45/2001), including the exception related to the possibility to further defer the information pursuant to Art. 20(5) of Regulation (EC) No 45/2001.

3.2 Information policy

43. The EDPS highlights that any information on investigations which might be made public by OLAF can involve sensitive personal data, and the necessity of any such publication must be carefully evaluated. The Court of First Instance (now the General Court), in its judgement in the *Nikolaou* case in 2007³¹, ruled that OLAF had violated Art. 8(3) of Regulation 1073/1999³² and Regulation (EC) No 45/2001 by not properly enforcing its obligation to ensure the protection of personal data in the context of a "leak"³³ and of a publication of a press release³⁴.

³⁰ As mentioned above, once the information has been provided to the data subject, it would not be necessary to repeat the same information in the following steps.

³¹ Case T-259/03, *Nikolaou v. Commission*, 12.07.2007, OJ C 247 of 20.10.2007, p. 23.

³² The article specifically refers to data protection law.

³³ *Nikolaou*, paragraph 213.

³⁴ *Nikolaou*, paragraph 232.

44. Therefore, the EDPS welcomes the introduction of paragraph 8(5) which provides explicitly that the Director-General shall ensure that information to the public is given "neutrally, impartially" and in accordance with the principles set out in Article 8 and in Article 7(a). In the light of the comments made above on Article 7(a) in relation to its restrictive approach to the rules of Regulation (EC) 45/2001, the EDPS particularly welcomes the reference in paragraph 8(5) to the more general provision of Article 8, which implies that any processing of personal data in the context of information to the public shall be done in conformity with all the principles Regulation (EC) No 45/2001.

3.3 *Confidentiality of the identity of whistleblowers and informants*

45. The EDPS would like to insist, in the context of the current revision, on the need to introduce a specific provision to guarantee the confidentiality of whistleblowers' and informants' identity. The EDPS underlines that the position of whistleblowers is a sensitive one. Persons that provide such information should be guaranteed that their identity is kept confidential, in particular vis-à-vis the person about whom an alleged wrongdoing is being reported³⁵. The present guarantees (Commission Communication SEC/2004/151/2) do not appear to be sufficient from a legal point of view. The EDPS notes that such provision would be in line with the Opinion of the Article 29 Data Protection Working Party on internal whistle-blowing schemes³⁶.

46. The EDPS recommends amending the current Proposal and ensuring that the identity of whistleblowers and informants is kept confidential during the investigations so long as this does not contravene national rules regulating judicial procedures. In particular, the subject of the allegations might be entitled to know the identity of the whistleblower and/or informant to instigate legal procedures against them if it has been established that they maliciously made false statements about him/her³⁷.

³⁵ The importance of keeping the identity of the whistleblower confidential has already been underlined by the EDPS in a letter to the European Ombudsman of 30 July 2010 in case 2010-0458, to be found on the EDPS website (www.edps.europa.eu). See also EDPS prior check Opinions of 23 June 2006, on OLAF internal investigations (Case 2005-0418), and of 4 October 2007 regarding OLAF external investigations (Cases 2007-47, 2007-48, 2007-49, 2007-50, 2007-72).

³⁶ See Opinion 1/2006 of the Article 29 Working Party of 1 February 2006 on the application of EU data protection rules to internal whistle blowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime, available at: http://ec.europa.eu/justice/policies/privacy/workinggroup/index_en.htm.

³⁷ See opinion on financial rules applicable to the annual budget of the Union 15/04/2011, available at www.edps.europa.eu.

3.4 Transfers of personal data from OLAF

Cooperation with Eurojust and Europol

47. The EDPS welcomes the specifications made in Recital 6 and Article 10(a), and in particular the introduction of the requirement for a clear legal basis governing the cooperation with Eurojust and Europol, which is fully in line with Regulation (EC) No 45/2001. However, the Proposal should be more detailed in order to reflect the different data protection regimes for Eurojust and Europol.
48. To date, OLAF has in place a Practical Agreement with Eurojust³⁸ which spells out the conditions under which the transfer of personal data can take place. The cooperation between OLAF and Eurojust includes in particular the exchange of case summaries, of case-related strategic and operational information, the participation to meetings and the mutual assistance that may be useful for the efficient and effective fulfilment of their respective tasks. The Practical Agreement³⁹ mostly defines the *modus operandi* for the exchange of information, including personal data, and in some cases also highlights or specifies certain elements of the existing legal framework.
49. As regards Europol, such an agreement is not in place with OLAF⁴⁰, but the Europol decision permits Europol to directly receive, use and transmit information, including personal data, from *-inter alia-* OLAF also before the conclusion of a formal exchange agreement as long as this is necessary for the legitimate performance of Europol's and OLAF's tasks⁴¹. The exchange is also subject to the existence of a confidentiality agreement between the two entities. Art. 24 of the Europol Decision specifies some safeguards that Europol should observe in relation to any data transfer which takes place before the conclusion of a formal exchange agreement: "*Europol shall be responsible for the legality of the transmission of data. Europol shall keep a record of all transmissions of data under this Article and of the grounds for such transmissions. Data shall be transmitted only if the recipient gives an undertaking that the data will be used only for the purpose for which they were transmitted*". Art. 29 of the same decision also specifies when the responsibility for the data transferred by third parties falls on Europol.
50. The conclusion of a specific agreement with Europol on data transfers is strongly supported by the EDPS, and the fact that so far it has not been

³⁸ Practical agreement on arrangements of cooperation between Eurojust and OLAF of 24 September 2008: see footnote 12 above.

³⁹ Eurojust-OLAF Practical agreement, point 4.1.

