



EDPS
EUROPEAN DATA PROTECTION SUPERVISOR

EDPS SUPERVISORY OPINION ON THE REVISED GUIDELINES ON INVESTIGATION PROCEDURE (GIPS) OF THE EUROPEAN ANTI-FRAUD OFFICE (OLAF) (Case 2024-0003)

1. INTRODUCTION

1. This Supervisory Opinion relates to the revised Guidelines on Investigation Procedure (GIPs) of the European Anti-Fraud Office (OLAF).
2. The EDPS issues this Supervisory Opinion in accordance with Article 58(3)(c) of Regulation (EU) 2018/1725¹ ('the Regulation').

2. FACTS

3. The EDPS received this consultation request on OLAF's revised GIPs on 22 December 2023 (ARES(2023)8849329), as a request "in line with Article 42(1) of Regulation (EU) 2018/1725". Given that the OLAF's revised GIPs are neither legislative acts, recommendations or proposals to the Council pursuant to Article 218 TFEU or draft delegated acts or implementing acts, the mandatory consultation of the EDPS provided for in Article 42(1) of the Regulation does not apply. As a consequence, in

¹ Regulation (EU) 2018/1725 of the European Parliament and the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ, L 295, 21.11.2018, pp. 39-98.

line with EDPS internal procedures and as specified in the acknowledgement of receipt of 10 January 2024, the EDPS decided initially to treat this request as an informal consultation under Article 41(1) of the Regulation. However, following a request from OLAF for a formal EDPS reply on 18 January 2024, the EDPS decided to issue this supervisory opinion in line with Article 58(3)(c) of the Regulation.

4. The GIPs for OLAF Staff constitute the guidelines provided for in Article 17(8) of Regulation No 883/2013². On 6 October 2021, OLAF had adopted the current GIPs to implement Regulation (EU, Euratom) 2020/2223³ amending Regulation (EU, Euratom) 883/2013.
5. According to OLAF, the current GIPs revision aims at clarifying and updating the Guidelines. They take into consideration changes related by the OLAF Regulation, developments in the case law, recommendations of stakeholders such as OLAF's Supervisory Committee, the Controller of procedural guarantees and the European Ombudsman, as well as established practices and instructions from the OLAF management that accumulated over the years. The scope of the revision is limited to laying down OLAF internal investigation procedures, and does not include rules on non-investigative or administrative matters and/or workflows.
6. Regarding modalities of processing personal data, OLAF drew the attention of the EDPS to several new provisions that have been included in the GIPs in order to ensure transparent and fair procedures and relevant safeguards in a unified document. According to OLAF, these provisions were previously part of the Digital Forensic Guidelines. They comprise: (a) Transfer of documents and evidence to a different investigation file (Article 34 of the GIPs), (b) Interviews by video conferencing (Articles 64 and 67 of the GIPs), (c) Requests for information in electronic format under Article 8(2) of Regulation 883/2013 or information in electronic format provided

² Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, OJ L 248, 18.9.2013, p. 1–22.

³ Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations, OJ L 437, 28.12.2020, p. 49–73.

spontaneously/voluntarily (Articles 61 and 62) and (d) Digital forensic re-acquisition of data in the context of a different investigation (Article 60).

7. According to OLAF, following the adoption of the new GIPs, the current Data Protection Guidelines (adopted in November 2021) and Digital Forensic Guidelines will be reviewed and updated as necessary to reflect the changes introduced by the revision of the GIPs. The EDPS will be timely informed on the proposed modifications.

3. LEGAL AND TECHNICAL ASSESSMENT

8. The EDPS welcomes the reference to Article [6](#) EUDPR included in both **Article 34(1)(c) as well as Article 60(1)(c)** of the GIPs. The EDPS recalls its previous guidance provided to OLAF on further use and re-acquisition in Opinion in case 2014-0027 regarding OLAF's "Guidelines on Digital Forensic Procedures for OLAF Staff" and the resulting need for OLAF to pursue a strict purpose limitation approach in order to allow for re-use.
9. In that context, in section 3 of the Opinion in case 2014-0027, the EDPS highlighted in particular that (i) the new purpose must be specified, that (ii) all data quality requirements must be satisfied (Article 4(1)(a) to (f) EUDPR) and, in addition, the further processing must be compatible with the initial purpose and applicable procedural rules must be complied with. In order to ensure that no incompatible further use occurs, the following aspects should be *assessed and documented*:
 - The relationship between the purposes for which the data have been collected and the purposes of further processing. This criterion of a close relationship (e.g. persons concerned, kind of alleged fraud, timeframe etc.) should be included in the Guidelines;
 - The context in which the data have been collected and the reasonable expectations of the data subjects as to their further use. The reasonable expectations of the person concerned needs particular attention whenever a data subject changes roles (person concerned, witness...) between the two investigations and are also linked to the information provided to the data subject;

