



## **Opinion on the notifications for prior checking from the Data Protection Officer of the European Anti-Fraud Office (OLAF) 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)**

Brussels, 3 February 2012 (cases 2011-1127, 2011-1129, 2011-1130, 2011-1131, 2011-1132)

### **1. Proceedings**

On 1 December 2011, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Anti-Fraud Office (OLAF) five notifications for prior checking relating to, respectively, OLAF internal investigations (2011-1127), external investigations (2011-1129), dismissed cases and incoming information of no investigative interest (2011-1130), coordination cases (2011-1131) and implementation of OLAF recommendations (2011-1132). The notifications were accompanied by the following documents:

- short version of the privacy statement included in OLAF work-forms which are sent to data subjects during the course of investigations and monitoring activities;
- the full privacy statement for, respectively, internal and external investigations, dismissed cases and incoming information of no investigative interest, coordination cases and implementation of OLAF recommendations.

By letter of the same day, the Director-General of OLAF ('DG') transmitted to the EDPS an explanatory memorandum concerning OLAF new investigative procedures (the 'Memorandum') and the draft-Instructions to Staff on Investigative Procedures, replacing the OLAF Manual on operational procedures and setting out guidelines to OLAF staff reflecting the new procedures.

On 3 January 2012, the EDPS received a note from OLAF concerning the procedures followed in selecting cases from new information of potential investigative interest (the 'NIPII Note').

On 4 January 2012, the EDPS received the finally approved version of the draft-Instructions to Staff on Investigative Procedures (the 'Instructions to Staff').

The EDPS decided to analyse the five cases jointly, in a single prior-checking Opinion, because the processing operations in question and the personal data involved are similar.

The EDPS requested OLAF to provide some complementary information on 17 January. The answer was received on 24 January.

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## 2. Facts

OLAF investigation procedures have been the subject of prior checking by the EDPS over the past years. In particular, the EDPS issued the following prior-checking Opinions on OLAF procedures (hereinafter the 'previous OLAF Opinions'):

- Internal investigations, 23 June 2006 (Case 2005-0418);
- External investigations, 4 October 2007 (Cases 2007-47, 2007-48, 2007-49, 2007-72);
- Non-cases and prima facie cases, 3 October 2007 (Case 2007-205);
- Coordination cases, 7 April 2008 (Case 2007-699);
- Criminal assistance cases, 12 October 2007 (Case 2007-203);
- Monitoring cases, 11 July 2007 (Case 2006-548);
- Follow-up data processing operations (disciplinary, judicial, financial), 26 March 2007 (Cases 2006/543, 2006-644, 2006-545, 2006-547).

As a part of the OLAF reform which will enter into force on 1 February 2012, OLAF intends to adopt new procedures for investigations. These procedures are reflected in the Instructions to Staff, which will replace the OLAF Manual on operational procedures and set out guidelines to OLAF staff. The changes introduced in the OLAF procedures are mainly of organizational type, as they reflect the new structure of the Office following the reorganization of its organigram. As such, they do not appear to affect substantially the way data are processed by OLAF during its investigation activities.<sup>1</sup> Nonetheless, some aspects of the new procedures need to be addressed in the present Opinion.

In the documentation submitted to the EDPS, OLAF declared that the reorganizational changes do not affect the way OLAF processes personal data and that the new procedures will offer an identical level of data protection and respect of data subjects' rights. As confirmed by OLAF, the current OLAF data protection guidelines, a copy of which was notified to the EDPS on 24 June 2008,<sup>2</sup> will continue to apply under the new procedures.

In light of the above, the new notifications have to be considered as an update of the previous ones, which have been already prior-checked by the EDPS. Accordingly, the analysis and the recommendations put forward in the previous OLAF Opinions are still largely valid.

In the present Opinion, the EDPS therefore will not carry out a full analysis of all processing operations, but will limit himself to highlight, where necessary, new issues or issues not identified in the previous OLAF Opinions.

### **2.1. Overview of OLAF new investigative procedures**

OLAF new investigative procedures consist of four main phases: I) Selection; II) Investigation or Coordination; III) Review; and IV) Monitoring of recommendations.

#### *2.1.1. Selection*

During the selection phase, the Investigation Selection and Review Unit (the 'ISR Unit') will analyse a NIPII in order to provide an opinion to the DG on whether an investigation or coordination case should be opened or whether the case should be dismissed.