⁴⁰ The Administrative Arrangement of 8 April 2004 is restricted to the exchange of strategic information and expressly excludes the exchange of personal data, leaving the issue to a further agreement between Europol and OLAF.

⁴¹ Europol decision, art. 22.3, footnote 14 above.

concluded reinforces the need for specific guarantees in the text of the Proposal. In view of the different data protection regimes in relation to the transfer of personal data from OLAF to Eurojust and Europol and vice versa, the EDPS believes that the Proposal should address more clearly the necessary guarantees and standards which should govern the cooperation between OLAF and those bodies and be taken into account in the current and future working arrangements between them.

51. In order to reinforce the need for the conclusion of an administrative arrangement, the provision of Art. 10(a)(2) should be changed to read "*The Office shall agree on administrative arrangements [...]*". This way, it would mirror the similar provision of the Europol decision⁴², which establishes that Europol shall conclude agreements or working arrangements with other Union institutions, bodies and agencies. Furthermore, the Proposal could clarify in Art. 10(a) that, as a general principle, the exchange of personal data with Eurojust and Europol should be limited to and should not exceed what is *necessary* for the legitimate performance of the tasks entrusted to OLAF, Europol and Eurojust. The Proposal should also introduce the obligation for OLAF to keep a record of all transmissions of data and the grounds of such transmissions, in order to reinforce the accountability of OLAF as to the implementation of the obligations imposed by Regulation (EC) No 45/2001 on transfers of personal data.

Cooperation with third countries and international organisations

52. Par. 3 of Article 10(a) mentions that "*The Office may [also] agree, as appropriate, on administrative arrangements with competent services in third countries and international organisations. The Office shall coordinate with the Commission services concerned and the European External Action Service*".
53. The EDPS welcomes the fact that the cooperation of OLAF with third countries and international organisations is connected to the conclusion of administrative arrangements. However, the data protection implications resulting from the possible exchange of data with third countries and international organisations should be more specifically addressed in the Proposal.
54. The Proposal should be more precise on the specific requirements and conditions for possible transfers of data from and to third countries and organisations. The EDPS advises that the text of Art. 10(a)(3) should include also the following wording: "*To the extent that cooperation with international organizations and third countries entails the transfer of personal data from*

⁴² Europol decision, art. 22.2, see footnote 14 above: "*Europol shall conclude agreements of working arrangements with the entities referred to in paragraph 1*" (namely, Eurojust, OLAF, Frontex, CEPOL, the ECB and the EMCDDA).

OLAF to other entities, any such transfer should take place according to the criteria of Art. 9 of Regulation 45/2001".

Access by Supervisory Committee to personal data

55. The EDPS welcomes the wording of Art. 11 of the Proposal according to which "*The Supervisory Committee may ask the Office for additional information on investigations in duly justified situations, without however interfering with the conduct of investigations*", since such wording expresses the principle of necessity in relation to any possible transfer of personal data from OLAF to the Supervisory Committee.
56. The issue of access of the Supervisory Committee to personal data of persons implicated or possibly implicated in investigations should also be clarified in the context of the rules of procedure to be adopted by the Committee on the basis of the new Article 11 par. 6. The EDPS would appreciate being involved in the process that would lead to the adoption of the rules of procedure of the Supervisory Committee. The consultation of the EDPS could also be inserted in the text of the Proposal as a requirement for the adoption of the rules of procedure.

4. Strategic planning

57. Besides all the specific points mentioned above, the EDPS would like to encourage the Commission to propose a more open approach to the EU data protection regime by OLAF. It would be the right moment for OLAF to develop a strategic planning of its data protection compliance by voluntarily clarifying the practical approach to the treatment of its numerous files containing personal data. OLAF could proactively and publicly explain how it treats personal data in its various activities. The EDPS believes that such a global and explicit approach would result in enhanced transparency of OLAF's treatment of personal data and in an ameliorated user friendliness of its investigative processes.
58. Therefore, the EDPS suggests that the provisions of the Proposal give the Director General the task of ensuring that a comprehensive overview of all different processing operations of OLAF is carried out and kept up to date, or that at least this is explained in a recital. Such an overview -the results of which should be transparent through, for example, an annual report or through other options- would not only enhance the effectiveness of the different activities of OLAF and their interaction, but also encourage OLAF to take a more global approach on the necessity and proportionality of processing operations. It would also be helpful to OLAF to better demonstrate that it properly implements privacy by design and accountability principles.

5. Conclusion

59. In conclusion the EDPS welcomes those modifications introduced in the text which enhance the compliance of the Proposal with the EU data protection regime.

60. However, the EDPS would also like to highlight a number of shortcomings that should be addressed by the modification of the text, and most importantly:

- the Proposal should clearly mention the right to information of the different categories of data subjects, as well as the right of access and rectification in relation to all the phases of the investigations carried out by OLAF;
- the Proposal should clarify the relationship between the need for confidentiality of the investigations and the data protection regime applicable during the investigations: the EDPS suggests that the rights of the data subjects should be clearly defined and separated as well as possible exceptions due to confidentiality requirements, and that the safeguards provided for by Art. 20 of Regulation (EC) No 45/2001 should be explicitly introduced;
- the Proposal should clarify OLAF's information policy to the public in relation to data protection;
- the Proposal should introduce specific provisions for the confidentiality of whistleblowers and informants;
- the Proposal should clarify the general data protection principles on the basis of which OLAF can transmit and receive information, including personal data, with other EU bodies and agencies, third countries and international organisations;
- the provisions of the Proposal should give the Director General the task of ensuring that a strategic and comprehensive overview of the different processing operations of OLAF is carried out, kept up to date and made transparent, or at least that the need for this should be explained in a recital.

Done in Brussels, 1 June 2011

(signed)

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