

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Commission regarding the processing operation on personal data concerning the "Registration of a Data Subject in the Central Exclusion Database".

Brussels, 26 May 2010 (Case 2009-0681)

1. Proceedings

On 21 October 2009, the European Data Protection Supervisor (hereinafter "EDPS") received from the Data Protection Officer of the European Commission a notification for prior checking regarding the data processing operations that take place in the context of the registration of a Data Subject in the Central Exclusion Database ("the Notification").

The notification was accompanied by several documents:

- Copy of the Commission Regulation of 17 December 2008 on the Central Exclusion Database
- First consultation on the Vademecum for the exclusion database
- Practical guide of DG BUDG on the Central Exclusion Database
- Draft Privacy statement for the Central Exclusion Database
- Privacy Statement for Legal Entity and Bank Account Validation
- Prior Information of Candidates, Tenderers and Grant Applicants
- Draft letter on a contradictory procedure and activation of a provisional warning
- Draft letter on activation of an exclusion warning
- Table of duration of exclusion/warning in the Central Exclusion Database

On 24 November 2009, the EDPS requested further information to the data controller. On 5 February 2010, the EDPS received some documents, which partially answered his requests. The answer also contained 25 attached documents (some similar to the first documents provided and some others relating to further aspects of the procedure). The EDPS received the final answers to his questions on 29 March 2010. This time also, the 25 documents were joined to the answers.

On 22 April 2010, the EDPS sent the draft prior check Opinion to the data controller and to the Data Protection Officer ("DPO") of the European Commission for comments. On 18 May 2010, the data controller requested the extension of the deadline. The EDPS received the comments on 25 May 2010.

2. The facts

On 17 December 2008 the Commission adopted Regulation No 1302/2008 (hereafter the 'CED Regulation'), which laid down the framework for a central exclusion database to be established as of 1 January 2009. More precisely, this instrument, adopted on the basis of

Article 95 of the Financial Regulation (FR), details an information system that existed previously before being extended and rationalised during the revision of the Financial Regulation in 2006.

2.1 Purpose

In view of protecting the financial interests of the institutions, data contained in the central exclusion database are processed and may only be used for the purposes of excluding from any procurement or grant procedures funded with EU Funds or EDF Funds, entities which represent a threat to the European financial interests (e.g. entities which are personally under an exclusion situation within the meaning of Articles 93 to 96 and 114 of the Financial Regulation n° 1605/2002 (general budget) and Articles 96 to 99 and 110 of Regulation n° 215/2008 (10th EDF))

2.2 Legal basis of Processing:

- The basis of the processing as regards the General Budget is Article 95¹ of Council Regulation (EC, Euratom) n° 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities as revised by Council Regulation n°1995/2006 of 13 December 2006:

"1. A central database shall be set up and operated by the Commission in compliance with Community Rules on the protection of personal data. The database shall contain details of candidates and tenderers which are in one of the situations referred to in Articles 93,94,96(1)(b) and (2)(a). It shall be common to the institutions, executive agencies and the bodies referred to in Article 185.

2. The authorities of the Member States and third countries as well as the bodies, other than those referred to in paragraph 1, participating in the implementation of the budget in accordance with Articles 53 and 54, shall communicate to the competent authorising officer information on candidates and tenderers which are in one of the situations referred to in Article 93(1)(e), where the conduct of the operator concerned was detrimental to the Communities' financial interests. The authorising officer shall receive this information and request the Accounting Officer to enter it into the database.

The authorities and bodies mentioned in the first subparagraph shall have access to the information contained in the database and may take it into account, as appropriate and on their own responsibility for the award of contracts associated with the implementation of the budget."

As regards grants, Article 114(3) of the Financial Regulation shall also apply.

- As regards the European Development Fund, the reference is Article 98 of Council Regulation n° 215/2008 of 18 February 2008 on the Financial Regulation applicable to the 10th European Development Fund.

- Finally, a last legal basis is to be found in Commission Regulation² (EC, Euratom) N° 1302/2008 of 17 December 2008 on the Central Exclusion Database.

¹ The situations of exclusion are explained in Article 93(1) of the Financial Regulation

² OJ L 344, 20.12.2008, p.12

2.3 Procedure:

As explained in the information provided by the data controller, the procedure to register in the exclusion database is as follows:

The identification of any excluded entity is integrated in the accounting system of the Commission which manages the Legal Entity Files.

