



Opinion on a notification for Prior Checking received from the Data Protection Officer of the Court of Justice on the Early Warning System.

Brussels, 22 December 2006 (Case 2006-397)

1. Proceedings

On 8 August 2006, the European Data Protection Supervisor (EDPS) received by regular mail a notification for a prior checking in accordance with Article 27 of Regulation (EC) 45/2001 (hereinafter the "Regulation") from the Data Protection Officer (DPO) of the European Court of Justice. This notification concerned the "Early Warning System" (EWS)¹.

This EWS itself has already been prior checked by the EDPS. The processing submitted by the Court of Justice deals with the use of the EWS by other institutions, in this case, the Court of Justice.

Questions were put to the Data Protection Officer of the European Court of Justice in e-mails dated 21 September 2006. Replies were partially given on 9 October 2006. On 19 December 2006, a draft for comments and further information was sent to the DPO who answered on 20 December 2006.

2. The facts

According to Article 95 of the Financial Regulation applicable to the general budget of the European Communities (hereafter "FR"), each institution shall establish a central database containing details of candidates and tenderers (hereafter third parties) who are in one of the cases of exclusion provided for in Articles 93 and 94. Each institution shall have access to the databases of the other institutions.

In practice, the Court of Justice does not have a separate database but uses the computerised database of the European Commission and exchanges information with the latter. Such a procedure satisfies the conditions of the central database provided for in Article 95 FR, since the Commission centralises all relevant information and plays the role of a central gateway between all institutions participating in the scheme.

The present notification envisages the access to the database of the Commission by the Court of Justice of the European communities as well as the updating of that database by the Court of Justice upon transmission to the Accounting officer of the Commission the details of exclusions made by the Court of Justice in the framework of Articles 93 and 94 of the FR.

¹ See the EDPS opinion of 6 December 2006, Case 2005-120 (on EDPS web site)

The proposals currently tabled in order to modify the Financial Regulation and the related implementing rules (hereafter IR)² foresee in the new Article 95 of the Financial Regulation a common database to all institutions and in the new Article 134a of the implementing rules, it is foreseen that "in compliance with the Community rules on the processing of personal data, the Commission shall, via a secured protocol and on a regular basis, provide validated data contained in the database to persons designated in the institutions, executive agencies, authorities and bodies referred to in Articles 95(1) and (2) of the FR"³. If those proposals are approved, they will confirm the actual practice.

The Commission updates and transmits to the other institutions, on a monthly basis, an encrypted file extracted from its internal database containing the details of third parties (including natural persons with powers of representation, decision making or control over given legal persons) who are in one of the situations described under Articles 93 and 94 of the FR or where the Authorising Officer has, on the initiative of one or more Authorising officers by delegation (AOD)(s), excluded a third party from the benefit of contracts financed by the Communities' budget in accordance with Article 96 of the FR. In the Court of Justice there is one authorising officer by delegation (AOD) who is the Registrar of the Court. In addition, the Registrar of the Court of First Instance is also an AOD, but for a very limited number of budget sub-items. The Registrar, acting as AOD, is responsible for ensuring that revenue and expenditure are implemented in accordance with the principles of sound financial management and for ensuring the compliance with requirements of legality and regularity. He may delegate its powers to one/several authorising officers by sub-delegation (AOSD).

Accounting Officers of all participating institutions provide the Commission with information on the cases of exclusion under Articles 93, 94 and 96 of the FR as encountered in their institution. This information is transmitted using a specific form accompanied by all relevant supporting documents for analysis by the Commission 'services'.

Article 93 (FR) mentions the cases of exclusion within the framework of a procurement procedure: bankruptcy (93.1.a); offence concerning professional conduct (93.1.b); being guilty of grave professional misconduct (93.1.c); obligations relating to the payment of social security contributions/taxes not fulfilled (93.1.d); fraud, corruption, involvement in a criminal organisation or any other illegal activities detrimental to the Communities' financial interests (93.1.e); being in serious breach of contract for failure to comply with contractual obligations following another procurement procedure or grant award procedure financed by the Community budget (93.1.f).

Article 94 of the FR establishes that contracts may not be awarded to third parties, who during the procurement procedure are subject to a conflict of interest; or are guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the contract procedure or fail to supply this information.

Article 96 of the FR further establishes that administrative or financial penalties may be imposed by the contracting authority on third parties who are in one of the cases of exclusion

² Modified proposal for a Council Regulation amending Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (COM(2006) 213 final) and the proposal for a Commission Regulation (EC, Euratom) amending Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (SEC(2006) 866 final).