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<sup>1</sup> The new OLAF procedures are described in more detail below in Section 2.1.

<sup>2</sup> A revised version was transmitted by OLAF on 11 July 2011.

The ISR Unit should provide an opinion on the opening or dismissal of a case to the DG within 2 months of the registration of the NIPII. After consideration of the ISR opinion, the Director-General will decide whether to open an investigation or coordination case, or dismiss the case.

The main difference with the current procedures is the creation of the ISR Unit, which will be in charge of conducting the selection procedure. The Selection phase will replace the existing initial assessment of cases, currently conducted by OLAF investigators.

#### *2.1.2. Investigation and coordination*

The purpose of an investigation will be to collect the evidence needed to establish the facts of the case to verify whether a fraud or irregularity affecting the financial or other interests of the EU has occurred, including serious matters relating to the discharge of professional duties of Members, officials or other servants of the EU institutions and bodies, offices and agencies.

An investigation will remain internal or external. Internal investigations will be conducted within EU institutions and bodies for the purpose of detecting a breach of the obligations of Members, officials or other servants of such bodies, including offices and agencies. External investigations will be conducted outside the EU institutions and bodies, for the purpose of detecting fraud or other irregularities concerning matters not relating to EU Members, officials or other servants.

Within the framework of an investigation, an investigation unit will collect evidence by various means, including operational meetings, taking statements, fact-finding missions in Member States, taking samples for scientific examination, interviews, inspections of premises, on-the-spot checks, forensic operations, and investigative missions in third countries.

The purpose of a coordination case is to provide the Member States with assistance in the coordination of their investigations and other related activities for the protection of the EU financial interests. An investigation unit must not conduct investigative activities in coordination cases. However it may provide assistance to Member States in the conduct of their investigation by facilitating the collection and exchange of evidence.

Upon completion of the investigation or coordination, the Investigation Directorate will adopt a final report, and submit a proposal for recommendations if warranted to the DG. Both documents are submitted to the ISR Unit, which will prepare an opinion for the DG.

#### *2.1.3. Review*

The Review phase will consist of the examination of the final report together with the proposed recommendations by the ISR Unit. The purpose of the Review will be to ensure the legality of the activities undertaken during the investigation or coordination case and the respect of the rights of the persons involved, including data protection rights. In the new system, the ISR Unit will therefore take over the functions of the Executive Board concerning the review of the final report prepared by OLAF investigators.

The ISR Unit will issue an opinion to the DG who will take a decision on the closure of the investigation or the coordination case. The DG will make recommendations for actions to be taken by EU institutions and bodies and/or Member State authorities.

#### *2.1.4. Implementation of recommendations*

The purpose of the Monitoring phase will be to monitor the progress of the actions taken by Member States or EU institutions and bodies, in implementing the recommendations made by the DG following OLAF investigation or coordination cases.

In the new system, the follow-up/monitoring phase, which is currently carried out as a separate activity, will be integrated in the investigative process. Following the closure of the investigation or coordination cases, the investigative unit will retain responsibility to monitor the implementation of OLAF recommendations.

## **2.2. The most significant changes of the new investigation procedures**

The most significant changes brought about by the new procedures, compared to the procedures currently in place, can therefore be summarised as follows:

- a new selection procedure will replace the initial assessment of cases. A new Selection and Review Unit has been created to centralise the processing of NIPII and provide advice to the DG on the opening (or not) of investigations;
- cases of no investigative interest will be no longer classified as prima facie non-cases. Where the information is of no possible investigative interest, no further action will be taken. When following the selection procedure, the DG decides that there is no need to open an investigation or a coordination case, e.g. because OLAF is not competent or the allegations are not sufficiently substantiated, the case will be dismissed;
- cases with respect to which preliminary actions reveal that the evidence available does not indicate the existence of a fraud or irregularity affecting the financial or other interests of the EU will no longer be classified as non-cases. Rather, the DG will close the investigation following the preliminary actions;
- monitoring cases and criminal assistance cases will no longer exist: the notifications for these processing operations will be withdrawn from OLAF register;
- the current functions of the Executive Board will be performed by the ISR Unit. This Unit will review the results of the investigation and provide the DG with independent advice. The review will include a verification of compliance with data protection requirements;
- the follow up phase will no longer exist. The monitoring tasks will be integrated in the investigative process and performed by the investigative units.

