



## **Prior Checking Opinion**

**"Antifraud Transit Information System (ATIS)  
at the European Anti-Fraud Office (OLAF)"**

Case 2013-1296

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ATIS is a tool for facilitating cooperation among the national competent authorities and with the OLAF concerning possible customs fraud for goods placed under the transit procedure. This entails processing movement records of goods, which may possibly be linked to natural persons for purposes of fraud prevention and investigation.

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Brussels, 18 May 2016

## 1. Proceedings

On 21 November 2013, the European Data Protection Supervisor (**EDPS**) received a notification for prior checking relating to the processing of personal data in the Antifraud Transit Information System (**ATIS**) from the Data Protection Officer (**DPO**) of OLAF.

As this is an ex-post case, the deadline of two months for the EDPS to issue his Opinion does not apply.<sup>1</sup>

## 2. The facts

ATIS is a system hosted by OLAF and **intended to fight customs fraud**. It collects certain movement records of goods placed under the customs transit procedure.

It is used to detect trends and suspicious movements as well as for targeting checks. OLAF prepares regular reports on trends, which are made available to EU and EFTA Member States. The results of checks carried out are not included in ATIS.

ATIS is **accessible to authorised users** in the customs services of the EU and EFTA Member States (except Switzerland) as well as at OLAF for the purpose of strategic and operational analysis.

The **data in the system** originate from the New Computerised Transit System (NCTS), a system developed by the Member States and DG TAXUD and managed by DG TAXUD. All anticipated arrival records (AAR) for intra-EU and international movements of goods in the NCTS are copied to ATIS. For intra-national movements, only AARs for sensitive goods<sup>2</sup> are fed into ATIS.

AARs contain information (name and address) of consigners, consignees, carriers and principals for movements of goods placed under the transit regime. These usually, but not always, refer to legal persons; additionally, the names of legal persons may lead to the identity of natural persons. The principal is the person placing goods under the transit procedure (also if done by an authorised representative). Additionally, "audit" messages from NCTS are fed into ATIS as well.<sup>3</sup>

The **data are kept** for a maximum period of ten years.

A **privacy statement** has been provided to the EDPS and is available on OLAF's website.<sup>4</sup>

ATIS forms part of the Anti-Fraud Information System (AFIS) platform [...].<sup>5</sup>

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<sup>1</sup> Questions were raised on 9 January and 14 March 2014 to which OLAF replied on 11 and 26 March 2014. On 18 February 2016, OLAF provided additional information. The draft opinion was sent to the DPO for comments on 18 April 2016. The EDPS received a reply on 12 May 2016.

<sup>2</sup> Defined in Annex 44c of implementing provisions of the customs code as goods involving a higher risk of fraud, e.g. large quantities of tobacco, alcoholic beverages, sugar, or frozen poultry.

<sup>3</sup> The "audit" messages contain the following data items: movement reference number (MRN), sending and the receiving gateway, type of NCTS record exchanged (e.g. change of destination), date

<sup>4</sup> [http://ec.europa.eu/anti\\_fraud/documents/data-protection/dpo/165-atis.pdf](http://ec.europa.eu/anti_fraud/documents/data-protection/dpo/165-atis.pdf)

<sup>5</sup> Other systems in AFIS have been prior-checked in the following cases: 2010-0797 to -0799, 2013-1003.

### **3. Legal analysis**

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

The processing of personal data is performed by a Union body in the exercise of activities which fall within the scope of Union law. The processing of the data is done through automatic means. Therefore, Regulation No 45/2001 is applicable.

Although the processing mostly relates to legal persons, their names may lead to natural persons. In some cases, it may also refer directly to natural persons. It can therefore not be excluded that this constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2(a) of the Regulation).

Article 27 (2) of the Regulation contains a list of processing operations that are likely to present specific risks and are thus subject to prior checking by the EDPS.

In the case at hand, data are being processed in order to detect customs fraud and may thus be related to (suspected) offences (Article 27(2)(a)). Similarly, analysis of these records may constitute an evaluation of the conduct of data subjects (Article 27(2)(b)). ATIS is therefore subject to prior-checking.

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case however the processing operation has already been established.<sup>6</sup>

#### **3.2. Lawfulness of the processing**

Article 5(a) states that in order to be lawful, processing has to be "necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof". OLAF provided a number of references to legal bases, which will be analysed below.