³ See also the EDPS opinion of 12 December 2006 on proposals for amending the Financial Regulation applicable to the general budget of the European Communities and its Implementing Rules (COM(2006) 213 final and SEC(2006) 866 final). (see on EDPS web site)

provided in Articles 93 and 94 of the FR, after they have been given the opportunity to present their observations. These penalties may consist in the exclusion of the third party concerned from contracts and grants financed by the budget, for a maximum period of five years; or in the payment of financial penalties by the contractor in the case referred to in Article 93(1) (f) of the FR and by the third party in the cases referred to in Article 94 of the FR where they are really serious and without exceeding the value of the contract in question.

For all exclusions, a warning is entered into the system. The data required are administrative in nature (Name and address of the individual, additional information such as VAT number or other national identification numbers and number of ID card or passport). However, in case of exclusions from the award of a contract in accordance with Article 94 of FR shall be merely registered for information, without activation of the warning (the inclusion in the database of the Commission is linked to the situations described under article 93 of the FR which are much more serious and dangerous for the financial interests of the institutions than those related to Article 94 of the FR). By being under Article 93 the third party is automatically excluded from the participation in a procurement procedure while in the case of Article 94 it is excluded from the award but not from participating in it.

The procedure established by the administration of the Court of Justice to use the information from the database of the Commission is as follows:

Only one category of warnings of the Commission EWS is made available to the Court of Justice, namely the W5a flags, as those deal with third parties excluded in accordance with regulatory provisions, namely Articles 93, 94 and 96 FR.

A W5a Warning requested by AOD in accordance with Financial Regulation has different classifications and has to specify under which specific item of Articles 93, 94 or 96 FR it is adopted.

The other warnings (W1, W2, W3 and W4) are internal to the Commission⁴. As to W5b flags, they deal with the implementation of the Council regulation imposing Common Foreign and Security Policy (CFSP) related financial restrictions⁵, and are not shared with the other Institutions as the Institutions should implement the Council decision themselves.

Every time that a third party is involved in a procurement procedure or in the framework of a certain contract or procurement procedure to be awarded by the Court of Justice, the AOSD of the Court of Justice submits to the Accounting officer of the Court of Justice a standard form that includes the relevant details ;

Upon reception of the completed form by the Accounting officer it is compared with the details included in the latest list received from the Commission (which is provided through an encrypted file transmitted by e-mail). A password is transmitted separately upon request of the accounting officer of the Court of Justice.

The main aim of this comparison is to check if the third party is already included in the database of the Commission. If included, the AOSD of the Court of Justice receives the name and telephone number of the contact person at the Commission (as no details on the cause of inclusion are available on the list) as well as both the date of introduction of the third party in

⁴ See EDPS opinion (2005-120) of 6 December 2006.

⁵ Such as Council Regulation (EC) n° 811/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with with Usama bin Laden, the Al-Qaida network and the Taliban.

the list and the date of expiration of its inclusion. The AOSD of the Court of Justice should inform himself by consulting the relevant Commission services of the reason for the inclusion of the third party on the list and so decide on the appropriate action to take (to exclude the third party from participating or to avoid awarding the contract to this party) and, if necessary, to impose the sanctions authorised by Article 96 of the FR. The AOSD of the Court of Justice is also informed if the third party is no longer included on the list. In both cases the information should be provided within a week of the reception of the request from the AOSD of the Court of Justice. Then the relevant AOSD of the Court of Justice has to decide if the third party is going to be excluded from participation in a procurement or award procedure.

Notification to the Commission of the exclusions under Articles 93, 94 and 96 of FR:

If an AOSD of the Court of Justice has identified a third party as being placed under one of the exclusions described by Articles 93, 94 and 96 of the FR, the accounting officer is provided with the relevant details in order to check if it is already included in the database of the Commission. If it is not included, the Accounting officer of the Court of Justice provides the Commission with the relevant data by filling in the standard form included in Annex 1 as requested by the Commission.

When providing the Accounting officer of the Commission with the list of exclusions decided by the Court of Justice, under articles 93 and 94 of the FR, both the causes and all relevant information are included in the proposed form included in Annex 1. The Accounting officer of the Commission is responsible to ensure that the confidentiality of the documents provided by the Court of Justice is respected inside the Commission.

Access to data

Only the Accounting officer of the Court of Justice and the administrator responsible for the checking of the information have access to the data received from the database of the Commission.

Upon official written request of individual third parties who have duly proved their power of representation⁶, the Accounting officer of the Commission, as well as the Accounting officer of the Court of Justice, may communicate to this third party the information registered in the central database set out for exclusion cases in accordance with Article 95 of the FR and the author of the alert may be contacted for further information.

In addition, and in accordance with the revised implementing rules of the FR (IR) as amended on 20 July 2005 and in particular the new paragraph 3 of Article 149, in the case of contracts awarded by the Community institutions on their own account, under article 105 of the FR, the contracting authority shall inform all unsuccessful third parties, simultaneously and individually, as soon as possible after the award decision and within the following week at the latest, by mail, fax or email, that their application or tender has not been accepted; specifying in each case the underlying reasons.