## **2.3. Data processing by OLAF under the new procedures**

As already noted, OLAF has declared that the new procedures are not intended to have any impact on the way the Office processes personal data during its activities. In its notifications to the EDPS, OLAF has not highlighted any particular changes in this respect.

OLAF Guidelines to Staff regarding the implementation of Data Protection requirements ('the Data Protection Guidelines'), a copy of which was notified to the EDPS on 24 June 2008,<sup>3</sup> will continue to apply under the new procedures.

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<sup>3</sup> A revised version was transmitted on 11 July 2011.

The description of OLAF processing activities in previous EDPS Opinions can be considered therefore still largely valid. Bearing this in mind, the main elements of the data processing activities will be outlined below.

### *2.3.1. Categories of data subjects*

The categories of data subjects involved in the processing activities will be the following: 1) natural persons who are or were suspected of wrongdoing which is the subject of the OLAF investigations; 2) natural persons who have provided information to OLAF including informants, whistleblowers, witnesses and persons who have provided statements; 3) staff of OLAF operational partners (e.g. competent staff of the EU institutions and bodies or national authorities) working on OLAF matters whose name appears in documents stored by OLAF; 4) other persons whose name appears in the case file but have no relevance to the case.

### *2.3.2. Categories of data*

The categories of data processed will be: 1) identification data (surname, forename, nickname, birthday, birthplace, street, postcode, city, country, telephone number, fax number and e-mail address); 2) professional data: profession, organisation and function; 3) case involvement data (case involvement, activities and information related to matters which are the subject of implementation and comments of the person involved).

The notification form specifies that data fields which fall under Article 10 of Regulation EC 45/2001 (hereinafter ‘the Regulation’) will be only processed where strictly necessary within a given case.

### *2.3.3. Selection procedure by the ISR Unit and new intelligence database*

The NIPII Note specifies that a new database has been created whose purpose is to cross-match defined data fields extracted from the NIPII against data fields extracted from existing case files, whether active or closed. This database will be queried in order to check whether any of the entities mentioned in a NIPII is already mentioned in any existing case. The NIPII Note states that when the process of text-mining is sufficiently developed, this check will be performed automatically.

### *2.3.4. Information to be given to data subjects*

A short version of the privacy statement will be included in the OLAF workforms which are sent to data subjects during the normal course of activities. The full privacy statement will be available on the OLAF Europa website. The short version makes reference to the OLAF data protection page on the OLAF Europa website, which includes the full privacy statement.

### *2.3.5. Handling of files (electronic and manual)*

A central database, the Case Management System (CMS), is already used to manage all of OLAF case files. All documents related to a case, including reports, notes, correspondence, decisions and all other events related to a case are recorded in the CMS. This includes those documents related to the implementation of OLAF recommendations. The OLAF staff member (investigative unit) in charge is given access rights to the CMS and is responsible for updating the system in a timely manner and monitoring the completeness of details and documentation for his case.

OLAF Greffe maintains the official case file in paper form in a uniform manner, in compliance with Commission Rules of procedure. OLAF case handlers may keep their own paper working files for the cases assigned to them, containing only copies of documents. When the implementation has been completed, the staff in charge hands over any case-related documents in his/her possession to the Greffe. The Greffe staff will then compare the two sets of files (original and copies) ensuring that the Greffe file is complete and destroying duplicate documents.

#### *2.3.6. Categories of recipients to whom data might be disclosed*

The categories of recipients to whom data might be disclosed will be: 1) concerned EU institutions and bodies; 2) competent national authorities; 3) competent third country authorities and international organisations.

#### *2.3.7. Conservation of data*

OLAF will keep both electronic and paper files relating to the case for up to 20 years after the closure of the investigation where recommendations have been made, and up to 10 years where no recommendations have been made. OLAF will keep electronic files relating to dismissed cases for a period of five years. Statistical data will be kept in anonymised form for 50 years.

#### *2.3.8. Right of access*

The privacy statement attached to the notification specifies that data subjects will have the right to access the personal data held by OLAF, to correct and complete them, on request and within three months from its receipt. Any request for access, rectification, blocking and/or erasure should be addressed to the controller at the indicated e-mail address. The privacy statement specifies that exemptions under article 20 (1) (a) and (b) of the Regulation may apply.

[...]

