

## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Commission regarding the DEVCO IT-tool (DEVIT)**

Brussels, 30 January (2013-1230)

### **1. Proceedings**

On 5 November 2013, the European Data Protection Supervisor (**EDPS**) received a notification for prior checking relating to the processing of personal data in the DEVCO IT-tool (DEVIT) from the Data Protection Officer (**DPO**) of the European Commission (**EC**).

Questions were raised on 7 November and 2 December 2013 to which the DPO replied on 12 November and 3 December 2013. The draft Opinion was sent to the DPO for comments on 18 December 2013. Comments were received on 30 January 2014.

### **2. The facts**

DEVIT serves to facilitate cooperation between the EC's Directorate-General for Development and Cooperation–EuropeAid (DG DEVCO) and the European Anti-Fraud Office (OLAF) concerning OLAF cases involving DG DEVCO and is a joint venture between the two bodies.

The system records relevant developments in DG DEVCO's OLAF cases in order to allow for efficient cooperation with OLAF's investigations. It also serves to generate periodic reports on these cases for DG DEVCO's hierarchy and its commissioner.

The legal basis is mentioned as Article 4 of Regulation 1073/1999, Article 2 of Commission Decision 352/1999 and the "relevant Articles of the Financial Regulation" (not specified in the notification). The notification also mentions Articles 20 and 27 of Regulation 45/2001 as legal bases for the processing.

The data categories in DEVIT include basic information on OLAF investigations related to DG DEVCO, such as the type of the case, case creation date, case handler at OLAF, companies/persons involved (names of natural persons abbreviated) and a short description of the case.

For each case, the initial data is provided from OLAF's case management system (following approval by the OLAF investigator in charge). Subsequent updates are introduced using DEVIT.

DG DEVCO staff working with DEVIT will receive a note reminding them of their obligations under Regulation (EC) 45/2001. The note was provided as annex to the

notification, but mostly concerns data protection obligations related to external audits carried out by DG DEVCO, not the use of DEVIT as such.

The notification submitted refers to the Head of Unit of DG DEVCO R.2 as "controller" and a staff member of the same unit as "delegate". DG DEVCO has no role in the technical management of the system; all technical aspects are under OLAF's responsibility.

A privacy statement will be published both on DG DEVCO's intranet, as well as on its public website. The statement as annexed to the notification mentions a conservation period of 20 years if OLAF makes recommendations, while the notification form mentions a period of 15 years. This statement will also be provided to data subjects directly, provided that this will not compromise OLAF's investigation of the case; DG DEVCO will consult with OLAF for this aspect. Similarly, in response to requests for data subject access, DG DEVCO will consult with OLAF before replying.

The electronic versions of the files are stored in a database hosted by OLAF. [...].

### **3. Legal analysis**

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

The data processing 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 partly through automatic means. Therefore, Regulation No 45/2001 is applicable.

Article 27(1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects 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. One of the items mentioned in Article 27(2)(a) is the processing of personal data related to (suspected) offences, which is the case here. DEVIT therefore qualifies for prior checking. As the system is not active yet, this is a true prior check.

The notification of the DPO was received on 5 November 2013. On 7 November and 2 December 2013, the EDPS asked questions for clarification, suspending the case; answers were provided on 12 November and 3 December 2013. On 18 December 2013, the draft Opinion was sent to the DPO for comments, which were received on 30 January 2014. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than the 24 February 2014. In total, the case has been suspended for 49 days.

It should be noted that this Opinion only concerns the processing operations in DEVIT. OLAF's processing operations in conducting its investigations have been analysed by the EDPS in cases 2011-1127 and -1129 to -1132.

#### **3.2. Lawfulness of the processing and legal basis**

Personal data may only be processed if grounds can be found in Article 5 of the Regulation.

Article 5(a) declares lawful processing that is "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".

The notification mentioned Article 4 of Regulation (EC) 1073/1999 as a legal basis. This Regulation has however been replaced by Regulation (EU) 883/2013, whose Article 4 is the successor provision to the one mentioned in the notification. This Article refers to internal investigations, i.e. investigations against staff of members of the EU institutions and bodies.

However, as the Commission clarified, DEVIT only deals with external investigations (i.e. investigations concerning possible fraud related to Union funds by third parties, e.g. in projects financed by the EU); the correct reference would thus be Article 3 of Regulation (EU) 883/2013. Similarly, Article 2 of Commission Decision 352/1999 has been replaced by Article 2 of Commission Decision 2013/478/EU.

Article 7(3), second subparagraph of Regulation (EU) 883/2013 obliges the institutions, bodies, offices and agencies of the European Union to provide OLAF "the necessary assistance to enable the staff of [OLAF] to fulfil their tasks effectively". DEVIT serves to enable this assistance by streamlining information flows. The processing is thus lawful under Article 5(a).

The notification also mentioned Articles 20 and 27 of the Regulation as legal bases for the processing notified. These Articles provide the bases for restricting data subject rights and the obligation to notify risky processing operations to the EDPS, but are not in themselves legal bases for the processing in question.