Storage of the data

Every time a third party is included in the database of the Commission following one of the situations described under Articles 93 and 94 of the FR, the AOSD of the Court of Justice is

⁶ If it is the case (see point 3.8 -rights of access and rectification in the EDPS opinion about the EWS of the Commission)

obliged to introduce in the corresponding personal file related to that third party a copy of the notification made by the Accounting officer of the Court of Justice.

In addition, if a third party is included in the database of the Commission, the relevant AOSD of the Court of Justice has to decide, after consultation with the contact point at the Commission, if the third party is excluded from participation in a procurement or award procedure with the Court of Justice for cases listed under Articles 93 and 94 of the FR, or if a different administrative and financial penalty should be imposed under Article 96 of the FR.

Finally it must be emphasised that the exclusion by the Court of Justice of a third party is not based on the fact of being included in the database of the Commission, rather it is based on the additional information received from the Commission services clarifying the situation of the third party in respect of one of the typified situations listed under articles 93 and 94 of the FR.

Information given to the data subject

In the context of a procurement process at the Court of Justice all third parties are informed beforehand that their personal data may be used by the Court not only for internal purposes related to the procurement process but also communicated to other institutions in the context of Articles 93 and 94 of the FR with the purpose of being included in the database of the Commission foreseen by Article 95 of the FR.

In cases where a third party requests a clarification on its potential inclusion in the database of the Commission it should address its request directly to the Commission.

Processing operation

The process begins with the receipt from the Commission of an e-mail that includes an encrypted file. Then the password is then received separately, upon request by the accounting officer of the Court of Justice to the accounting officer of the Commission.

The process continues by comparing two items: the request made by the AOSD of the Court of Justice containing the details of third parties selected under a procurement procedure and the information contained in the file received from the Commission. The internal procedure at the Court of Justice for the transmission of the information from the AOSD to the accounting officer is based on a paper transmission through the normal mail system. The comparison can be made through an automated processing operation as it is feasible to search data inside the received file of the Commission using the functionality "search or find"⁷.

The transmission of information from the Accounting officer of the Court of Justice to the Accounting officer of the Commission (containing the details of the third party excluded by the AOSD of the Court of Justice in accordance with articles 93, 94 and 96 of the FR) is also made by paper using the mail system (single closed envelope) following the procedure established for classified documents "Restricted EU"⁸.

⁷ As to the other persons not included in the previous list, the exclusion information is broad to the personal file to that third party.

⁸ See Security Notice 02 about creation, handling and storage of restreint UE information. from the DG ADMIN of 8 March 2005.

Recipients

Recipients are the natural persons or organisations to whom personal data may be disclosed. The following categories are of standard (potential) recipients: the Court of Justice (Court), the Court of First Instance (CFI) and the lawyers and agents of the parties involved in the event of legal proceedings; the President, the Registrar of the court concerned and the Legal Advisor for administrative affairs, in the event of a complaint instituted under Article 90, paragraph 2 of the Staff Regulations; OLAF (European Anti-Fraud Office) in the event of an investigation under Regulation (EC) No 1073/1999 and the Court of Justice decision of the 26 October 1999; the Internal Auditor in the course of the duties vested in him by Articles 85 to 87 of the Financial Regulation; the Court of Auditors within the scope of its mandate conferred by Article 248 of the EC Treaty; the specialised financial irregularities panel in accordance with Article 66, paragraph 4 of the Financial Regulation and Article 8 of the Internal Financial Regulation; the President and the Registrar of the Court and the officials who assist them in their responsibilities conferred by Article 23 of the Rules of Procedure of the Court; the European Data Protection Supervisor in accordance with Article 47, paragraph 2 of Regulation (EC) No 45/2001; the Data Protection Officer of the institution in accordance with paragraph 4 of the Annex to Regulation (EC) No 45/2001.

Time limits

When the Court introduces a warning, it is the AOSD who proposes to the Commission the precise duration of the storage. In order to give the same treatment to a third party in respect of the timing proposed by the Commission, the AOSD of the Court of Justice will take that situation into consideration before proposing the exact duration of the storage.

The data are blocked up to five years following the final decision by the AOSD on the active registration of the third party in the database of the Commission. In case of exclusions in accordance with article 93 (1), c and f, it is envisaged an adversarial procedure which gives rise to active registration for a period of three months renewable pending a possible decision by the AOSD on exclusion in application of article 96 of the FR. The data coming from the Commission are kept upon reception from the Commission of the next encrypted file the previous one is deleted (the encrypted files from the Commission are provided on a monthly basis).

Security measures

The file received is kept at the Court of Justice on two separate PC's and is password protected. The transmission of information to the Commission is performed according to the existing rules concerning classified documents. As the proposed "form" is a restricted EU document it has to be sent in a single closed envelope.