1) Collection of data:

According to the information provided, when submitting offers, legal persons provide to the Commission a legal entity file which contains the following data:

- Type of Company
- Name of Company
- Address of head office
- VAT and/or registration number
- date of registration
- other data (fax, tel., mail)

As underlined by the data controller, the name of the manager of the company is not requested in the entity file and is therefore not processed at that level.

These identification data of the legal person are recorded by the authorising officers and validated by the accounting officer's services when the entity has been selected and will be part of financial and legal contract.

When the applicant is a physical person, processed coordinates of the physical person acting as a legal entity are:

- Name and Surname,
- Address
- ID card or Passport number
- Date of Birth, Place of Birth
- Other data (fax, tel., mail)

For records requested by other operators of the Common exclusion system (Institutions, Member States, International organisation and third country) where the excluded person is not yet present in the accounting system of the Commission, a legal entity file is created and a marked for future exclusion.

2) Filtering of the excluded entities for generating the exclusion database.

At the time of recording of any exclusion, the relevant legal entity is flagged and its details are extracted daily to produce a list of excluded entities.

a) For a physical person, who is personally in a situation of exclusion, data on his/her legal entity file are, on the occasion of the request for exclusion:

- updated, if necessary, in the legal entity file (change of address);
- extracted to feed the exclusion database;
- completed by the data communicated in the recording request and linked to the nature and length of exclusion.

b) for a legal person which is personally in a situation of exclusion, data on its legal entity file are, on the occasion of the request for exclusion:

- updated, if necessary, in the legal entity file (change of address);
- extracted to feed the exclusion database;
- completed by the data communicated in the recording request and linked to the nature and length of exclusion.

3) As regards the content of the exclusion database itself, the data retained in the database is as follows:

- As a legal representative of an entity subject of an exclusion decision: the name of the individual
- As an entity subject to an exclusion decision:
 - name and address of the individual
 - ground of exclusion (some of the grounds of exclusion are related to res judicata criminal judgements mentioned in Article 93 of the Financial Regulation : these data are covered by Article 10(5) special categories of data of Regulation (EC) 45/2001).
 - end date of the active warning
 - references of the authority that requested the warning

As underlined by the data controller, this information will be kept within the services of the Accounting Officer and will not be extracted to the exclusion database. It will therefore not be available to the users of the exclusion database.

2.4 Manual/automatic processing

The processing is partially automatic.

- As non automatic processing operation:

Registration of exclusion warnings are made by staff reporting to the Accounting Officer of the Commission (manual data entry) on the basis of standard forms included in the Commission Regulation n° 1302/2008 and filled and signed by the initiators of a warning.

These forms are "RESTREINT UE" documents addressed to the Accounting Officer of the Commission. Circulation of these forms is made in a single closed envelope which is archived afterwards in a secured safe.

- The following are automatic processing operations:
 - Gathering the relevant information on excluded entities: in the accounting system of the Commission, the concerned entity is flagged in the Legal Entity File (LEF).
 - Exclusion warnings are made available automatically to all authorised users:
 - i. from the Commission and the Executive Agencies through ABAC, the accounting system of the Commission, by a standard interface.

ii. The same information is retrieved on a daily basis and mirrored in a new database to make it available to external authorised users from other Community Institutions, or from Member States and subject to conditions - from International Organisations and third Countries. Where a secured internet access is not available, the information is extracted from the database in a listing to be sent by secured mail to registered liaison points.

- Automatic deactivation of exclusion warnings: the warning is automatically deactivated at the end of the registration period if the deactivation has not been requested in the meantime by the initiator of the warning.

2.5 Special Categories of data:

The data which are processed are not included in the scope of Article 10 of Regulation (EC) 45/2001 except for data registered under the field "ground of exclusion": some of them are related to res judicata criminal judgements mentioned in Article 93 of the Financial Regulation: these data are covered by Article 10(5) "special categories of data" of Regulation (EC) 45/2001.

2.6 Data subjects

The categories of data subjects concerned are:

1. candidates, applicants and tenderers for Community funding (or EDF funding);
2. recipients of community funds (or EDF funds) : contractors and subcontractors.

Data on excluded entities relate to all individuals who are excluded in accordance with regulatory provisions (including natural persons managing legal entities as far as these natural persons are personally under an exclusion decision).

