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Mr Giovanni KESSLER
Director General
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European Anti-Fraud Office
(OLAF)
BE-1049 Brussels

Brussels, 3 April 2012
GB/RDG/et/D(2012)746 C 2012-0086

Subject: Your consultation concerning OLAF revised Model Data Protection Contractual Clauses to be used in Administrative Cooperation Agreements (ACAs) concluded with third country authorities or international organisations

Dear Mr Kessler,

Thank you for your consultation under Article 46 of Regulation (EC) 45/2001 (hereinafter the 'Regulation') concerning OLAF revised Model Data Protection Contractual Clauses to be used in Administrative Cooperation Agreements (ACAs) concluded with third country authorities or international organisations (hereinafter the 'Draft Contractual Clauses').

1. Facts

On 26 January 2012, OLAF submitted to the EDPS a set of Model Data Protection Contractual Clauses to be used in ACAs concluded with third country authorities or international organisations, requesting the EDPS's advice pursuant to Articles 28(1) and 46 (d) of the Regulation. The Draft Contractual Clauses are intended to revise and replace a previous set of contractual clauses which OLAF submitted to the EDPS in 2006 (the '2006 Contractual Clauses'). OLAF stated that the revisions are aimed at simplifying the text, thereby making it more understandable to its ACA partners.

2. Legal Analysis

2.1. Transfers to third countries under Regulation 45/2001

Pursuant to Article 9(1) of the Regulation, transfers of personal data to recipients other than EU Community institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, can only take place if an adequate level of protection is ensured in the country of the recipient or within the recipient international organisation and data are transferred solely to allow tasks covered by the competence of the controller to be carried out. This rule is of particular relevance to OLAF as most of the third countries or international organisations with respect to which transfers of personal data by OLAF would take place would not be recognised as ensuring an adequate level of protection.

By way of derogation to the general rule, a EU institution or body may transfer personal data to the above mentioned recipients if one of the exceptions laid down in Article 9(6) of the Regulation applies.

Among the various exceptions stipulated in Article 9(6), subparagraph (d) concerning transfers necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims is of specific relevance to OLAF, as many of the international transfers it carries out are likely to fall within its scope.

However, a systematic use of the derogations would not be fully satisfactory from a data protection viewpoint. In principle, transfers based on the above mentioned exceptions should not be massive or structural. Furthermore, the EDPS considers that adequate safeguards would need to be adopted when a transfer that would in principle be covered by an exception under Article 9(6) presents special characteristics which would create disproportionate risks for the protection of data subject rights. This may be the case, for instance, because of the nature of the data involved (e.g. sensitive data), the purpose of the processing (e.g. investigations which could result in criminal prosecution) or the legal framework in the country of destination (e.g. absence or low level of data protection).

Another case in which transfers of personal data to third countries/international organisations not ensuring an adequate level of protection can take place is provided for by Article 9(7) of the Regulation. Pursuant to this provision, the EDPS may authorise a transfer or a set of transfers of personal data to a third country or international organisation which does not ensure an adequate level of protection, where the controller adduces adequate safeguards, which may in particular result from appropriate contractual clauses.

The purpose of OLAF Contractual Clauses (both the 2006 and the new ones) is to provide for a framework of adequate safeguards under which the transfers may take place to third countries not ensuring adequate level of protection while maintaining sufficient guarantees for the rights of data subjects. As discussed above, these clauses may play a role both in the context of a transfer made pursuant to an exception under Article 9(6) and in the context of a transfer or set of transfers authorised under Article 9(7).

2.2. Assessment of the Draft Contractual Clauses

There are two main issues to be considered with regard to the Draft Contractual Clauses, one relating to their content and one to their legal form and material scope. These aspects will be examined in turn below.

2.2.1. Comments relating the substantive provisions

The 2006 Contractual Clauses were largely based on the Commission Decision C(2004)5271, approving an '*alternative set of standard contractual clauses for the transfer of personal data to third countries*' (hereinafter 'Commission's alternative contractual clauses'). The Draft Contractual Clauses seem instead to deviate more significantly from the latter. The EDPS considers that these changes may have the effect of significantly lowering the level of safeguards and should therefore be reconsidered. In particular, the following elements should be reviewed.

1) First, it is essential that data subjects be provided with effective legal redress mechanisms. The principle of effective legal redress is enshrined in the EU Charter of Fundamental Rights, in Article 41(3) thereof. The Draft Contractual Clauses should therefore be enforceable not only by the countries/organisations which are parties to the ACAs but also by data subjects. Furthermore, the data exporter should retain a subsidiary liability, in cases where the data subject is not able to enforce its rights vis-à-vis the data importer. In this regard, the EDPS recommends that OLAF introduces a liability provision and a third party right provision, following the model of Clause III of the Commission's alternative contractual clauses.

2) Second, the EDPS notes that the Draft Contractual Clauses may lower the guarantees with regard to the obligations of the importer. In this regard, the following observations have to be made:

- Clauses II.(c) and (e) of the Commission's alternative contractual clauses concerning, respectively, local laws and the contact point for enquiries, have been removed. OLAF has not explained why these clauses may be removed. In the absence any specific explanation, the EDPS recommends reinserting those clauses as they play an important role in contributing to the protection of data subject rights;
- Clause 2.4 of the Draft Contractual Clauses states that the disclosure to government authorities can take place 'only with the express agreement of the exporting authority' (i.e. OLAF), and subject to certain additional conditions to be respected by the recipients concerning purpose limitation, disposal of data, and further dissemination. The EDPS considers that the guarantees with regard to onward transfers should be reinforced. In particular, the recipients should undertake in writing to respect at least the data protection principles listed in the annex to the ACA. Before providing its agreement, OLAF should receive copy of such an undertaking and should carry out an assessment of the capacity of the recipient to respect these rules. Furthermore, such onward transfers should be adequately described and recorded.