##### **3.2.1. Information initially provided**

The notification mentioned a number of legal provisions serving as legal bases for ATIS; however, some of them were not relevant, as will be explained below:

- 1) Article 17(1)(a), third indent of Regulation (EC) 515/1997:

*"1. The competent authorities of each Member State shall communicate to the Commission as soon as it is available to them:*

*(a) any information they consider relevant concerning:*

*[...]*

*— requests for assistance, action taken and information exchanged in application of Articles 4 to 16 which are capable of revealing fraudulent tendencies in the field of customs and agriculture;"*

Articles 4 to 16, referred to here, deal with spontaneous assistance and assistance between customs authorities upon request. Several of these do not seem relevant at all for the kind of information included in ATIS. The most relevant Article is Article 15(2), explained below.

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<sup>6</sup> The deadline of Article 27(4) of the Regulation therefore does not apply. The notification of the DPO was received on 21 November 2013. On 9 January and 14 March 2014, the EDPS raised questions, to which OLAF replied on 11 and 26 March 2014. On 18 April, the draft Opinion was sent to the DPO for comments, which were received on 12 May 2016.

2) Article 15(2) of Regulation (EC) 515/1997:

*"The competent authorities of each Member State may also, by regular automatic exchange or occasional automatic exchange, communicate to the competent authority of any other Member State concerned information received concerning the entry, exit, transit, storage and end use of goods, including postal traffic, moved between the customs territory of the Community and other territories, and the presence and movement within the customs territory of the Community of noncommunity and end-use goods, where necessary to prevent or detect operations which constitute, or appear to constitute, breaches of customs or agricultural legislation."*

This provision allows the automated exchange of movement data, such as AARs. While this provision deals with exchanges between Member States, Article 17(1)(a) quoted above provides for communication to the Commission. The possibility for this exchange is tied to being *"necessary to prevent or detect operations which constitute, or appear to constitute, breaches of customs or agricultural legislation"*. The implementation of this Article is elaborated in the ATIS Administrative Arrangement.

**In the EDPS' view, it is doubtful that blanket analysis of all AARs is necessary for these purposes.** It should also be noted that this provision refers to exchanges between competent authorities of Member States; while having a centralised system may be useful for facilitating these exchanges, this Article does not explicitly give OLAF the task to establish such a central system here.

3) ATIS Administrative Arrangement

This Administrative Arrangement, signed on 6 July 2011, maintains that in order to usefully prevent and detect operations which constitute breaches of customs or agricultural legislation, *all* AARs need to be subject to systematic operational analysis. It should be noted that this Administrative Arrangement is not a binding text.

4) Article 47(2) of the new Customs code (Regulation (EU) 952/2013):

*"2. In the framework of the controls referred to in this Section, customs and other competent authorities may, where necessary for the purposes of minimising risk and combating fraud, exchange with each other and with the Commission data received in the context of the entry, exit, transit, movement, storage and end-use of goods, including postal traffic, moved between the customs territory of the Union and countries or territories outside the customs territory of the Union, the presence and movement within the customs territory of the Union of non-Union goods and goods placed under the end-use procedure, and the results of any control. Customs authorities and the Commission may also exchange such data with each other for the purpose of ensuring a uniform application of the customs legislation."*

This is the successor provision to Article 26(2) of Regulation (EC) 450/2008 initially quoted in the notification. Since the notification to the EDPS, Regulation (EC) 450/2008 has been repealed and replaced by Regulation (EU) 952/2013.

The applicability of Regulation 952/2013 is staggered (see its Article 288). Some of its provisions, including Article 286, which repeals Regulation 450/2008, have become applicable on 30 October 2013. Other provisions, including Article 47(2), which is the broadly similar successor provision to Article 26(2) of Regulation 450/2008, will only become applicable as of 1 May 2016 (see Article 286(1) and (2) of Regulation 952/2013, as corrected).

Regardless of which rules are currently applicable, the EDPS has doubts whether blanket analysis of *all* AARs is necessary for these purposes. To summarise, the **provisions quoted initially by OLAF in the notification as legal bases for ATIS do not appear to constitute a solid legal basis for the system, as they do not establish two main elements of ATIS, i.e. that *all* AARs are to be fed into a *central database* run by OLAF.** What these provision cover are exchanges related to suspected breaches.

### **3.2.2. Information provided later**

However, OLAF later also made reference to Article 18d inserted in Regulation (EC) 515/1997 by Regulation (EU) 2015/1525<sup>7</sup>. This Article states that:

*"The Commission shall establish and manage a directory ("import, export and transit directory") containing data on: [...] (b) transit of goods". Concerning the sources of the information, this Article states that "the Commission shall systematically replicate data from the sources operated by the Commission on the basis of Regulation (EU) No 952/2013 into the import, export and transit directory. The Member States may supply to the Commission data concerning the transit of goods within a Member State and direct export, depending on the availability of data and Member States' information technology infrastructure"*

Paragraph 2 of this Article states that

*"The import, export and transit directory shall be accessible to the national authorities referred to in Article 29 of this Regulation. Within the Commission, only designated analysts shall be empowered to process data contained in the import, export and transit directory"*

The Articles then goes on to detail the exact access to be given.