3. Legal aspects

3.1. Prior checking

The notification received on 8 August 2006 relates to processing of personal data in the terms of Article 2.b of Regulation 45/2001 ("any information relating to an identified or identifiable natural person" - Article 2.a). Indeed, the Early Warning System (EWS) includes data relating to natural persons not only in their capacity to represent a legal person, but also in their capacity as individual liable to be subject to an evaluation under the EWS.

The data processing in question is carried out by an institution in the exercise of activities which fall within the scope of Community law (Article 3.1).

Processing under the registration procedure for data subject in the Early Warning System is at least partially automated within the meaning of Article 3.2 of Regulation 45/2001. This processing is manual, but the content is intended to form part of an automated system, because, after the transmission of information by the Court of Justice to the Commission, W5a flaggings are visible in the Commission's accounting system and shared with the other Institutions. Furthermore, those data go into the personal file of the third party. This processing is done manually but the content is intended to form part of a filing system. The Regulation therefore applies in accordance with Article 3.2.

Article 27.1 of Regulation 45/2001 subjects processing operations likely to present specific risks to the rights and freedoms of data subjects to prior checking by the European Data Protection Supervisor. Article 27.2 contains a list of processing operations likely to present such risks including, in Article 27.2.d "processing operations for the purpose of excluding individuals from a right, benefit or contract". The registration of a natural person⁹ in the EWS can lead notably to the exclusion from a contract, granting of an award or refusal of funds and therefore is covered by Article 27.2.d and as such subject to prior checking by the European Data Protection Supervisor.

The Regulation also subjects to prior checking: "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct" (Article 27.2.b). The EWS is clearly linked to an evaluation procedure by the Court of Justice notably as concerns the financial conduct of a person and to this effect must be prior checked.

In principle, checks by the EDPS should be performed before the processing operation is implemented. In this case, as the EDPS was appointed after the system was set up; the check necessarily has to be performed ex post. However, this does not alter the fact that the recommendations issued by the EDPS should be implemented.

The formal notification was received on 8 August 2006. Further information was requested by e-mails on 21 September 2006. Pursuant to Article 27.4 of Regulation 45/2001, the two-month period within which the EDPS must deliver an opinion was suspended. Partial replies were sent by e-mail on 9 October 2006. On 19 December 2006, a draft for comments and further information was sent to the DPO who answered on 20 December 2006. The suspension was lifted. The EDPS should therefore deliver an opinion by 8 January 2007 (i.e. 9 October plus 88 days of suspension).

3.2. Lawfulness of the processing

The lawfulness of the processing must be considered in the light of Article 5.a of Regulation 45/2001 which provides that personal data may be processed only if the processing is "*necessary for the 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 or in the legitimate exercise of official authority vested in the Community institution...*". Article 5.b provides that personal data may be processed if the "*processing is necessary for compliance with a legal obligation to which the controller is subject*". Furthermore, data concerning offences, criminal convictions or security measures are

⁹ As well as legal persons (not covered by the Regulation 45/2001).

qualified as "special categories of data" under Article 10.5 of the Regulation and therefore grounds must be found in Article 10 in order to allow the data to be processed by the Community institutions (see 3.3 Special categories of data).

Processing of personal data in the EWS falls within the legitimate exercise of official authority vested in the institutions as it aims at ensuring circulation of restricted information concerning third parties who could represent a threat to the Communities' financial interests and reputation, should the Commission enter, or if it has already entered a contractual/conventional relationship with them. In addition, as mentioned in the article 95 of the Financial Regulation (FR), the controller has to comply with the establishment of the database containing information in relation with the articles 93 and 94 (FR) and therefore the EWS corresponds, at least in part, to a legal obligation for the Court of Justice. As a reminder, this legal obligation comes from these provisions:

- Articles 93, 94, 95 and 96 of Council Regulation (EC Euratom) N° 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.
- Articles 133 and 134 of Commission Regulation (EC, Euratom) N° 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) N° 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities as amended by Commission regulation (EC, Euratom) N° 1261/2005 of 20 July 2005 amending Regulation (EC, Euratom) N° 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) N° 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities.

As already explained, the obligation of keeping its own database has been implemented in an equivalent manner, namely by using the database of the Commission. This has been regulated by the Commission Decision C(2004) 193/3 of 03.03.2004 as last modified by the 2006 Internal rules (SEC(2006)131), relating to the Early Warning System¹⁰.

As also mentioned, the proposals amending FR and IR will consolidate this equivalent solution by setting up a common database for all institutions¹¹. It will remain compliant with the Article 5.a of the Regulation 45/2001.

3.3. Processing of special categories of data

Among other data, the EWS processes special categories of data as referred in Article 10.5: *"processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards"*.