Are also part of the processing (without being extracted to the exclusion database and therefore unavailable to its user) the name of natural persons who are managing an excluded entity (this information is kept in the services of the data controller in order to identify the person that can legally request information, modification or removal of registered data) without these persons being personally subject of an exclusion. For this reason, the Commission has decided that the data regarding the managing person will not be exported in the exclusion database.

Data on the natural persons managing legal entity will only be available for the accounting officer of the Commission and persons who are habilitated by him to administer the database and will therefore not be available for the users of the exclusion database, whatever the nature of the access to the database is. According to the data controller, modification of the extraction process has been made to ensure that such data on managing persons who are not personally subject of exclusion will not be downloaded in the database and will therefore not be subject to a query. .

2.7 Recipients

Recipients

According to the information provided, the recipients can be classified in three categories:

- Community institutions or bodies, within the meaning of Article 7 of Regulation (EC) 45/2001 (Commission departments, Executive Agencies, bodies referred to in Article 185 and other Community institutions such as the Court of auditors, the European Parliament) ;
- recipients, other than Community institutions and bodies, subject to Directive 95/46/EC, within the meaning of Article 8 of Regulation (EC) 45/2001 (Authorities and bodies of Member States participating in the implementation of the budget in accordance with Articles 53 and 54 of the Financial Regulation);
- and, subject to conditions and after further consultation with the EDPS, recipients other than Community institutions and bodies, which are not subject to Directive 95/46/EC (Authorities and bodies of third countries and international organisations participating in the implementation of the budget in accordance with Articles 53 and 54 of the Financial Regulation). These recipients will need to have an adequate level of protection (in the respect of Article 9 of Regulation (EC) 45/2001).

Authorised users

Data are provided only to authorised users of the various categories of recipients detailed above. An authorised user is defined by Articles 6 and 7 of the CED Regulation as: "*staff members of the institutions [or of the implementing authorities and bodies] for whom access to that database is indispensable for the proper exercise of their tasks*". Authorised users are registered: the registration of these authorised users shall be constantly updated, kept and accessible to the Commission upon request.

Contact and liaison points.

According to Article 6 of the CED, each institution, other than the Commission and the executive agencies shall designate a contact point responsible as regards all issues related to the exclusion database and communicate the names of the persons in charge to the accounting officer of the Commission. Moreover, each contact point shall keep a register of authorised users and give the Commission access to it upon request.

According to Article 7, each Member State shall designate one liaison point for the funds it implements by shared management pursuant to Article 53(b) and the funds implemented by centralised indirect management by its national public-sector bodies pursuant to Article 54(2)(c) of the Financial Regulation. [...]. Moreover, each third country implementing funds by decentralised management pursuant to Article 53(b) of the Financial Regulation or each international organisation implementing funds in joint management pursuant to Article 53(d) of the Financial Regulation shall designate a liaison point at the request of the Commission service responsible.

In accordance with Article 7(5) of the CED, the list of excluded entities contained in the exclusion database may be made available, via a secured protocol, to the recipients of authorities and bodies mentioned in this same Article 7.

The secured protocol consists in the transmission, by electronic mail, of an encrypted file to designated recipients. After having received the file, these recipients have to request a password that is then sent to them individually and that allows them to open the file and view the report contained in it. Passwords are changed on every new transmission of these files.

The Commission underlined that this alternative procedure is currently suspended for third countries and international organisations. Authorisation is suspended until agreement with the EDPS on adequacy of protection provided by these third countries and international organisations.

2.8 Retention period

A time limit is set in the database for each type of exclusion warning³. In such cases, the warning is deactivated as soon as the time period has elapsed if the initiator of the warning has not requested its removal before the end of the time limit.

Removed warnings are then not visible for the users of the database (Article 13(5) of the CED Regulation).

However, under Article 13(5) of the CED Regulation, removed warnings shall be accessible for audit and investigation purposes only and shall not be visible for the users of the database.

According to the notification, personal data contained in exclusion warnings are erased 5 years after the removal of the warning.

2.9 Time limit to block/erase data

While analysing the procedure to block/erase data as foreseen in the notification, the data controller submitted the following amendments to the procedure:

1) As long as the legitimacy of a request is not established, the Commission commits itself to answer the correspondences of the applicant within 10 working days of his/her/its initial demand in order to complete the request and make it legitimate.