**Recommendation:** Adapt the notification form to refer to the correct legal basis.

### **3.3. Controllershship**

Article 2(2)(d) defines the controller as the Union "institution or body, the Directorate-General, the unit or any other organisational entity which alone or jointly with others determines the purposes and means of the processing of personal data".

The notification form refers to the Head of Unit of DG DEVCO R.2 as "controller" and a staff member of the same unit as "delegate".

The EDPS stresses that the institution(s) as such should be seen as the controller and not specific staff members. This should be clarified in the notification form.

Additionally, due to the technical set-up of DEVIT, with OLAF providing and managing the system, DG DEVCO would not be in a position to alter the "purposes and means" of the processing on its own. This can only be done together with OLAF. Similarly, the provision of personalised information and access to the data subject only occurs after consultation with OLAF (see also 3.8 below). Therefore, the EDPS considers DEVIT to be a case of joint controllershship between DG DEVCO and OLAF.

**Recommendation:** Adapt the notification and privacy statement accordingly.

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

Personal data relating to offences, criminal convictions or security measures may only be processed if authorised by the Treaties establishing the European Union or other legal instruments adopted on the basis thereof (Article 10(5) of the Regulation).

In the present case, processing such data is authorised under Article 7(3), second subparagraph of Regulation (EU) 883/2013, which obliges the EU institutions and bodies to provide assistance to OLAF in its investigations (see also 3.2 above).<sup>1</sup> DEVIT serves as a repository of DG DEVCO's OLAF cases in order to streamline cooperation.

### **3.5. Data Quality**

---

<sup>1</sup> Again, the processing by OLAF in the course of its investigations is outside the scope of this Opinion (see also section 3.1 above).

Article 4(1)(c) of the Regulation establishes that data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed.

Given that the initial content of cases in DEVIT is extracted from OLAF's case management system, the data quality can be assumed to be equivalent to the quality in that system. This provides some assurance as to the level of data quality.<sup>2</sup>

The data categories seem adequate, relevant and not excessive in relation to the purpose of the system. DG DEVCO should ensure that any subsequent updates made to the information in the system are accurate.

### **3.6. Conservation of data**

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

The privacy statement for DEVIT mentions a conservation period of 20 years if OLAF makes recommendations, while the notification form mentions a period of 15 years in the same case.

The conservation periods should be aligned with those in OLAF's case management system, i.e. 15 years for cases in which there have been recommendations. The DPO has confirmed in an e-mail of 12 November 2013 that the information in the notification form is correct.

**Recommendation:** Correct the information on conservation periods in the privacy statement.

### **3.7. Transfer of data**

Articles 7, 8, and 9 of the Regulation set out the rules applicable to transfers of personal data to different categories of recipients.

The content of DEVIT is not disclosed to outside recipients; data in the system are used to produce brief reports for the responsible Commissioner and DG DEVCO hierarchy on a monthly basis. These reports refer to the OLAF case numbers of the respective investigations, but do not contain references to specific natural persons.

There is no indication of an infringement of Article 7.

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

Articles 13 and 14 of the Regulation establish data subjects' rights to access and rectification. Restrictions are possible in line with Article 20.

In case DG DEVCO receives requests for access or rectification, it will consult with OLAF and either grant or not grant access/rectification, following OLAF's opinion.

The criterion used for determining whether or not access/rectification requests would be granted is whether doing so would compromise on-going OLAF investigations. Possibly compromising such an investigation can be a valid reason for restricting data subject rights under Article 20(1)(a).<sup>3</sup>

Consequently, there is no reason to believe that the rights to access and rectification have been infringed.

---

<sup>2</sup> See EDPS case 2011-1130 for the steps taken by OLAF as concerns external investigations.

<sup>3</sup> See EDPS case 2011-1130 for how OLAF deals with access/rectification request relating to external investigations.

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

Article 12 contains the information obligations for cases in which the data are not collected from the data subject.

A privacy statement will be published on DG DEVCO's intranet and on its public website. It will also be communicated to data subjects, provided that this would not compromise OLAF's investigation. OLAF makes this assessment and DG DEVCO either provides the information or defers provision accordingly.<sup>4</sup>

The privacy statement as attached to the notification has several shortcomings:

- it contains a link to further information on data protection at DG DEVCO which points to an intranet location that will not be accessible from outside the Commission's network. This link should be replaced for the version to be published on DG DEVCO's public website;
- the purpose of the processing is not clearly stated in the statement;
- the conservation period mentioned is incorrect (see 3.6 above);
- the legal basis for the processing is not mentioned (see also 3.2 above).

**Recommendation:** The privacy statement should be improved as explained in this section.

### **3.10. Security measures**

[...].

## **4. Conclusion**

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations in this Opinion are fully taken into account:

- update the notification as explained in this Opinion and provide it to the EDPS;
- update the privacy statement as explained in this Opinion.

Please inform us about the steps taken to comply with these recommendations within three months of receipt of this Opinion.

Done at Brussels, 30 January 2014

[signed]

Giovanni BUTTARELLI

---

<sup>4</sup> See EDPS case 2011-1130