As described in above, the processing activities as concerns the warnings used by the Court (W5a in the terminology of the EWS Commission decision) are carried out on the basis of the legal instruments referred to (Financial Regulation and its implementing rules, Commission

¹⁰ This decision has been published on EUROPA website since the 16 August 2006. It has not been published in the Official Journal but the EDPS has recommended doing so in his opinion on the EWS decision - See the EDPS opinion of 6 December 2006, Case 2005-120 (on the EDPS web site).

¹¹ See also the EDPS opinion on the revision of the Financial Regulation and its Implementing Rules (COM(2006) 213 final and SEC(2006) 866 final) (on the EDPS web site).

decision on the Early Warning System) and therefore complies with Article 10.5 of the Regulation (EC) 45/2001.

3.4. Data Quality

Article 4 of Regulation (EC) No 45/2001 sets out a number of obligations regarding the quality of personal data.

The data must be "*processed fairly and lawfully*" (Article 4.1.a). The lawfulness of the processing has already been discussed (see point 3.2 above). As regards fairness, this relates to the information given to the data subjects (See point 3.9 below on this point).

Personal data should be collected for "*specified, explicit and legitimate purposes*" (Article 4.1.b). This provision implies that processing of personal data may only be carried out for a determined purpose. It also implies that a balanced approach must be carried out between the need to process personal data and the intrusion it may cause in the private lives of the persons concerned. The benefits of the processing of the data must be weighed against any possible adverse impact. If it is in the legitimate interests of the Institutions and bodies to set up such a system in order to preserve the financial interests and reputation of the Communities, the introduction of a warning against a person can have serious adverse effects for a data subject and for this reason specific safeguards must be in place to uphold the data subject's legitimate interests. These safeguards should notably be found in the data subject's right to be informed and to have access to data relating to him/her (see below 3.9 and 3.8).

Data must be "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*" (Article 4.1.c). The processed data described at the beginning of this opinion should be regarded as satisfying these conditions. The data required are administrative in nature (Name and address of the individual, additional information such as VAT number or other national identification numbers and number of ID card or passport, and the warning) and are necessary for the proper functioning of the various stages of the procedure for EWS. The EDPS considers that Article 4.1.c of Regulation 45/2001 is respected.

Under Article 4.1.d of the Regulation, data must be "*accurate and, where necessary, kept up to date*".

As concerns the warnings used by the Court (W5a in the terminology of the EWS Commission decision), Article 7§2 ii) of the EWS Commission decision provides that "where certifications and evidence obtained by any authorising department in accordance with Article 93(2) FR on the occasion of another award procedure are not consistent with activated W5a warnings, the AOD/AOSD shall immediately inform the AOD/AOSD responsible for the warning, so that deactivation may be requested in accordance with Article 9(3)". This provision leaves scope for the correction of inaccurate or outdated data. However, deactivation does not lead to removal from the system. The EDPS has recommended in his EWS Commission decision opinion¹² that any trace of a flag which is subsequently removed be made invisible to the common user of the EWS system, and only be kept in a form accessible to a limited number of users for audit reasons. Such audit trails may not be kept for longer than is necessary according to the provisions of the IR (Article 49).

¹² See footnote 2.

The accuracy of data also means that any rectification of inaccurate or incomplete data outside the system should be reflected in the EWS.

The EDPS has also questioned the value of information related to the subcategory W5a10 (exclusion in accordance with art 94 FR: conflict of interest or guilty of misrepresentation) which, according to the EWS request form, has to be mentioned and not activated by the system, since as soon as a person is mentioned in the system under a W5 flag, this has a legal affect. Therefore the value of a non activated but visible warning must be questioned. This also applies to the Court of Justice in its way of managing data relating to W5a flags when the Court is at the origin of the information.

As the Court of Justice receives the encrypted file of the Commission each month, it is possible to ensure the accuracy of the data as well as ensure that it is kept up to date. Each time the Court receives the new list from the Commission, the Court has to update the information in the personal files. A mention should be made about the date of this update. The Court has to update the personal files indicating the real date of correction and not the date when the Court receives the list from the Commission as data may have been updated between the monthly lists. It is also the case when the AOSD of the Court asks for further information from the contact person at the Commission for a specific case as the cause of exclusion is not included.

The EDPS recommends that the Court ensures the data quality by updating the personal files as soon as new information is received.

When the Court reaches the conclusion of a need for a warning after the adversarial procedure (this is the case of Article 93.1.c and .f), updating elements have also to be taken into account.

The right of access and rectification as provided by Article 13 of Regulation 45/2001 should also serve to guarantee the quality of data. However, the Court of Justice follows the Commission decision on the EWS providing for a very limited right of access to the data subject only in certain circumstances (Article 8.3 of Commission Decision). This will be discussed further below (see point 3.8).