**This provision can serve as a legal basis for ATIS. However, it will only become applicable as of 1 September 2016.<sup>8</sup> That being said, the EDPS has no objection to keeping the system operational during this interim period.**

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

Personal data relating to offences, criminal convictions or security measures may only be processed when authorised by the Treaties or other legal instruments based on them (Article 10(5) of the Regulation).

Article 18d(4) of the amended Regulation (EC) 515/1997, once the amendments will have become applicable will state that such special categories of data shall not be included in the transit directory (=ATIS).

The data at hand in ATIS do not directly refer to (suspected) offences, but can be indications of such facts. Analysing suspected cases of fraud appears to be covered by the provisions referred to in points 2 to 4 above in section 3.2.1.

### **3.4. Data Quality**

Data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed (Article 4(1)(c) of the Regulation).

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<sup>7</sup> OJ L 243, 18.9.2015, p. 1–12

<sup>8</sup> See Article 2(2) of Regulation (EU) 2015/1525

The data in ATIS is copied from the NCTS, which in turn is filled based on the declarations filled in by shipping companies themselves, which can be assumed to assure a reasonably high level of accuracy. Additionally, data subjects have the right to access and the right to rectify data, which can contribute to the accuracy of data.

### **3.5. Conservation of data/ Data retention**

According to Article 4(1)(e) of the Regulation, personal data shall be kept in a form which permits identification of data of data subjects for not longer than is necessary for the purpose for which the data are collected and/or further processed.

Concerning specific rules on retention in the legal basis for ATIS, Article 18d(3), fourth subparagraph of Regulation (EC) 515/1997 as amended states that "data contained in the import, export and transit directory may not be stored for more than five years, with an additional period of two years, if justified."

According to the notification, data in ATIS may be stored up to ten years.

**OLAF should align the conservation period in ATIS with the one specified in the legal basis and provide for a functionality to record the justification for the extension of conservation.**

### **3.6. Recipients of the data**

Users of ATIS in OLAF and relevant national authorities have access to ATIS and can access the data in it.

Articles 18d(1), fourth subparagraph and (2) of Regulation (EC) 515/1997 as amended provide an authorisation for the relevant designated authorities to access the data, which they need for the performance of their tasks. The system is also used by authorities in non-EU EFTA Member States (Iceland, Norway, Liechtenstein). As members of the European Economic Area, these countries, although not members of the EU, have also implemented Directive 95/46/EC.

### **3.7. Right of access and rectification**

According to Article 13 of the Regulation, data subjects have the right to access their personal data processed by the institutions

According to the information received, the rights of access and rectification will be granted in line with Articles 13 and 14.

### **3.8. Information to the data subject**

As the information is not directly obtained from the data subject, Article 12 of the Regulation applies for the controller's information duties. According to Article 12(2), actively providing this information to the data subject is not necessary where this is impossible or would require a disproportionate effort. In such cases, other safeguards have to be devised.

The content of the data protection notice is appropriate.

OLAF has published the data protection notice about ATIS on its website, which contains the information required under Article 12. However, simple publication is not enough to comply with Article 12; this Article requires actively informing the data subject, and only if this is

impossible or would require a disproportionate effort, other safeguards, such as *only* publishing it can be considered.<sup>9</sup>

One other, additional, safeguard would be to provide information about ATIS in the information provided about the NCTS; a short addition noting that the data will also be copied into ATIS, together with a link to the published ATIS privacy statement could provide adequate safeguards.

Given that NCTS is not managed by OLAF, the recommendation is **to liaise with the relevant controller to have the link to information about ATIS included in the information provided to data subjects for the NCTS.**

### **3.9. Security measures**

[...]

### **4. Conclusion:**

The EDPS notes that Article 18(d) of Regulation (EC) 515/1997 as amended will provide for a legal basis for ATIS once it will become applicable and has no objections to keeping the system operational in the meantime.

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001, provided that OLAF:

- aligns the conservation period in ATIS with the one specified in the legal basis;
- provides for a functionality to record the justification for the extension of conservation
- liaises with the relevant controller to have the link to information about ATIS included in the information provided to data subjects for the NCTS.

Done at Brussels, 18 May 2016

**(signed)**

Wojciech Rafał WIEWIÓROWSKI

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<sup>9</sup> See also EDPS cases 2014-0888 and 2015-0545.