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GB/XK/sn/D(2013)0284 C **2013-0757**
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correspondence

Subject: Prior checking notification of the processing of personal data related to OLAF cases (Case 2013-0757)

Dear Mr Beckers,

I refer to the prior checking ex-post notification pursuant to Article 27(3) of Regulation (EC) No 45/2001 (the "Regulation") on the processing of personal data related to OLAF cases at the Trans-European Transport Network Executive Agency (TEN-T EA), which TEN-T EA Data Protection Officer (DPO) notified to the European Data Protection Supervisor (EDPS) on 26 June 2013. The notification included among others also the following documents:

- Specific Privacy Statement for management of OLAF cases;
- Decision of the TEN-T EA Steering Committee of 30 September 2008 concerning terms and conditions of internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interest (hereinafter the "Decision")
- Chapter 3.14 of the Manual of Procedures of the TEN-T EA (the "Manual of Procedures").

The EDPS has adopted a fully-fledged Opinion concerning the processing of personal data by a European agency in the context of OLAF cases.¹ We will therefore highlight in the present Opinion only those aspects which do not seem to be in conformity with the principles of the Regulation and with the above Opinion to which we refer. The analysis will be limited to the legal analysis of those practices. The present Opinion does not concern per se administrative investigations and disciplinary procedures, which should normally be notified separately.

¹See EDPS Opinion of regarding the "Analysis and transfer of information related to fraud to OLAF"–EACI, available on EDPS website (www.edps.europa.eu) under the section Supervision/Priorchecking/Opinions, case 2012-0652.

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, the EDPS regrets that the processing operation has already been established. All his recommendations given in the present Opinion should therefore be duly implemented in all ongoing and future processing operations carried out by TEN-T EA.

Having regard to **data quality**, we encourage you to lay down concrete guarantees in order to respect such principle. TEN-T EA should include in the file of a suspected data subject, only information which is relevant and proportionate having regard to the purpose pursued. TEN-T EA should instruct the persons in charge of drafting reports and setting up the files that they should only collect and further process necessary and proportionate data to the purpose of the processing under analysis. In addition to this, we would also recommend that the OLAF Coordinator and the officials concerned be specifically instructed when taking up their tasks about the existing data quality requirements and restrictive rules concerning the processing of special categories of data under Article 10 of the Regulation.

Having regard to **data-transfers**, we consider the situations giving rise to transfers listed in the notification as in line with Article 7 of the Regulation. In any event, respect of Article 7 of the Regulation is subject to an evaluation of the concrete circumstances of each case. TEN-T EA should therefore engage in a case by case analysis of necessity and other requirements in order to verify whether a transfer is in compliance with Article 7 of the Regulation. As the present processing is likely to involve very sensitive data, we recommend paying particular attention to this aspect. Taking into account the size of the agency, it might also be the case that data subjects are indirectly identifiable. The EDPS therefore recommends that EACI prepares confidentiality declarations to be signed by all the above recipients before a specific transfer of data takes place in conformity with Article 7(3).

We would also suggest adding the EDPS and the European Ombudsman, as possible recipients in case of complaints lodged concerning alleged breach of personal data or maladministration. The notification does not contemplate cases of transfers to national authorities. We understand therefore that such transfers do not occur in the framework of the present processing. Should this not be the case, the notification would need to be integrated on this point.

Concerning the **information** of data subjects, the notification provides that “*information to data subjects in relation to the management of OLAF cases is provided by OLAF*”. However, it would appear that in some cases TEN-T EA may process personal data under the present notification before OLAF is involved. In these cases (for example, where it has conducted autonomously an initial investigation), TEN-T EA may be required to provide the information directly and individually to the persons concerned (including possible whistleblowers and informants), even before OLAF is involved, unless one of the exceptions under Article 20 of the Regulation applies.

In relation to the possible **restriction** of access and information rights pursuant to Article 20 of the Regulation, these restrictions cannot be applied systematically. In particular, TEN-T EA should assess the necessity of the restriction on a case by case basis and be able to demonstrate it upon request. TEN-T EA should also take into account that the restriction can only be temporary and must comply with the other prescriptions of Article 20.

We would appreciate if you could inform us of the follow up measures taken concerning the above recommendations within three months of reception of this letter. Considering that this

is an ex post prior-check, the recommendations need to be immediately applied by TEN-T EA to on-going processing activities.

We remain at your disposal should you have any questions concerning this matter.

Yours sincerely,

(signed)

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