### **3. Legal aspects**

#### **3.1. Prior checking**

This prior check Opinion relates to the processing of personal data in the context of OLAF administrative investigations (both internal and external), dismissed cases, and incoming information of no investigative interest, coordination cases and implementation of OLAF recommendations (Articles 2(a) and (b) of the Regulation). The processing activity will be carried out by a European institution, in the exercise of activities which fall within the scope of EU law (Article 3.1 of the Regulation). The processing of personal data will be done, at least partly, by automatic means (Article 3.2 of the Regulation). As a consequence, the Regulation is applicable.

Article 27.1 of the Regulation subjects to prior checking by the EDPS all '*processing operations likely to present specific risks to the rights and freedoms of data subject by virtue of their nature, their scope or their purposes*'. Article 27.2 of the Regulation contains a list of processing operations that are likely to present such risks. Article 27.2(b) of the Regulation stipulates that operations relating to "*evaluate personal aspects relating to the data subject, including his or her (...) conduct*" shall be subject to prior checking by the EDPS. In the case under analysis, the conduct of the officials is analysed by OLAF. Furthermore, under Article

27.2(a) of the Regulation, processing *operations relating to "suspected offences, offences, criminal convictions or security measures"* shall be subject to prior checking by the EDPS. In the present case, the processing of data carried out by OLAF under its investigation procedures could relate to both processing described under Article 27.2(a) and (b).

The notification of the DPO was received on 1 December 2011. According to Article 27(4) the present Opinion must be delivered within a period of two months. Complementary information and documentation was transmitted by OLAF and received by the EDPS on 3 and 4 January 2012. The EDPS requested OLAF to provide additional information on 17 January. The answer was received on 24 January. The procedure was therefore suspended during 7 days.

The procedure was further suspended for 1 day to allow for provision of comments on the draft Opinion. Therefore, the present Opinion must be delivered no later than 10 February 2012.

### **3.2. Prior checking of the NIPII database**

The documentation transmitted by OLAF (i.e. the NIPII Note) describes the steps of the procedure to be followed by the ISR Unit in the Selection phase. The NIPII Note indicates that OLAF will create (or is creating) a new data-base whose purpose is to cross-match defined data fields extracted from the NIPII against data fields extracted from existing case files, whether active or closed.

This data base will be queried by the Registry in order to check whether any of the entities mentioned in the NIPII is already mentioned in any existing case. The result of this query will be then transmitted to the Head of the ISR Unit in view of the selection process. The NIPII Note states that when the process of text-mining is sufficiently developed, this check will be performed automatically.

The EDPS considers that the new database *may* fall under one of the situations laid down under Article 27 of the Regulation, namely Article 27(2) (a) and (b), for the same reasons indicated above in Section 3.1. In addition, the data mining operations and the cross checking of data belonging to different files *may* also fall under Article 27(2)(d) which subjects to prior checking by the EDPS those processing operations allowing linkages not provided for pursuant to national or European legislation between data processed for different purposes.

The information concerning the new database was not included in the original notifications. The EDPS obtained such information for the first time on 3 January 2012, when he received the NIPII Note. However, he does not consider the information transmitted as sufficiently detailed and comprehensive to carry out a prior check of the processing activity relating to the new database in the present Opinion.

In the light of the above, the EDPS has decided not to deal with the issues related to the new database in the present Opinion. He therefore invites OLAF to submit a separate notification for prior checking relating to this processing activity. In the meanwhile, OLAF should not process personal data by means of the database until the prior-check of the latter is completed.

### **3.3. Lawfulness of the processing**

Article 5(a) of the Regulation stipulates that personal data may be processed if *'the processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European [Union] or other legal instruments adopted on the basis of*

*thereof or in the legitimate exercise of official authority vested in the [European] institution or body'.*

Article 5(b) of the Regulation stipulates that personal data may be processed if *'the processing is necessary for compliance with a legal obligation to which the controller is subject'*.

As established in the previous OLAF Opinions, the processing of personal data by OLAF in the context of internal and external investigations, dismissed cases and incoming information of no investigative interest, coordination cases and implementation of OLAF recommendations can be considered in general as necessary for the performance of OLAF tasks and respect of its obligations established by Regulation (EC) No 1073/1999, Regulation (EC) No 2185/96, and various sectoral regulations, such as Regulation (EC) No 2988/95.