The request will be legitimate when the following elements will be established:

- The request for blocking/erasure is signed,
- It contains a serious motivation,
- The identity of the signatory is established (copy of an ID card)
- The link between the signatory and the concerned legal entity is established (given by the form of recording of the exclusion or, otherwise: copy of extract of register, status, gazette).

2) Within 10 working days of the receipt by the Accounting officer of the Commission of a legitimate request of blocking/erasure of the data, the flag on the legal entity will be deactivated in the accounting system of the Commission and the excluded entity will disappear one day after the deactivation of the flag (with the automatic daily update of the exclusion database).

According to the data controller, the excluded entity will be informed of the deactivation and the subsequent decision by standard letter. Therefore, there will be no prejudice to the requestor should the examination take more than 10 working days.

3) If the examination of the request shows that the request of blocking/erasure is not justified, the flag will be reactivated and the concerned person will be notified in writing within 10 working days about the reactivation.

³ As said above, the exclusion warnings are described in Article 93 of the Financial Regulation

The Commission also underlined that the procedure to block/erase data will not have effects on the general processing operation taking place on the exclusion database.

Access to the exclusion data are only for consultation (no data entry) and is made through queries and update transactions initiated by authorised users.

Finally, as explained above (point 2.8), warnings are activated upon registration and deactivated automatically at the end of the duration of the warning if, in the meanwhile, they have not been manually removed on the basis of a duly justified request by the Data Subject.

2.10 Rights of data subjects

- In accordance with Article 13(4) of the Commission Regulation (EC, Euratom) n° 1302/2008 a duly empowered representative of an entity, may request information on whether that entity is registered in the CED to the Accounting Officer of the Commission who shall respond and, should the entity be registered, he shall provide the registered information and inform the institution that initiated the warning.

- In accordance with Article 13(2) of the same Regulation the institution requesting the registration shall be responsible for the relations with the natural or legal person whose data are introduced into the CED.

- The rights of the data subjects enshrined in Articles 13 to 19 of the Regulation (EC) 45/2001 are confirmed by the CED Regulation (Recital n° 22) and they are reminded to the data subject or its legal representative when the registration of an exclusion warning is notified (a draft notification letter for the activation of a definitive warning was attached to the notification received).

The privacy statement for the central exclusion database has been transmitted to the EDPS. On its point 6, it states that natural persons *"have the right to access, correct and complete the data we hold regarding the legal entity you are representing or regarding your personal data. Upon request, you may be sent a copy of these data to correct and complete them. Any request for access, rectification, blocking and/or erasing these data should be directed to [...] Data Protection Officer of the Commission. You may also contact him in case of any difficulties or for any questions relating to the processing of these data."*

2.11 Information of data subjects

As regards information provided, the following procedures are implemented:

- A privacy statement accessible on line on the Internet website of the Commission:

1. Privacy statement for the central exclusion database
2. Modified privacy statement for the Legal Entity File (LEF) of the accounting system of the Commission

- Prior information of candidates, tenderers and grant applicants (Article 13 of Commission Regulation (EC, Euratom) N° 1302/2008 of 17 December 2008 on the central exclusion database (via a clause to be inserted into call for proposals and call for tenders).

- Information given at the beginning of the contradictory procedure before a possible exclusion decision (draft letter opening the contradictory procedure);

- Information given with the notification of the registration of the exclusion warning (draft letter for the activation of a definitive warning).

2.12 Storage and security measures

[...]

The data controller makes references to the following documents:

- Generic notification on IT infrastructure n° DPO-1
- Security measures shall be implemented by the institutions and Authorities or bodies to whom access to the database has been authorised (Articles 6 and 7 of CED Regulation)

[...]

3. Legal analysis

3.1. Prior checking

Applicability of Regulation (EC) 45/2001: The notification received on 21 October 2009 relates to processing of personal data in the terms of Article 2 (b) of Regulation (EC) 45/2001 ("any information relating to an identified or identifiable natural person" - Article 2(a)). Indeed, the registration of a Data Subject in the Central Exclusion Database includes data relating to natural persons not only in their capacity to represent a legal person when they are themselves subject of an exclusion, but also in their capacity as individual entity entered into the LEF and liable to be subject to exclusion under the established rules.