3) Third, with a view to reinforcing the level of guarantees the EDPS recommends introducing the following provisions in the Draft Contractual Clauses:

- a clause similar to Clause V.(c) of the Commission's alternative contractual clauses concerning compliance with Courts decisions;
- a clause obliging the parties to describe the details of the transfer and to record transfers made in pursuance of the ACA in a central register in line with Clause VIII of the Commission's alternative contractual clauses;
- an accountability clause stating that OLAF and the counterparty should be obliged to provide upon request (i.e. to the EDPS, an arbitrator or to the competent Court, as the

case may be) sufficient evidence of compliance (including the need to demonstrate the effectiveness of measures taken);

- a further specification in Clause 7 stating that the ACA can be terminated by any of the parties or the competent supervisory authority if one of the conditions under Clause VI(b)(i), (iii) and (iv) of the Commission's alternative contractual clauses is fulfilled.

4) Finally, the EDPS considers it important that OLAF ensure full transparency of the arrangements, by publishing in a dedicated section of its website the text of all the ACAs it has entered into.

2.2.2. Comments concerning the legal form and material scope

The EDPS welcomes OLAF efforts to establish a coherent set of legal safeguards for transfers of personal data to third countries/international organisations not ensuring adequate protection. He takes the view that the Draft Contractual Clauses, as appropriately modified in light of the above recommendations, could be used in the framework of transfers to third countries based on Article 9(6)(d) of the Regulation. In this regard, he encourages OLAF to conclude such ACAs with third country authorities and international organisations with which such transfers are likely to occur.

Furthermore, the Draft Contractual Clauses may also constitute a good initial platform for an authorisation under Article 9(7) of the Regulation. However, in the latter respect, the EDPS highlights that a number of formal aspects concerning the countersigning parties and the legal effects of the ACAs still need to be clarified. In particular, additional information would be needed concerning the specific third country authorities and international organisations with which these arrangements are concluded. Moreover, OLAF needs to clarify *ex ante* whether the countersigning party has the legal authority to bind the country/organisation to which it belongs under the applicable legal framework.

The EDPS also notes that the model clauses submitted by OLAF seem to have an open-ended scope of application. They are apparently intended to be negotiated with an undefined group of third country authorities and international organisations not offering adequate protection and to be used as a general legal basis for future trans-border data flows towards such authorities and organisations. In this respect, the EDPS is of the view that these arrangements may go beyond, because of their open-ended scope of application, the notion of 'transfers of set of transfers' which can be authorised by the EDPS under Article 9(7) of the Regulation.

The EDPS therefore invites OLAF to provide further information in order to clarify the above aspects. In particular, OLAF has to provide information (i.e. within one year at the latest) on the number and types of ACAs that have been concluded, the third country authorities or international organisations involved, the transfers or set of transfers that have been made and the mechanisms adopted to verify the legal authority of the countersigning counterparty to give warranties and fulfil the undertakings set out in the clauses.

3. Conclusions

The EDPS welcomes the Draft Contractual Clauses as a means to strengthen the legal safeguards of data subjects in the context of transfers to recipients not ensuring an adequate level of protection based on the exception of Article 9(6)(d) of the Regulation. In this regard, he encourages OLAF to conclude such ACAs with third country authorities and international

organisations with which such transfers are likely to occur, subject to the following recommendations:

- introduce a liability provision and a third party rights provision equivalent to Clause III of the Commission's alternative contractual clauses;
- reintroduce provisions equivalent to Clauses II.(c) and (e) of the Commission's alternative contractual clauses concerning, respectively, local laws and the contact point for enquiries;
- as regards onward transfers, introduce in Clause 2.4 of the Draft Contractual Clauses the obligation for the third party recipient to undertake in writing to respect the data protection principles in the annex;
- introduce a provision equivalent to Clause V.(c) of the Commission's alternative Contractual Clauses concerning compliance with Courts decisions;
- introduce a clause obliging the parties to describe the details of the transfer and to record transfers made in pursuance of the ACA in a central register in line with Clause VIII of the Commission's alternative contractual clauses;
- specify in Clause 7 that the ACA can be terminated by any of the parties or the competent supervisory authority if one of the conditions foreseen under Clause VI(b)(i), (iii) and (iv) of the Commission's alternative contractual clauses is fulfilled;
- include an accountability clause stating that OLAF and the counterparty should be obliged to provide upon request (i.e. to the EDPS, an arbitrator or to the competent Court) sufficient evidence of compliance (including the need to demonstrate the effectiveness of measures taken);
- publish in a dedicated section of OLAF website the ACAs entered into with third country authorities and international organisations;
- provide the EDPS within three months with relevant documents evidencing proper implementation and the adoption of the necessary measures to ensure compliance with Regulation (EC) 45/2001 in the light of the above conclusions.

Finally, the EDPS recommends OLAF to inform him at the latest within one year from the conclusion of the first ACA on the number and types of ACAs that have been concluded, the third countries authorities or international organisations involved, the transfers or sets of transfers that have been made and the mechanisms adopted to verify the legal authority of the countersigning counterparty to give warranties and fulfil the undertakings set out in the clauses.

Yours sincerely,

Giovanni BUTTARELLI

(signed)

Cc : Ms Laraine LAUDATI, *Data Protection Officer OLAF*