3.5. Conservation of data

Article 4.1.e of Regulation (EC) No 45/2001 sets forth the principle that data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*".

When the Court of Justice introduces a warning, it is the AOSD who proposes to the Commission the precise duration of the storage. In order to give the same treatment to a third party in respect of the timing proposed by the Commission, the AOSD of the Court of Justice will take that situation into consideration before proposing the exact duration of the storage.

The Court of Justice generally follows the rules laid down in the Commission decision C(2004) 193/3 (EWS Commission decision). As such, the recommendations of the EDPS in his opinion related to the case¹³ EWS of the Commission apply.

¹³ See case 2005-120, EDPS opinion of 6 December 2006.

Regarding the data inserted in the personal files of third parties, the Court of Justice has no policy about their conservation. The EDPS recommends that the Court of Justice foresees the policy of data retention regarding the personal files of third parties

3.6. Compatible use / Change of purpose

The Regulation (EC) 45/2001 (Article 4.1.b) provides that personal data must be collected for specified, explicit and legitimate purposes and not be further processed in a way incompatible with those purposes. The processing of the EWS itself and the database used for the personal files of the third parties follow the same objective. The EDPS does not detect any incompatible use of the data since they both contribute to the general framework of sound financial management of the Community funds.

3.7. Transfer of data

Transfer of personal data within or between Community institutions or bodies

Article 7.1 of the Regulation stipulates: "*Personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

On one hand, the EWS of the Commission is shared by the other institutions, so there is an exchange of data between different Institutions. The Court of Justice is one of them. On the other hand, the Court transfers data (see facts at Recipients)

The EDPS considers that these transfers comply with Regulation (EC) 45/2001 as they are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*"

It should be ensured that the recipient shall only process the personal data for the purposes for which they were transmitted.

In this context, Article 2.g of Regulation (EC) 45/2001 has to be considered. It defines the "recipient" as "*natural or legal person, public authority or any other body to whom data are disclosed, whether a third party or not; however authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients*". The exact scope of this provision and whether it applies to transfers of data to such instances as the IAS and duly authorised investigation authorities (such as PIF for example¹⁴) will be examined below, (3.9 Information to the data subject). However, it must be mentioned here that should the exception of Article 2 (g) apply to such authorities, the exception is to be understood as an exception to the right to information and not to the provisions of Article 7 and following of the Regulation as concerns transfers of data. The above mentioned recommendation therefore also applies to transfers to such authorities.

As to transfers foreseen in Articles 8 and 9 of the Regulation 45/2001 which are transfers of personal data to recipients, other than Community institutions and bodies, subject to Directive 95/46/EC (Article 8) and transfers of personal data to recipients, other than Community institutions and bodies, which are not subject to Directive 95/46/EC (Article 9), they are not done by the Court, but by the central system of the Commission¹⁵.

¹⁴ In this respect see Prior check opinion 2005-0407

¹⁵ For that purpose, see the case 2005-120 (opinion of the EDPS on the EWS of the Commission - on the EDPS web site).

3.8. Right of access and rectification

The right of access is the right of the data subject to be informed that personal data relating to him or her is processed by the data controller and to obtain the communication of such data in an intelligible form. As a matter of principle, this right has to be interpreted through the concept of personal data. Indeed, the Regulation has adopted a broad concept of personal data. This is based on the need to respect the right of defence, in general; and in the very field of personal data protection, the respect of the rights of access and rectification is directly linked to the data quality principle as described above (3.4). Although in most cases leading to a warning in the EWS the data subjects are aware of the facts leading to such a warning, this does not mean that they should not be granted an access to the information contained in the system which relates to them.

According to Article 13 of Regulation 45/2001, *"the data subject shall have the right to obtain without constraint and at any time within three months from the receipt of the request and free of charge from the controller information at least as to the purposes of the processing operation, the categories of data concerned, the recipients to whom the data are disclosed and communication in an intelligible form of the data undergoing processing and of any available information as to their source"*. Article 14 provides: *"the data subject shall have the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data"*.

Article 20 of Regulation 45/2001 provides for limitations to the right of access in certain cases notably where such a restriction constitutes a necessary measure to safeguard *"an important economic or financial interest of ... the European Communities, including monetary, budgetary and taxation matters"*.

In the notification of the Court of Justice, the latter considers that the right of access is given to the data subject because of the prior adversarial procedure¹⁶ to a registration in the Commission database (in case of article 93.1.c and 93.1.f). And in all cases of W5 warnings, Article 7§2 of the EWS of the Commission Decision leaves scope for the correction of inaccurate or outdated data by the AOD/AOSD. However the EDPS considers that this does not provide a right of access for the person concerned to the data processed by the Court.