The data processing is performed by a European Union body (former "Community institution") in the exercise of activities which fall within the scope of the European law (former "Community law") (Article 3 (1) of the Regulation).⁴

Processing in the registration procedure of the exclusion database is at least partially automated within the meaning of Article 3.2 of Regulation (EC) No 45/2001. Registration of exclusion warnings are made by staff reporting to the Accounting Officer of the Commission (manual data entry) on the basis of standard forms included in the Commission Regulation n° 1302/2008 and filled and signed by the initiators of a warning. This processing is manual, but the content is intended to form part of an automated system, because these flaggings are visible in the Commission's accounting system and made available, via a secured protocol, to outside bodies. The Regulation therefore applies in accordance with Article 3.2.

Grounds for prior checking: According to Article 27 (1) of the Regulation, "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purpose shall be subject 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 legal or natural person in the exclusion database leads to the exclusion from a contract, granting of an award

⁴ The concepts of "Community institutions and bodies" and "Community law" are not to be any more used after the entry into force of the Lisbon Treaty on 1st December 2009. Article 3 of Regulation 45/2001 must therefore be read in the light of the Lisbon Treaty.

or refusal of funds and therefore is covered by Article 27.2.d and as such subject to prior checking by the EDPS.

Besides, the regulation also subjects to the prior-checking "*processing of data relating to [...] suspected offences, offences, criminal convictions [...]*" (article 27.2.a). The procedure to introduce information into the central database, as far as the mentioned exclusions in article 93 from the Financial Regulation can contain these categories of data, has to be the subject also to prior checking.

Finally, the regulation also subjects to prior-checking "*processing intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (article 27.2.b). The procedure leading to the introduction in the central exclusion database is connected to a procedure of evaluation led by the Commission, in particular as regards the financial conduct of a person, and also has to be subject to prior checking by the EDPS.

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 registration in the exclusion database is clearly linked to an evaluation procedure by the Commission notably as concerns the financial conduct of a person and to this effect must be prior checked⁵.

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 however the processing operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly

Deadlines: The formal notification was received by e-mail on 21 October 2009. Further information was requested by e-mail on 21 November 2009. Pursuant to Article 27.4 of Regulation (EC) No 45/2001, the two-month period within which the EDPS must deliver an opinion was suspended. Replies by the data controller were received by e-mail on 29 March 2010.

The EDPS should therefore deliver an opinion by 31 May 2010

3.2. Lawfulness of the processing

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data lawful. One of the criteria provided in Article 5 (a) is that the "*processing 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 or in the legitimate exercise of official authority vested in the Community institutions or body*". The processing of personal data for performance of tasks carried out in the public interest includes "*the processing necessary for the management and functioning of those institutions and bodies*" (recital 27). Moreover, 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*".

⁵ Processing of data by other institutions in view of consulting and sending information for the registration in the exclusion database will also be subject to prior checking on the basis of Article 27§2 b). See for example prior checking of the Committee of the Regions (2010-0248), in progress.

The exclusion database concerns the economic operators which are in one of the situations referred to in Articles 93, 94, 96(1)(b) and 96(2)(a) of the Financial Regulation. It also concerns natural persons with powers of representation, decision making or control over economic operators which are legal entities, when these persons have found themselves in one of the situations referred to in Articles 93, 94, 96(1)(b) and 96(2)(a) of the Financial Regulation (Article 134 of the Implementing Rules).

The natural person is the excluded entity and it is his legal entity file which is registered in the accounting system and which is flagged when it is the object of a decision of exclusion. The natural person is the entity excluded in the database of the exclusions. Only this excluded natural person can be the object of a request in the database of the exclusions. If this natural person is only a manager of an excluded legal entity and is not him/herself subject of exclusion, the request on the name of the natural person will report no result as the relevant identification data will not be downloaded to the exclusion database (see above points 2.3 and 2.6).

Processing of personal data in the exclusion database falls within the legitimate exercise of official authority vested in the institutions. Indeed, data contained in the central exclusion database are processed and may only be used for the purposes of excluding from any procurement or grant procedures funded with Community Funds or EDF Funds, entities which represent a threat to the Communities' financial interests (e.g. entities which are personally under an exclusion situation within the meaning of Articles 93 to 96 and 114 of the Financial Regulation n° 1605/2002 (general budget) and Articles 96 to 99 and 110 of Regulation n° 215/2008 (10th EDF)).