Therefore, the processing of personal data can be considered as lawful pursuant to Articles 5(a) (processing necessary for a task in the public interest) and 5(b) of the Regulation (processing necessary in compliance with a legal obligation). For a more comprehensive analysis of the legal basis, the EDPS refers to the previous prior-checking Opinions concerning OLAF investigation procedures.

The EDPS reiterates also in the present Opinion that that the necessity of the processing has nonetheless to be better analysed *in concreto* and on a case by case basis in the course of the specific processing operations. As will be stressed below, the need for a concrete evaluation of the necessity is particularly relevant in relation to the exercise by OLAF of its investigation powers, such as inspections, on-the-spot checks, forensic investigations (see Section 3.6), and transfers of data (see Section 3.8).

### **3.4. Processing of special categories of data**

Article 10.5 stipulates what follows: *"[p]rocessing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor"*. In the present case, processing of the mentioned data is to be considered as authorised by the legal instruments mentioned in point 3.3. above.

According to Article 10.1 of the Regulation, the processing of special categories of data (that is *'data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life'*) is prohibited. The Regulation foresees certain exceptions in Article 10(2). However, it seems most likely that, if any exception would apply, only those of sub-paragraph (b) or (d) would possibly be relevant.

The notifications state that data fields falling under Article 10 of the Regulation are only processed where strictly necessary within a given case. In practice, the type of data described in Article 10.1 should only be processed exceptionally. It could happen, for instance, that while conducting forensic examinations of computers, e-mails exchanged by data subjects with trade unions or with the EU Sickness insurance scheme may be found, revealing political opinions or data concerning health respectively. In the event that this happens, the general rule of Article 10.1 has to be respected, or, otherwise, it has to be evaluated whether the application of an exception would be 'necessary'. As the processing of sensitive data is to be considered as an exception rather than the rule, the necessity criterion here has to be applied in a restrictive manner.



In this regard, the Instructions to Staff contain a provision which does not appear consistent with this principle and with the information included in the notification. Point 13.5 of the Instructions to Staff stipulate that '*[d]uring an inspection of premises, members of the investigation unit may access any information held by the EU institution, body, office or agency concerned, including inter alia copies of electronic documents (including medical records) where they may be relevant to the investigation*' (emphasis added).

The EDPS considers that this approach is not in line with the Regulation. The collection and further processing of sensitive data is admissible only where it is *necessary* in the specific case in view of one of the purposes laid down in Article 10(2). In this respect, the fact that the data 'may be relevant' is not sufficient to fulfil the conditions of applicability of the exception. The data at issue must be necessary for the purposes of the exception. The EDPS therefore urges OLAF to amend the Instructions to Staff accordingly.

Whenever the investigator comes accidentally across sensitive data not falling under one of the exceptions foreseen by Article 10(2) or Article 10(4), the files in question have to be deleted or blocked so as to be made unreadable.

### **3.5. Data quality**

According to Article 4(1)(c) personal data must be "*adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed*".

As specified in previous OLAF Opinions, while some standard data will always be present in the investigation file (typically identification data), the precise content of a file will vary from case to case. It is therefore important that OLAF staff is made aware of the need to comply with the proportionality principle, for example by means of a general recommendation to ensure the respect of the rule.

In this respect, the EDPS welcomes that the Instructions to Staff state that all evidence collected should be relevant to the matter under investigation and collected for the purpose of the investigation. However, he stresses that the personal information collected should also be '*adequate and not excessive*' as provided for by Article 4(1)(c) of the Regulation and specified in OLAF Data Protection Guidelines (point 1.3 thereof).

### **3.6. Forensic operations**

Regarding seizures in physical premises, the OLAF Instructions to Staff stipulate in Article 15 that: '*[f]orensic operations must respect the principles of necessity, proportionality and must be carried out in accordance with national legal provisions. Forensic operations should, where possible, be preceded by preliminary identification of the necessary data to be collected in order to target the scope of the operation. The forensic examination and analysis must be limited to extracting data relevant to the investigation concerned*'. The EDPS welcomes these provisions, as they go in the direction of the principle of data quality.