- The nature of the data and the impact of the further processing on the data subjects. The impact of reacquisition on data subjects might vary according to their role(s) in the two investigations; this aspect needs to be analysed especially carefully when the role of a data subject changes;
 - Safeguards applied by the controller to ensure fair processing (Article 4(1)(a) EUDPR) and to prevent any undue impact on the data subjects.
10. **Article 53(3)** of the GIPs allows OLAF staff to "inspect, take a copy and/or obtain extracts from...information in privately owned devices used for work purposes...where they may be relevant to the investigations". In this context, the EDPS reminds OLAF that the respective EDPS guidance on the topic of handling private devices used for professional purposes by EU staff, provided to OLAF in EDPS Opinions in cases 2020-0664 and 2014-0027, continues to apply.
11. In his Opinion in case 2020-0664 on OLAF's Forensic Guidelines, regarding the "permission" of the holder of the private device referred to in Article 5.4 of those Guidelines, the EDPS noted that this raises questions as to the value of consent in that context. The EDPS highlighted that consent in an employment relationship would only be valid in exceptional circumstances when the employee has a genuine free choice and is subsequently able to withdraw the consent without any prejudice to his/her rights and freedoms⁴.
12. In his Opinion in case 2014-0027 regarding OLAF's "Guidelines on Digital Forensic Procedures for OLAF Staff", the EDPS acknowledged that "it is true that the pure fact that certain data (e.g. e-mail folders) are marked as "private" does not prevent forensic acquisition of the data", but highlighted that "...in the subsequent analysis of the data acquired, OLAF staff should pay particular attention to only extracting such data where necessary for the investigation at hand". The EDPS further recommended complementing these general instructions with additional guidance for staff.
13. Regarding **Article 60** of the GIPs, OLAF states in their cover letter that "These provisions were previously part of the Digital Forensic Guidelines". However, Article

⁴ Against this background, the EDPS in his Opinion explicitly noted his understanding that, as mentioned in OLAF's consultation in case 2020-0664 on OLAF's Forensic Guidelines, this permission does not mean that consent would be the legal ground to process data under the data protection legislative framework, but that it relates to the duty for EU staff members to cooperate with OLAF.

60(2) last sentence states that a digital forensic re-acquisition "...shall be conducted in accordance with the procedures established in OLAF Digital Forensic Guidelines". The EDPS reminds OLAF that, regardless of the existence of provisions similar to Article 60 of the GIPs in the Digital Forensic Guidelines, the EDPS guidance provided on the topic of forensic re-acquisition in the Opinions in cases 2020-0664 and 2014-0027 as further outlined in §§ 9, 11 and 12 of this Opinion continues to apply.

14. The EDPS recommends reviewing the reference to "privacy" in **Articles 62(4) and 61(2)** of the GIPs and suggests that this should read instead – or at least also include a reference to – “personal data protection”.
15. Furthermore, the reference in **Article 62(4)** to "an appropriate level of privacy", which, in referring to an “appropriate” level, suggests a balancing of competing interests, should be brought in line with the requirements of data protection as a fundamental right. The EDPS suggests the following wording:

“In instances where there is a need to ensure the integrity of information, and admissibility of evidence ~~and an appropriate level of protection of privacy~~, any electronic device and digital data containing certain types of information should be examined in the framework of digital forensic examination. The safeguarding of personal data and the confidentiality of electronic communications shall be ensured in accordance with the provisions of Article 14 of these Guidelines.”

16. **Article 64(3)** states that "The investigation unit may conduct an interview remotely by video conference as an alternative to a face-to-face interview. The interviewee shall confirm that he or she agrees with such interview, including the use of a specific video conference platform." **Article 67(1)** refers to "a request for an authorisation", but leaves open who authorises what in the specific context. The EDPS would like to point out that in a situation of power imbalance such as an interviewee subjected to an interview in the context of an OLAF investigation, consent as a legal basis is not an appropriate legal ground under Article 5 EUDPR for the processing of personal data. The EDPS has previously pointed this out in the context of handling private devices used for professional purposes by EU staff provided in our Opinions in cases 2020-0664 and 2014-0027. The EDPS also notes that this makes reference to an "agreement" or "authorisation" by the interviewee doubtful and invites OLAF to reconsider and revise the wording accordingly.

17. As regards interviews by video conference (**Article 67** of the GIPs), the EDPS notes that in the light of OLAF's responsibility under Articles [4](#) and [33](#) EUDPR, the statement in **Article 67(3)** according to which "investigators shall in principle use video conferencing platforms provided by the relevant Commission services" should be carefully reconsidered. Video conferencing platforms provided by the relevant Commission services will need to meet all requirements under Articles [4](#) and [33](#) EUDPR and, where such video conferencing platforms have been made available in keeping with these requirements, their use (instead of the use of other video conferencing platforms) should be *obligatory*, not just "in principle".
18. The EDPS welcomes the reference to the possibility to refer the matter to the EDPs mentioned in **Article 74(1)(d)** of the GIPs and the fact that **Article 92(3)** of the GIPs explicitly mentions that transmission of information to international organisations or third country authorities "must... be in line with the applicable data protection provisions".

4. CONCLUSION

As indicated above, in order to ensure compliance of the processing with the Regulation, the EDPS **deems necessary** that OLAF:

1. pursue a strict purpose limitation approach in order to allow for re-use in line with the guidance provided on further use and re-acquisition in section 3 of the Opinion in case 2014-0027;
2. implement the respective EDPS guidance on the topic of handling private devices used for professional purposes by EU staff, provided in EDPS Opinions in cases 2020-0664 and 2014-0027;
3. make the use of video conferencing platforms, which have been made available in keeping with requirements under Articles [4](#) and [33](#) EUDPR, obligatory, not just "in principle".

Moreover, the EDPS **recommends** that OLAF:

4. review the reference to "privacy" in Articles 62(4) and 61(2) of the GIPs;
5. review the reference in Article 62(4) to "an appropriate" level of privacy;
6. revises references to an "agreement" or "authorisation" by the interviewee.

In light of the accountability principle, the EDPS expects that OLAF implement the above recommendations accordingly and has decided to **close the case**.

Done at Brussels on 22 January 2024

[e-signed]

Wojciech Rafał WIEWIÓROWSKI