Finally, as described in the facts, a number of legal instruments support the processing of personal data in relation to registration in the exclusion database, namely:

- Article 95 of Council Regulation (EC, Euratom) n° 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities as revised by Council Regulation n°1995/2006 of 13 December 2006
- Commission Regulation (EC, Euratom) N° 1302/2008 of 17 December 2008 on the central exclusion database

3.3. Processing of special categories of data

Among other data, the exclusion database processes special categories of data as mentioned 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"*.

Some of the grounds of exclusion are related to res judicata criminal judgements mentioned in Article 93 of the Financial Regulation.

The processing of such data is authorised by a legal instrument adopted on the basis of the Treaties establishing the European Communities (Council Regulation (EC, Euratom) n° 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities and its implementing rules and Commission Regulation on the central exclusion database) and therefore complies with Article 10.5 of the Regulation (EC) 45/2001.

3.4. Data Quality

Adequacy, relevance and proportionality: According to Article 4 (1) (c) of the Regulation, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*". The information presented to the EDPS on the data processed appears, *prima facie*, to meet those requirements.

The data required are administrative in nature (name and address of the individual, ground of exclusion, end date of the active warning, references of the authority that requested the warning) and are necessary for the proper functioning of the various stages of the procedure for exclusion. The EDPS considers that Article 4.1.c of Regulation (EC) No 45/2001 is respected.

Accuracy: Article 4 (1) (d) of the Regulation provides that personal data must be "*accurate and, where necessary, kept up to date*" and that "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified*". The data subject has the right to access and the right to rectify data, so that the file can be as complete as possible. This also contributes to ensuring the quality of data (Article 13 of the CED Regulation).

The processed data (both in the collection and in the recording in the exclusion database) described at the beginning of this opinion should be regarded as satisfying these conditions.

The EDPS notes that the Commission is implementing specific procedures to ensure that the accuracy of data is respected. These are implemented in the Vademecum⁶ as well as in the Privacy Statement. Forms established for the purpose of correcting/modifying/deleting warnings have also been developed.

Fairness and lawfulness: Article 4 (1) (a) of the Regulation also provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (cf. point 3.2) and fairness will be dealt with in relation to information provided to data subjects (cf. point 3.7)

3.5. Conservation of data/ Data retention

Article 4 (1)(e) of the Regulation states that personal 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*".

The EDPS notes that a time limit is set in the database for each type of exclusion warning. In such cases, warnings are deactivated automatically at the end of the duration of the warning if, in the meantime, they have not been manually removed on the basis of a duly justified request by the Data Subject.

In the case at stake, under Article 13(5), after the exclusion period has elapsed, the warning is automatically removed from the data base and related data are not accessible any more for authorised users, save for audit and investigation operations made by the European Anti Fraud Office (OLAF). The EDPS considers that the conservation of the data for a period of 5 years after deactivation for reasons of audit trails complies with the provisions of the Financial Regulation (Article 49 of the Implementing Rules of the Financial Regulation).

⁶ See for instance point 2.4.2 on "Updating and removal of the information contained in the database" and point 3.2.5 "Responsibility for updating a warning"

Furthermore, in his opinion on the Early warning system, the EDPS concluded that flags which have been entered on the basis of suspicion or pending a legal decision, once deactivated on the basis either of lack of grounds for suspicion or following a legal decision which clears any grounds for condemnation, should leave no trace in the system. The EDPS considered that, as a principle deactivated flags should be removed from the system and should entail no legal consequences.

However, in the current case, the procedure (see point 3.2.7 of the Vademecum) does not seem to foresee a similar procedure in the cases where the flagged entity would be cleared of any wrongdoing by a legal decision or for manifest errors discovered after the registration of the exclusion (Article 11 of the CED). In such cases, the EDPS considers that the removal from the deactivated flag of a person cleared or for manifest errors should entail no legal consequences and therefore, that the deactivated flag should not be subject to audit or further investigations.

The EDPS is not aware of any conservation for statistical, historical or scientific purposes. If such cases were to happen, Article 4(1)d would be applicable.

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 exclusion database uses the data collected in the LEF (legal entity file) since the flags are entered into the LEF. However 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 European funds.

3.7. Transfer of data

The recipients of data provided in the exclusion database are multiple. On the basis of the planned transfers, Articles 7, 8 and 9 shall apply in the framework of this procedure. Indeed, the following recipients may receive the data:

- **Transfer of personal data within or between Community institutions or bodies**

Article 7 applies to all transfers of personal data between Community institutions or bodies or even within one same institution. 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"*.