In response to EDPS recommendations in the earlier prior checks listed in Section 2, OLAF has adopted a Protocol of 'Standard Operating Procedures' for conducting computer forensic investigations (the 'Forensic Protocol'), which has been notified to the EDPS on 24 June 2008. After more than 3 years following the adoption of the Protocol, the EDPS considers that the implementation of these procedures could be reassessed or reviewed, in the light of the experience built up over the first years of its operation. He therefore invites OLAF to prepare a

report concerning the implementation of the Protocol focusing on the aspects more strictly related to the processing of personal data.

The EDPS is currently analysing the issue of forensic operations conducted by OLAF in the context of a more general inquiry relating to various complaints filed by data subjects. Therefore, additional and more specific recommendations will be included in the EDPS' opinions to be issued upon conclusion of such inquiry.

### **3.7. Conservation of data**

In previous OLAF opinions, the EDPS recommended that, ten years after its establishment, the Office should carry out an evaluation of the necessity of the 20 years retention period and a second evaluation 20 years after.

During the annual meeting held between the EDPS and the OLAF DG on 2 March 2010, it was agreed that OLAF would submit revision plans to its personal data retention policy to the EDPS in 2012.

The EDPS recognises that this evaluation raises complex issues, but urges OLAF to conduct the analysis rapidly in 2012 and transmit the evaluation report to the EDPS not later than six months from the adoption of the present Opinion.

### **3.8. Transfer of data**

#### *3.8.1. Transfer of personal data within or between EU institutions or bodies*

Transfers of personal data within or between EU institutions and bodies must comply with the requirements set out by Article 7 of the Regulation:

*'1. Personal data shall only be transferred within or to other [...] institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipients.*

*2. Where the data are transferred following a request from the recipient, both the controller and the recipient shall bear responsibility for the legitimacy of this transfer. The controller shall be required to verify the competence of the recipient and to make a provisional evaluation of the necessity for the transfer of the data. If doubts arise as to this necessity, the controller shall seek further information from the recipient.*

*The recipient shall ensure that the necessity of for the transfer can be subsequently verified.*

*3. The recipient shall process the personal data only for the purposes for which they have been transmitted'.*

With regard to Article 7 transfers, the EDPS reiterates once again in this Opinion his recommendation that personal data must be transferred within or between other institutions or bodies only insofar as necessary for the legitimate performance of tasks covered by the competence of the recipient. The assessment of necessity has therefore to be carried out *in concreto* and on a case by case basis. As highlighted in previous OLAF Opinions, the EDPS takes the view that even if the transfer of information is foreseen in relevant legislation, such

transfer is only lawful if it meets these two additional requirements.<sup>4</sup> Indeed, legislative provisions allowing the exchanges of documents and information between institutions or bodies always have to be read and applied together with the data protection legislation.

Article 25.1 of the Instructions to Staff provides that '*[w]here the Director-General has taken a decision to close an investigation or a coordination case, the investigation unit must always transmit the final report together with the Recommendations if any, to the relevant EU institution, body, office or agency concerned*'. As OLAF final reports contain personal data of various categories of data subjects, this point of the Instructions to Staff shall comply with the requirements of Article 7 of the Regulation. While the transmission of OLAF final reports with recommendations for follow-up can normally be considered as necessary in light of Article 7 of the Regulation, a more specific analysis must be done for reports without recommendations.

In the course of the procedure, OLAF indicated that it considers that the transmission of all final reports, including those without recommendations, is required on the basis of Article 9(4), first sentence, of Regulation 1073/1999.<sup>5</sup> OLAF argues that information about cases closed without recommendations for follow-up could also be relevant for the design of new administrative measures or procedures for fraud prevention and used for this purposes by the institution or body concerned. In this respect, the Commission has indicated to OLAF that it needs to receive all reports for internal investigations concerning Commission staff members, whether or not recommendations are included.

The EDPS takes note of the arguments put forward by OLAF. The EDPS would also refer to Article 10(3) of Regulation 1073/1999 in this respect. Nonetheless, after careful examination, he finds that Article 9(4) of Regulation 1073/1999 must be considered within the whole legal context. It cannot be read in isolation, but must be interpreted in conjunction with other parts of the same Article and with other relevant provisions. In particular, Article 9(4), first sentence, is inserted in a provision which refers essentially to reports drawn in connection with the action to be taken following an internal investigation.<sup>6</sup> Account should be taken also of Article 1(3) of Annex IX to the Staff Regulations which provides '*[i]f, following an OLAF investigation, no case can be made against an official about whom allegations have been made, the investigation in question shall be closed, with no further action taken, by decision of the Director of OLAF, who shall inform the official and the institution in writing.*' (emphasis supplied). This provision suggests that where OLAF concludes that the allegations are not substantiated, the institution or body concerned should simply be informed about the OLAF decision to close the case and no further action should be taken.