In addition, every time a third party is included in the database of the Commission following one of the situations described under Articles 93 and 94 of the FR, the AOSD of the Court of Justice is obliged to introduce in the corresponding personal file related to that third party a copy of the notification made by the Accounting officer of the Court of Justice. Under Regulation 45/2001, this filing system opens the rights of access to all data subjects to personal files concerning them, except for reasons mentioned in Article 20. The rules should therefore be reviewed in order to grant an unconditional right of access for, at least, the natural persons concerned (see scope of Regulation 45/2001 in point 3.1. of this opinion).

In cases where a personal evaluation is carried out by the Court of Justice, access should be given by the Court of Justice itself to data subjects, particularly in order to allow the data subject to exercise his rights of defence. However, if this personal evaluation is not carried out by the Court of Justice, but by another institution and with the consequence of being

¹⁶ Exclusions from participation in a contract or grant award procedure in accordance with Article 93(1) c and f FR, based on the assessment by the AOD/AOSD after an adversarial procedure, shall, without prejudice to Article 9(2), give rise to active registration under W5a for a period of three months (renewable) pending a possible decision by the Authorising Officer (Commission) on exclusion in application of Article 96 FR (Article 7 of the EWS Commission decision).

introduced in the Commission database, the fact that the Court has opened a specific file relating to the data subject involved means that the right of access should also be given by the Court, if asked.

The right of access is also applicable when a data subject requests access to the file of others, where information relating to him or her is included therein (for example: employees of a tenderer). This should not be refused subject to possible limitations in accordance with Article 20.1.c ("*necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others*").

The restrictions to the rights of the data subject, mentioned in the Article 20 of the Regulation 45/2001, could not be set up as a rule and should remain the exception. The EDPS therefore recommends that a right of access be introduced.

Should any of the restrictions provided for Article 20 be invoked, Article 20.3 has to be considered and respected by the Court: "*If a restriction provided for by paragraph 1 is imposed, the data subject shall be informed, in accordance with Community law, of the principal reasons on which the application of the restriction is based and of his right to have recourse to the European Data Protection Supervisor.*" Concerning the right to information, this provision has to be read jointly with Articles 11 and 12 of the Regulation (see below point 3.9).

If a restriction to the right of access is imposed, the data subject has a right to request indirect access through recourse to the EDPS (Article 20.4).

Article 14 of the Regulation provides the data subject with a right to rectify inaccurate or incomplete data. Given the sensitivity, in most cases, of these investigations, this right is of key importance, in order to guarantee the quality of the data used, which, in this specific case, is connected to the right of defence. Any restriction, as provided in Article 20 of the Regulation, has to be applied in the light of what has been said regarding the right of access in the paragraphs above. The EDPS recommends that a right of rectification be introduced when the Court has introduced the flag in the system.

Regarding the W5b warnings, the Court, as follow up of decisions taken on the base of those regulations imposing Common Foreign and Security Policy (CFSP) related financial restrictions has to ensure the rights of access and of rectification when appropriate (for example misunderstanding of a name) to people who could have been filed in the personal files set up by the Court. In these cases, the right of rectification of the exclusion itself is not competence of the Court as controller. According to the jurisprudence of the Court, it is different when the list is set up by the UN or by the Council¹⁷.

3.9. Information to the data subject

Article 11 of Regulation (EC) 45/2001 specifies that the controller must provide information to the data subject except where he or she already has it. This information covers at least the identity of the controller, the purposes of the processing operation for which the data are intended, the recipients or categories of recipients, whether replies to questions are obligatory or not as well as the possible consequence of a failure to reply and the existence of a right of access to, and right to rectify the data concerning him/her. Further information may also have to be provided such as the legal basis of the processing operation, the time-limits for storing

¹⁷ See Judgments of the Court of 21 September 2005 - cases Yusuf (T-306/01) and Kadi (T-315/01) and Judgment of the Court of First Instance (Second Chamber) of 12 December 2006 - case T-228/02.

the data and the right to have recourse at any time to the EDPS. When personal data are collected directly from the data subject, the information should be provided at the time of collection of this data. Since data are notably collected directly from data subjects, Article 11 applies.

The provisions of Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) are also applicable, due to the fact that the Court of Justice can collect information itself and from the Commission. In this case, the information must be provided to the data subject at the time of recording of the data or no later than the moment when data are disclosed to a third party, unless the person concerned already has this information.

Article 20 of Regulation (EC) No 4/2001 provides for certain restrictions to obligation to inform notably where such restriction constitutes a measure necessary to safeguard: "a) the prevention, investigation, detection and prosecution of criminal offences; b) an important economic interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters; c) the protection of data subjects or the rights and freedoms of others".

A distinction must be made here as concerns general information on the EWS and specific information to be given to data subjects which are object of a warning.

General information on the EWS is provided on the EUROPA website since 16 August 2006. However the EDPS has underlined the fact in his opinion on EWS Commission decision that most of the information related to the processing of personal data is not provided. All information included in Articles 11 & 12 should be provided by the Commission in the relevant EUROPA web pages following the EDPS recommendation.

It should be remembered that, in the context of a procurement process at the Court of Justice, all third parties are informed beforehand that their personal data may be used by the Court not only for internal purposes related to the procurement process but also communicated to other institutions in the context of Articles 93 and 94 of the FR with the purpose of being included in the database of the Commission foreseen by Article 95 of the FR. Therefore every third party has already been informed of the possibility of being excluded from the participation in the procurement process or excluded from the award of a contract, if it is included in the database of the Commission. In cases where a third party requests a clarification on its potential inclusion in the database of the Commission it should address its request directly to the Commission.

The EDPS welcomes this information but it has to be underlined that it only gives a general information on the possibility of being introduced in the EWS.

In order to comply with Regulation 45/2001, the EDPS recommends that general information on the mere existence of the EWS must be provided to all persons (third parties) with a personal file in the Court of Justice. Indeed, their inclusion in this data base makes them potentially liable to be included in the EWS system. This information should contain the items listed in Article 11 of the Regulation and should be given at the time of collection of the data in the personal files of third parties.

The implementing rules of the FR (IR) as amended on 20 July 2005 and in particular the new paragraph 3 of Article 149 provides that in the case of contracts awarded by the Community institutions on their own account, under article 105 of the FR, the contracting authority shall

inform all unsuccessful third parties, simultaneously and individually, as soon as possible after the award decision and within the following week at the latest, by mail, fax or email, that their application or tender has not been accepted; specifying in each case the underlying reasons. The EDPS welcomes this new paragraph, although this only gives information a posteriori, if the reason is the inclusion in the EWS. However, it does not allow the data subject to exercise his right of defence before the exclusion in that case, although it gives information for future cases.

The EDPS therefore recommends, as a rule, that the person concerned is informed of the issuance of a warning against him/her in the EWS.

In the light of these considerations, if the Court limits the right of information in the frame of specific cases on the basis of Article 20.1.b, this restriction must be the exception rather than the rule.

Furthermore, as mentioned above (3.7 transfer of data), Article 2.g provides for an exception to the obligation to inform data subjects. The provision excludes from the concept of recipient authorities receiving personal data in the course of a particular investigation. The scope of this article has to be further specified: authorities such as the Court of Auditors, IAS of the Commission, and internal auditors in the institutions and bodies are in principle not covered by this exception and information must therefore be given to data subjects. Authorities such as OLAF, IDOC, DPOs, the EDPS or other bodies receiving data in the frame of a specific inquiry could fall under the exception provided for in Article 2.g. In this respect Article 2.g and Article 20 somehow overlap.

Nevertheless, an important consideration to take into account here is the relationship between the EWS and other investigation procedures such as these carried out by OLAF or the PIF¹⁸ or others. Once the deferral of information based on Article 20 has been lifted in these procedures, there is no reason to refrain from informing data subjects in the frame of the EWS.

The Court is therefore expected to give information to data subjects (third parties) with a personal file in the Court of Justice on the EWS in general and on a case by case basis, subject to restrictions according to Article 20 of the Regulation (EC) 45/2001.

3.10. Automated individual decisions

Article 19 of the Regulation provides that *"The data subject shall have the right not to be subject to a decision which produces legal effects concerning him or her or significantly affects him or her and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him or her, such as his or her performance at work, reliability or conduct, unless the decision is expressly authorised pursuant to national or Community legislation or, if necessary, by the European Data Protection Supervisor. In either case, measures to safeguard the data subject's legitimate interests, such as arrangements allowing him or her to put his or her point of view, must be taken."*

As mentioned in the facts, the decision to issue a flag is the result of an evaluation which is not an automated decision. Furthermore any consequences resulting from the issuance of a warning are not automated. The provisions of Article 19 are therefore not applicable in this case.

¹⁸ On those cases see Prior check opinions of EDPS respectively 2005-0418 and 2005-0407

3.11. Security measures

After careful analysis by the EDPS of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of Regulation (EC) 45/2001.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the following considerations are fully taken into account. The Court of Justice should:

- clarify the value of a non activated W5a10 which has to be "mentioned and not activated"
- foresee a data retention policy regarding the personal files of third parties,
- ensure that the recipient shall only process the personal data for the purposes for which they were transmitted,
- ensure the data quality by updating the personal files as soon as new information are received.
- introduce a right of access for the persons concerned; any exceptions to this right should be strictly limited,
- introduce a right of rectification,
- inform, as a rule, the person concerned of the issuance of a warning against him/her in the EWS
- provide all information included in Articles 11 and 12 of Regulation 45/2001,

Done at Brussels, 22 December 2006

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