In this case, the recipients are: Commission departments, Executive Agencies, bodies referred to in Article 185 and other Community institutions such as the Court of auditors, the European Parliament

A Vademecum (practical guide to the central exclusion database) has been prepared by the Commission (DG BUDG) and are distributed among the EU institutions and bodies. It explains and details the different implementing procedures for the management of the central exclusion database.

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"*.

Finally, according to Article 7(3): *"The recipient shall process the personal data only for the purposes for which they were transmitted."* This is reminded in the definition of the purpose of the processing in the different steps of the processing.

- **Transfer of personal data to recipients, other than Community institutions and bodies, subject to Directive 95/46/EC**

Article 8 of the Regulation foresees: *"Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC (a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, (...)."*

In this case, the recipients of transfers are: Authorities and bodies of Member States participating in the implementation of the budget in accordance with Articles 53 and 54 of the Financial Regulation

Article 8 paragraph (a) is respected, considering that the "necessity" of the data for the performance of the tasks carried out by the recipients in this case is related to the way chosen by the Commission to implement the budget. Furthermore, all those bodies are acting under the national law implementing Directive 95/46 and are acting for the purpose of the implementation of the European budget.

- **Transfer to third country authorities and/or international organizations**

Article 9.1 of the Regulation stipulates that *"personal data shall only be transferred to recipients, other than Community institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, if an adequate level of protection is ensured in the country of the recipient or within the recipient international organisation and the data are transferred solely to allow tasks covered by the competence of the controller to be carried out"*. By way of derogation from Article 9.1, Article 9.6 allows the transfer of data to countries which do not provide for adequate protection if *"the transfer is necessary or legally required on important public interest grounds (...)"*.

In this case, the recipients foreseen are: Authorities and bodies of third countries and international organisations participating in the implementation of the budget in accordance with Articles 53 and 54 of the Financial Regulation. These recipients will need to have an adequate level of protection (in the respect of Article 9 of Regulation (EC) 45/2001). Further talks will be necessary to ensure that the adequate protection is provided regarding the processing of the data by third country/international organisations. The adequacy of processing will be dealt with separately from this opinion.

3.8. Right of access and rectification

Article 13 of Regulation 45/2001 grants the data subject the right of access to personal data being processed. Article 14 of Regulation 45/2001 provides a right to rectification without delay of inaccurate or incomplete data.

As described in point 2 above, specific procedures have been established to grant these rights to the data subjects and information has been provided in the privacy statement. Article 13 of the Regulation on exclusion database covers the right of access and rectification.

The EDPS considers as compliant the right of access and rectification as described in the facts.

3.9. Information to the data subject

Pursuant to Articles 11 and 12 of Regulation (EC) No 45/2001, those who collect personal data are required to inform individuals that their data are being collected and processed unless the data subject already has this information. Individuals are further entitled to be informed of, inter alia, the purposes of the processing, the recipients of the data and the specific rights that individuals, as data subjects, are entitled to.

The EDPS received a copy of the Privacy Statement, where the requirements requested by Article 11 and 12 are covered. The EDPS also notes that information on how the data are protected and safeguarded are provided in the draft privacy statement. Although not formally imposed by Articles 11 - 12 of the Regulation, the EDPS welcomes this general information which is provided to the data subjects.

Moreover, the data controller announced that prior information of candidates, tenderers and grant applicants (Article 13 of Commission Regulation (EC, Euratom) N° 1302/2008 of 17 December 2008 on the central exclusion database will be inserted, via a clause, into call for proposals and call for tenders. The EDPS analysed the standard clause for calls to be inserted in the Call for Tender or Call for Proposals and, in the absence of call, in a letter sent before awarding contracts or grants.

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.

3.11. Security measures

According to Article 22 of Regulation (EC) No 45/2001, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks presented by the processing and the nature of the personal data to be protected"*. These security measures must *"in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing"*.

On the basis of the available information, the EDPS does not see any indication to believe that the Commission has not applied the security measures required in Article 22 of the Regulation.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations are fully taken into account. In particular, the Commission should:

- ensure that the Call for proposals and call for tenders include the prior information of candidates, tenderers and grant applicants as analysed above;
- ensure that in case of manifest error in the inclusion of an entity in the database or if an entity has been cleared, the procedure will entail no legal consequences to it.

Done at Brussels, 26 May 2010

(signed)

G. Buttarelli
Assistant Supervisor