In view of the above, the EDPS considers that Article 9(4), first sentence, is to be interpreted in a manner which is compatible with this provision of the Staff Regulations and with data protection rules, which are both referred to in the text of Regulation 1073/1999.<sup>7</sup> Article 9(4)

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<sup>4</sup> See, e.g., EDPS 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), of 26 March 2007.

<sup>5</sup> Article 9(4), first sentence of the Regulation 1073/1999 states that '*[r]eports drawn up following an internal investigation and any useful related documents shall be sent to the institution, body, office or agency concerned*'.

<sup>6</sup> The title of Article 9 refers to investigation reports and to the '*action taken following investigations*'. The first paragraph of Article 9 refers to reports '*including the recommendations of the Director of the Office on the action that should be taken*'. The second sentence of the fourth paragraph of Article 9 refers to the obligation on the institution or body concerned to '*take such action, in particular disciplinary or legal, on the internal investigations, as the results of those investigations warrant*'.

<sup>7</sup> See in this regard Article 4(1) referring to the Staff Regulation and Article 8 referring to the applicable rules on the protection of personal data.

applies solely to the transmission of final reports of internal investigations including recommendations on the follow-up action that should be taken.<sup>8</sup>

The transmission of final reports without recommendations cannot therefore be based on this provision. The transmission of these final reports could however be based on Article 7(1) of the Data Protection Regulation, if it can be demonstrated that this transfer is necessary for the legitimate performance of a task covered by the competence of the recipient. This should be based on an assessment *in concreto* of the necessity for the transfer and should comply with the other requirements set out in the same Article.

The EDPS concludes that OLAF is entitled to transmit all final reports including those without recommendations to relevant EU institutions and bodies, provided that an assessment of the necessity of each transfer is made *in concreto*, whether in general terms per categories or on a case by case basis.

In its comments on the draft prior-check Opinion, OLAF informed the EDPS that in order to meet to the possible extent the EDPS recommendations with regard to the transmission of final reports, OLAF will, on a case-by-case basis, delete any personal data from the report that the concerned EU institution or body does not need to receive. The EDPS takes note of this undertaking and of the fact that the controller is already considering ways to implement EDPS recommendations related to the present Opinion.

Finally, the EDPS stresses the recipient's obligation not to process the data for purposes other than those for which they were transmitted. He therefore invites OLAF to recall this requirement when transmitting any report to the institution or body concerned.

### *3.8.2. Transfer of personal data to Member States*

Under Article 9(3) of Regulation 1073/1999, OLAF is obliged to send the reports drawn up following an external investigation and any useful related documents to the competent authorities of the Member States. Article 25(2) thus provides that the investigation unit must always transmit final reports with recommendations to the relevant judicial or other competent national authority. Article 25.3 of the Instructions to Staff provides instead that '*[w]here there are no recommendations, the Director-General may decide to transmit the Final report to the relevant international organisation or Member States concerned. In such cases, the investigation unit must transmit the relevant information*' (emphasis added).

Unlike Article 25.1 concerning internal investigations, here the Instructions leave to the OLAF DG to decide whether the final report without recommendations should be transmitted to the competent authorities of the Member States. Also in this case, the EDPS stresses that the necessity of the transfer of personal data contained in such reports should be evaluated *in concreto*, taking into account of the specific circumstances of the case. The EDPS refers as well to the analysis and recommendations regarding transfers of personal data to Member States made in his previous OLAF Opinions.

### *3.8.3. Transfer to third country authorities an/or international organisations*

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<sup>8</sup> See in particular in this regard the Opinion No 5 of 17 November 2011, of OLAF Supervisory Committee on the Transmission by the European Anti-Fraud Office (OLAF) to the institutions of final case reports drawn up following internal investigations closed without follow-up.

As has already been noted, this subject matter is being addressed by the EDPS in a horizontal document, to be issued in few months, and will therefore not be analysed in the present Opinion.

### **3.9. Rights of access and rectification**

With regard to the rights of access and rectification, the EDPS refers to the analysis and recommendations made in his previous OLAF Opinions.

### **3.10. Right to object**

In the course of an inspection, on-the-spot check or forensic operation, complaints may arise on the part of the person concerned that some data cannot be collected because the collection would be contrary to data protection legislation. The EDPS observes that the current version of the Instructions to Staff and of the Protocol does not contain any reference to the right of the parties to object on compelling legitimate grounds under Article 18 of the Regulation or, more widely, to the procedure to follow in case of data protection claims made during the acquisition of digital evidence.

Since this kind of complaints are not uncommon, the EDPS recommends that an effective mechanism for dealing with these issues be put in place soon, on the basis of a reasonable balance between the rights of the parties involved and the efficacy of OLAF investigations. In particular, the right of the parties to have recourse to a Court and apply for interim measures in the contested cases must be preserved.

### **3.11. Information to the person concerned**

With regard to the right to information, the EDPS refers to the analysis and recommendations made in his previous OLAF Opinions.

### **3.12. Confidentiality of communications**

With regard to the confidentiality of communications, the EDPS refers to the analysis and recommendations made in his previous OLAF Opinions.

It should be noted in this regard that the issue of monitoring or inspecting electronic communications (e-monitoring) will be dealt with by the EDPS separately, in horizontal guidelines which will cover also processing operations carried out by OLAF.

[...]

### **3.14. Data Protection Guidelines**

In the documentation sent in the course of the procedure, the OLAF DG indicated that the current Data Protection Guidelines will continue to apply under the new procedures. For the avoidance of doubt, the EDPS suggests that OLAF inform its staff in this respect.

It may be that certain parts of these Guidelines are not entirely consistent with the new structure of the OLAF organigram or with the new case handling procedures. To the extent that this is the case, the EDPS recommends OLAF to send a document to the staff clarifying the existing differences, if any. Such document should be transmitted to the EDPS as well.

### **3.15. Implementation of EDPS recommendations**

On 14 and 15 July 2011, the EDPS carried an inspection at OLAF premises pursuant to Article 47(2) of the Regulation. The inspection was designed to investigate and ensure compliance with EDPS recommendations in the framework of the previous OLAF Opinions where regular monitoring exercises had given indications that the compliance mechanism was blocked. On 12 October 2011, the EDPS produced an inspection report summarising the findings of the inspections and including recommendations for compliance (the OLAF Inspection Report).

Compliance with these recommendations is being monitored in the framework of Case 2011-0471. The present Opinion is therefore without prejudice to the findings and recommendations contained in the previous OLAF Opinions, OLAF Inspection Report and any further compliance related activity.

### **4. Conclusion**

The proposed processing operation would not appear to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. In particular, OLAF should:

- evaluate necessity and proportionality of the processing activities on a case-by-case basis;
- notify to the EDPS for prior-checking the processing operation relating to the new internal database for the selection of cases. The implementation or use of this database must be suspended until the EDPS has examined it pursuant to Article 27 of the Regulation;
- amend the Instructions to Staff so as to reflect the principle that special categories of data can only be processed if one of the exceptions provided for under Article 10(2) or 10(4) of the Regulation are fulfilled;
- delete or block special categories of data, which have been collected but do not fall under the exceptions, so as they cannot be further processed;
- prepare an assessment report concerning the implementation of the Protocol of 'Standard Operating Procedures' for conducting computer forensic operations, focusing on the aspects more strictly related to the processing of personal data;
- carry out an evaluation of the necessity of the current periods for conservation of personal data and transmit a related evaluation report to the EDPS not later than six months from the adoption of the present Opinion;
- ensure respect of Article 7 of the Regulation in cases where it transmits final reports to the institutions or bodies concerned, based on a concrete evaluation of the necessity for the transfer. Remind to the recipient of the report that it shall process personal data contained in the report only for the purposes for which it was transmitted;
- put in place an effective mechanism for dealing with the right to object or with data protection claims made in the context of an inspection, an on-the-spot check or a forensic operation;
- inform the staff that the current Data Protection Guidelines continue to apply under the new procedures, specifying in an annexed document to be transmitted to the EDPS, the existing differences, if any.

The present Opinion is without prejudice to the findings and recommendations contained in the previous OLAF Opinions, OLAF Inspection Report and any further compliance related activity.

Done at Brussels, 3 February 2012

**(signed)**

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor