

Opinion on a notification for Prior Checking received from the Data Protection Officer of the Research Executive Agency regarding the processing operation on personal data concerning the "Early Warning System (EWS) at the Research Executive Agency"

Brussels, 22 July 2014 (Case 2012-0981)

1. Proceedings

On 12 November 2012, the European Data Protection Supervisor ("**EDPS**") received from the Data Protection Officer ("**DPO**") of the Research Executive Agency ("**REA**") a notification for prior checking relating to the processing of personal data in the framework of its use of the Early Warning System ("**EWS**").

Questions were raised on 26 November 2012. REA re-notified on 9 July 2013. The draft Opinion was sent to the DPO for comments on 15 May 2014. The EDPS received a reply on 24 June 2014.

In 2006 the EDPS prior checked the European Commission's (**Commission**) EWS and an Opinion was adopted on 6 December 2006¹. The processing notified in the current case only covers the procedures specific to the REA's use of the EWS as operated by the Commission. Furthermore, the EDPS notes that the European Ombudsman conducted an inquiry into the Commission's EWS and recommended the revision of the current EWS' legal framework notably to enhance the right of to be heard of the persons listed in the EWS². Therefore, the Commission's EWS might undergo further revision in the future and accordingly trigger a new Article 27 notification from the Commission. This Opinion thus merely focuses on the implementation of the existing legal framework for the EWS by the REA and is without prejudice to the EDPS' position on the Commission's EWS or modifications that could be made to the general EWS as such.

2. The facts

Purpose of the EWS

The EWS is a system of warning signs incorporated in the Legal Entity Files ("**LEF**") which comprises all entities (legal and natural persons), the Commission and its executive agencies have financial dealings with (notably with regard to contracts, payments, grants etc.).

The purpose of the EWS is to ensure within the Commission and its executive agencies the circulation of restricted information concerning third parties who could represent a threat to the European Union's financial interests and reputation or to any other fund administered by the European Union (**EU**). This concerns information on third parties with whom the

¹ Case 2005-0120.

² Case OI/3/2008/FOR, Decision of 6 July 2012.

Commission and its services have or are likely to have financial relations and for which a risk has been identified or which are suspected of, or have been confirmed of, having committed fraud or serious administrative errors or irregularities. The Central Exclusion Database ("**CED**") is a specific output of the EWS containing all entities which are in an exclusion situation as defined by Regulation (EU, Euratom) No 966/2012 of the European Parliament and the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 ("**Financial Rules**")³. The EWS and the CED are managed by the Commission's Accounting Officer who is the only authority able to enter, modify or remove EWS warnings based on requests by Authorising Officers of Commission services or agencies such as the REA.

The architecture and use of the EWS as adopted and endorsed by the Commission were notified to the EDPS for prior checking in 2005 (and for the CED in 2010)⁴. The use of the EWS by the REA is based for the most part on the central database as operated by the Commission and prior-checked in the 2006 EDPS Opinion. As a consequence, this Opinion only covers processing operations of the REA when implementing the current EWS or requesting an EWS flagging⁵ (and not the EWS as such) by the REA Authorising Officer, as an Authorising Officer by Delegation ("**AOD**")⁶.

Since the 2006 EDPS Opinion on the Commission's EWS, the "**EWS Decision**"⁷ has been adopted. In addition, as described above, a revision of the general EWS by the Commission could occur in the future. In view of this, the necessity of the EWS as such to be notified again for prior checking to the EDPS by the Commission needs to be reassessed. The findings and recommendations issued by the EDPS in such a future Opinion on the Commission's EWS will have therefore to be taken into account by the REA insofar as applicable once such EDPS Opinion on the Commission's EWS will be adopted. Furthermore, the new Financial Rules were adopted after REA's initial notification and entered into force on 1 January 2013. The present Opinion refers to the provisions of the new Financial Rules (with references to the corresponding provisions of former "**Financial Regulation**"⁸ in brackets).

According to Article 9 of the EWS Decision depending on the nature of the information and the warning, information in the EWS is divided into five categories of warning of ever increasing risk, classified from W1 to W5.

The REA procedures relating to the EWS

The processing operations of personal data related to the EWS within the REA are based on the REA procedure (REA/RB/SM I (2010) regarding the Early Warning System of September 2010 ("**REA EWS procedure**").

³ According to Article 108 of the Financial Rules (former Article 95 of the Financial Regulation) a central database should be set up and operated by the Commission in compliance with the EU rules on the protection of personal data. The database shall contain details of the candidates and tenderers who are in one of the situations referred to in Articles 106, point (b) of the first subparagraph of Article 109(1) and point (a) of Article 109(2) of the Financial Rules (former Articles 93, 94, 96 of the Financial Regulation).

⁴ Case 2005-0120 for the EWS and Case 2010-0681 for the CED.

⁵ See also Opinion in case 2012-0823 on the ERCEA EWS.

⁶ Certain warnings can however only be requested by the Accounting Officer of the Commission, OLAF or IAS.

⁷ Commission Decision (2008/969/EC, Euratom) of 16 December 2008 on the "Early Warning System for the use of authorising officers of the Commission and the executive agencies" as amended by Commission Decision 2011/C 180/06 of 17 June 2011.

⁸ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the Communities.

Article 11 of the EWS Decision requires REA's Director in his capacity of Authorising Officer by Delegation (AOD) and Authorising Officers by Sub-delegation (AOSD) to check the existence of warnings in the EWS for third parties involved in contract/grant award decisions at the latest before the award decision. The AOD/AOSD shall verify whether there is a warning in the EWS concerning a person with power of representation, decision-making or control over the legal entity concerned (Article 17 of the REA EWS Procedure). The REA EWS Officer (HoU REA.A2, see Article 14 of the REA EWS Procedure) coordinates, in close cooperation with the operational units, a regular monitoring of warnings initiated by the REA (Article 15 of the REA EWS Procedure). The main purpose of this monitoring is to ensure timely deactivation of warnings W1c, W1d and W2b and follow-up on the contradictory procedures related to provisional registrations of W5a warnings.

The notification of a request for an EWS warning by the REA to the Commission is based on a standardised request form foreseen in the Annex of the EWS Decision and contained in Annex II of the REA EWS Procedure. The REA can request warnings of the categories W1c, W1d, W2b, W3b and W5a⁹ (Article 4 of the REA EWS Procedure). The REA EWS Officer is responsible for the practical implementation of the EWS in the REA, in particular the preparation of a request for a flag (Article 13 of the REA EWS Procedure). However, only the REA Director can request the activation of an EWS warning to the Commission at the end of the internal REA procedure (Articles 7 and 12 of the REA EWS Procedure).

The REA EWS Procedure in its Annex VIIa contains a flowchart for the registration or removal of an EWS warning, which outlines the **steps of the procedure**:

- First the Project Officer, on his own initiative or triggered by information received from a Financial Officer, reports grounds for an EWS registration or removal to the Head of Unit (AOSD).
- Then the Head of Unit (AOSD) verifies the file and addresses it to the REA EWS Officer (Head of Unit REA.A2), who in turn verifies the file, where applicable launches the contradictory procedure, and fills in the "RESTREINT EU" request form.

⁹ A W1c flag is requested by REA's Director where investigations of the Court of Auditors, REA's Internal Audit Capability (IAC) or any other audit or investigation made under the REA's responsibilities or brought to the REA's attention give sufficient reason to believe that final findings of serious administrative errors or fraud are likely to be recorded in relation to third parties, especially those who are benefiting or have benefited from Union funds under its responsibility. A W1d flag is requested when the REA excludes a candidate, tenderer or an applicant from the award of a contract or grant in a given procedure in accordance with Article 107(a) [conflict of interest] or Article 107(b) [misrepresentation of failure to supply information] of the Financial Rules. A W2b flag is entered where the European Court of Auditors, REA's IAC or any other audit or investigation made under its responsibility or brought to its attention have issued written findings of serious administrative errors or fraud in relation to third parties, especially those who are benefiting or have benefited from Union funds under its responsibility. A W3b flag is requested when third parties, especially those who are benefiting or who have benefited from Union funds under the REA's responsibility, are known to be the subject of judicial proceedings for serious administrative errors or fraud. However, where investigations conducted by OLAF lead to such judicial proceedings or OLAF offers assistance or follows up those proceedings, OLAF shall request the activation of the corresponding W3b warning which shall remain active until a judgment having the force of "*res judicata*" is rendered or the case has been otherwise settled. A W5a flag is requested where a third party is excluded in accordance with the Financial Rules (for reasons such as for bankruptcy, conviction for fraud, corruption, involvement in a criminal organisation or any illegal activity detrimental to the EU's financial interests, conviction for offences concerning the professional conduct or grave professional misconduct, failure to fulfil obligations relating to the payment of social security obligations, serious breach of contract for failure to comply with contractual obligations in other procurement/grant award procedure financed by EU budget, conflicts of interests). Such a W5a request must be preceded by a contradictory procedure giving the third party concerned the opportunity to express its views in writing within a deadline of at least 14 days. During such contradictory procedure a provisional exclusion warning shall be requested.

- As a last step, the REA Director (AOD) signs the letter of opening of a contradictory procedure (where applicable) and the "RESTREINT EU" form of request for registration or removal and sends these to the Commission's Accounting Officer. This request form is transmitted through encrypted e-mail or handed over in person to the services of the Commission's Accounting officer. In duly justified cases, the REA Director can request the execution of a suspended payment by motivated note to the Commission's Accounting Officer. This is the end of the REA procedure and the Commission's Accounting Officer is thereafter responsible for the examination of the EWS request and for the subsequent flagging of an entity in ABAC (Accrual Based Accounting).
- The REA has access to the EWS through consultation of the EWS and CED databases which is standardised for Executive Agencies (automatic availability of data through ABAC). The EWS flag attached to the LEF in ABAC is communicated to the REA's financial actors when a financial transaction (commitment or payment) is created.

Article 19 of the REA EWS Procedure establishes rules for the relations between the initiating REA service and the data subject. The service that requested the registration of an EWS warning shall be responsible for the relation with the natural or legal person whose data are introduced into the EWS ("**data subject concerned**"). Pursuant to Article 8(2) of the EWS Decision it shall inform the data subject concerned of the request for activation, updating and removal of any exclusion warning (W5a) directly concerning it and state the reasons thereof. Furthermore it shall respond to all requests from data subjects concerned to rectify inaccurate or incomplete personal data and to any other requests or questions from those subjects.

Controller

The controller of the processing is the REA, represented by its Director, who is AOD for part of the Commission's operational budget.

Data subjects

The data subjects are all natural persons who have been registered via the LEF directly as well as all natural persons with powers of representation, decision-making or control over given legal persons who are registered via the LEF and could thus potentially be included in the EWS or CED database of the Commission, including those notified by the REA to the Accounting Officer of the Commission.

Categories of data processed

The personal data processed include:

- identification and contact data (names and addresses, including e-mail addresses, and other contact data if any as well as telephone number) of
 - the person within REA requesting the warning to be registered including his/her function, and/or
 - individuals who are registered;
- other data:
 - type of EWS warning issued (W1-W5) and its start and end date;
 - service of the Agency that has requested the EWS flag to be set; contact person and reference(s) in this service;
 - reasons for the warning request, if not confidential. This comprises data relating to (suspected) fraud, insolvency, conviction of a serious professional misconduct or criminal offences that may be detrimental to the EU's financial interests.
- Special categories of data: Data related to offences, criminal convictions and security measures may be processed in the context of sub-category W5a.

Recipients

- The Director of the Agency in his/her capacity of AOD;
- Authorised members of the REA staff;
- All Commission services including services managing funds on behalf of the EU and Executive Agencies;
- EWS contacts designated by the other EU institutions or by EU bodies receiving grants charged to the EU budget;
- European Anti-Fraud Office (OLAF).

The recipients are reminded not to process the data received for any purpose other than the one for which they were transmitted to them, as required under Article 7(3) of the Regulation.

Further transfers of personal data are not done by the REA itself, but by the Commission in the framework of the general EWS and the CED which is also accessible to other EU institutions, and Member States Authorities, as well as third country authorities or international organisations when implementing EU funds. Notably, once an entity is flagged in the system through ABAC, all REA staff members (as well as of the Commission and other agencies) who have access to ABAC for processing commitments, payment files or for controlling or auditing can see and access the EWS warning information. Under the responsibility of the Accounting Officer of the Commission, information in the CED are not only accessible to the Commission and other EU institutions and bodies, but partly also to Member States administrations and third country organisations involved in EU funding¹⁰. These transfers are not specific to the implementation by REA of the EWS and were already assessed in the former EWS and CED cases of the EDPS¹¹.

Information given to data subjects

General information on the mere existence of the EWS: Under Article 19 of the REA procedure, data subjects are informed about the abstract possibility of inclusion in the EWS and the CED under certain circumstances by means of a clause 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 grants¹². Information regarding the EWS and the CED can be found on a Commission public website¹³, which also contains a specific privacy statement for the CED. A specific privacy statement relevant to Legal Entity and Bank Account Validation can also be found on a Commission public website¹⁴.

Information on the flagging of a particular data subject: Upon request of the registration of a W5a warning, the REA will inform the legal entity concerned of the request for registration,

¹⁰ Based on Commission Regulation (EC, EURATOM) No 1302/2008 of 17 December 2008 on the CED.

¹¹ See Case 2005-0120 for the EWS and case 2010-0681 for the CED.

¹² This clause (Annex 9 to the notification) reads as follows: "*The Commission and the executive agencies use an internal information tool (EWS), as well as a database available to public authorities implementing EU funds (CED) to flag identified risks related to beneficiaries of centrally managed contracts and grants with a view to protecting the EU's financial interests. Candidates, tenderers, grant applicants and, if they are legal entities, persons who have powers of representation, decision-making or control over them, are informed that, should they be in one of the situations mentioned in:...their personal details (name, given name if natural person, address, legal form and name and given name of the persons with powers of representation, decision-making or control, if legal person) may be registered in the EWS only or both in the EWS and CED, and communicated to the persons and entities listed in the above-mentioned Decision and Regulation, in relation to the award or the execution of a procurement contract or a grant agreement or decision. More information on the EWS and CED, can be found here: ...*".

¹³ http://ec.europa.eu/budget/explained/management/protecting/protect_en.cfm.

¹⁴ http://ec.europa.eu/budget/library/contracts_grants/info_contracts/privacy_statement_en.pdf.

modification and removal of such a warning. This obligation for the institution/body requesting the EWS warning is provided for by Articles 8(2) and 14(3)(a) of the EWS Decision.

For the remaining W1-W4 warning requests, no such obligation exists in the current EWS Decision and the REA does not inform the data subject concerned about the fact that he/she will be flagged in EWS. A natural person can, however, ask the Commission's Accounting Officer (DG BUDG) whether he/she is registered in the EWS. In this case, the Commission's Accounting Officer shall inform that legal/natural person concerned in writing, after having obtained confirmation from the REA that no restrictions under Article 20(1) of Regulation (EC) 45/2001 apply. According to the notifications, any restrictions to the rights of the data subject are not set up as a rule, and remain the exception. The Commission's Accounting Officer shall also attach the data stored in the EWS concerning that person (see Article 8(3) of the EWS Decision).

Rights of access and rectification

Art. 19 of the REA EWS Procedure (Article 8(2) of the EWS Decision) provides that the REA has the obligation to respond to requests from data subjects concerned to rectify inaccurate or incomplete personal data and to any other requests or questions from those subjects. According to the notification:

- any requests for blocking or erasing personal data on justified legitimate grounds are treated *within 15 working days* (beginning from the reception of the request);
- if applicable, the request will be transferred by the REA to the Commission responsible for the rectification of the EWS data;
- requests for blocking and/or erasure of the different categories of data will be evaluated on a case-by-case basis. The REA may decide that restrictions in blocking and erasure of data are applicable under Article 20(1) of Regulation (EC) 45/2001. In this case, the data subject shall be informed of the principal reasons on which the application of the restriction is based on and of his/her right to have recourse to the European Data Protection Supervisor.

Data conservation policy

The (maximum) time limits for which the REA can request an EWS warning or after which a flag shall be deactivated in the EWS are defined by Articles 10 to 14 of the EWS Decision and the Commission's EWS has been assessed in Case 2005-0120¹⁵. Therefore, this is an aspect derived directly from the Commission's practice on which the REA has no influence. Pursuant to the Common Commission Level Retention List (SEC(2007)970) point 4.2.3. "*Management of third party files (FEL/BAF) and EWS*", a retention period of five years after the file is closed applies to the REA request for flagging and the supporting documents (electronic and paper).

Security measures

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3. Legal analysis

3.1. Prior checking

¹⁵ See case 2005-0120 on the EWS.

Applicability of Regulation (EC) No. 45/2001 ("the Regulation")¹⁶: The notification relates to processing of personal data in the terms of Article 2(b) of the Regulation as it concerns any "*information relating to an identified or identifiable natural person*" pursuant to Article 2(a) of the Regulation. Although many entities listed in LEF are legal persons, the data included and processed in the framework of the EWS and CED warnings include data relating to natural persons either (i) in their capacity as an individual entity entered into the LEF and liable to be subject to an evaluation under the EWS, or (ii) if they have the powers of representation, decision-making or control in a legal person in LEF.

The Regulation applies to the processing of personal data by the REA (as Executive Agency) as it is carried out in the exercise of activities falling within the scope of EU law (Article 3(1) of the Regulation).

The processing of personal data with regard to the warnings in the EWS or CED is at least partially automated and if manually forms part of a filing system within the meaning of Article 3(2) of the Regulation. EWS warnings are entered and deactivated centrally by DG BUDG in the LEF, after receipt of a formal letter sent by the responsible authorising officer such as the one of the REA. This processing is thus electronic and manual, but the content is intended to form part of a filing system accessible according to specific criteria. The REA has electronic access to these databases. The Regulation therefore applies in accordance with Article 3(2).

Article 27(1) of the Regulation subjects to prior checking by the EDPS processing operations likely to present specific risks to the rights and freedoms of data subjects. Article 27(2) contains a list of processing operations likely to present such risks. Article 27(2)(d) sets out that "*processing operations for the purpose of excluding individuals from a right, benefit or contract*" should be subject to prior checking. The registration of a legal or natural person in the EWS and ultimately in the CED can lead notably to the exclusion from a contract or the granting of an award or to a refusal of a transfer of funds. The processing -including the preparations for an EWS flagging at the REA level- is therefore covered by Article 27(2)(d) and as such is subject to prior checking by the EDPS. A notification is also required on the ground of Article 27(2)(b) covering "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". The EWS is intended to evaluate notably the financial or professional conduct of a person and to this effect must be prior checked. Finally, given the fact that also information on alleged fraud or (suspected) offences might be processed, also Article 27(2)(a) may apply (processing of data relating to "*suspected offences, offences, criminal convictions or security measures*").

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 by the REA has already been established (the REA EWS Procedure dates of September 2010). The recommendations issued by the EDPS should however be fully implemented. As this is considered an ex-post notification, the two-month period within which the EDPS must deliver an Opinion pursuant to Article 27(4) of the Regulation does thus not apply to this notification, which has been treated on a best effort basis.

3.2. Lawfulness of the processing

¹⁶ Regulation (EC) No 45/2001 of the European Parliament and the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

Article 5 of the Regulation provides criteria for making processing of personal data lawful. One of the criteria provided in Article 5(a) of the Regulation 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) of the Regulation provides that personal data may be processed if the *"processing is necessary for compliance with a legal obligation to which the controller is subject"*.

Pursuant to the notification, the processing of personal data in the framework of the EWS by the REA and the REA EWS Procedure is supported inter alia by the following legal instruments adopted on the basis of the Treaties establishing the EU:

- Articles 106-109, 131 and 190 of the Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002;
- Article 50 of the Commission Regulation (EC) No 1653/2004 of 21 September 2004 on a standard financial regulation for the executive agencies pursuant to Council Regulation (EC) No 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes;
- Commission Decision C(2004) 193/3 of 03.03.2004 as last modified by the 2006 Internal rules (SEC(2006)131);
- Commission Decision of 16 December 2008 on the Early Warning System for the use of authorising officers of the Commission and the executive agencies (2008/969/EC, Euratom);
- Commission Decision of 17 June 2011 amending the Commission Decision of 16 December 2008 on the Early Warning System for the use of authorising officers of the Commission and the executive agencies (2011/C 180/06);
- Commission Regulation (EC, Euratom) No 1302/2008 of 17 December 2008 on the central exclusion database.

Article 108 of the Financial Rules (former Article 95 of the Financial Regulation) provides for the establishment of a database concerning candidates and tenderers who are in one of the situations described in Articles 106 and 107 of the Financial Rules (former Articles 93 and 94 Financial Regulation, i.e. W5a flags) only. The implementation of the EWS by the REA with regard to warning W5a and W1 to W4 (which are not provided for directly by the Financial Rules) is based on the EWS Decision, the Commission decision relating to the Early Warning System itself. As the Ombudsman stated in its Decision W1-4 and W5b warnings do not seem to have an explicit legal basis and thus could only derive as an implicit power based on Articles 317, 325 TFEU and Article 30 of the Financial Rules (former Article 27 of the Financial Regulation) and according to the Union Courts such implicit powers can only be exceptionally recognised to exist¹⁷. Furthermore, the General Court also found that the EWS Decision makes no reference to primary or secondary law expressly conferring on the Commission the power to create, carry out and manage a database relating to legal and natural persons suspected of representing a risk to the financial interests of the EU¹⁸. The EDPS takes

¹⁷ Case OI/3/2008/FOR, Decision of 6 July 2012, §§ 89-91.

¹⁸ See the order on admissibility in ongoing court proceedings; Order of the General Court of 13.04.2011, Case T-320/09, Planet v Commission, §§ 40+41 (upheld on appeal, see Case C-314/11P).

note of this but reserves its position on the sufficient legal basis of the EWS Decision as such¹⁹ which needs to be assessed when prior checking the revised EWS Decision²⁰ and the outcome of the on-going Court proceedings.

The delegation by the Commission to the REA established that the EWS Decision is binding upon the REA. These procedures have been adapted to the REA through a formally validated procedure, the internal REA EWS Procedure (REA/RB/SM I (2010)), which has been formally adopted in September 2010.

3.3. Processing of special categories of data

Among other data, the REA processes special categories of data related to the activation and the use of EWS flags as referred to in Article 10(5) of the Regulation ("*...data relating to offences, criminal convictions or security measures...*").

Such special categories of data may only be processed if it can be based on grounds pursuant to Article 10(5) of the Regulation. As described above, the processing activities concerning such special categories of data by the REA in the framework of EWS warnings are currently carried out on the basis of the Commission's EWS Decision as referred to above.

3.4. Data Quality

Article 4 of the Regulation sets out a number of obligations regarding the quality of personal data.

The data must be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). 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 3.8. below).

Personal data should be collected for "*specified, explicit and legitimate purposes*" (Article 4(1)(b) of the Regulation). This provision requires 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 and other rights and legitimate interests of the individuals concerned. The benefits of the processing of the data must be weighted against any possible adverse impact. It is in the legitimate interests of the institutions and bodies to set up and operate an EWS in order to preserve the financial interests and reputation of the EU. However, 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 rights and 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 points 3.7. 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) of the Regulation). The processed data described at the beginning of this Opinion should be regarded as satisfying these conditions. The data required are necessary for the proper functioning of the various stages of the procedure for the EWS. However, the REA shall carefully consider the necessity of communicating detailed information on the reasons for the flagging of an entity when requesting an EWS flag in ABAC, as these reasons might be confidential (as explicitly stated

¹⁹ See also EDPS Opinion in case 2012-0823.

²⁰ See Ombudsman case summary "Commission agrees to modify the Early Warning System", <http://www.ombudsman.europa.eu/en/cases/summary.faces/en/11799/html.bookmark>.

in the form for an EWS request as an exception with regard to the required information to be filled in).

Under Article 4(1)(d) of the Regulation, data must be "*accurate and, where necessary, kept up to date*". Furthermore, "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified*".

As described above, the procedure leading to a REA request for flagging an entity in the EWS requires that numerous persons within the REA are involved in order to assess the justification of such a flagging in more detail. The EDPS would like to point out that the REA is not only responsible for requesting the activation of flags but also for requesting their deactivation as soon as possible in order to safeguard that data is accurate and up to date.

The EDPS notes that Article 15 of the REA EWS Procedure stipulates in this respect that "*The REA EWS Officer coordinates, in close cooperation with the operational units, a regular monitoring of warnings initiated by the REA. The main purpose of this monitoring is to ensure timely deactivation of warnings W1c, W1d and W2b and follow-up on the contradictory procedures related to provisional registrations of W5a warnings. This may imply, where appropriate, (1) to request the modification of warnings before their automatic expiry, (2) to request the removal of the warning when the justification for the warning can no longer be maintained or (3) to initiate Commission Decisions on the duration of warnings and/or penalties*".

The right of access as provided by Article 13 of the Regulation should serve to guarantee the quality of data. This will be further discussed below (see 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 different periods for which the EWS warning remains active are determined by the EWS Decision (and the EWS as such is not subject to this Opinion)²¹. These periods must be differentiated from the time during which relevant data are kept by the REA.

Under the Commission Common Retention List, the REA keeps all data it processed for requests of an EWS warning for a duration of 5 years after the file has been closed, time period in line with Article 136 of the Financial Rules and Article 48 of the Commission Delegated Regulation²². The latter article makes an explicit reference to the fact that "*personal data contained in supporting documents shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes*". The EDPS has not enough evidence to assess the justification of a five years conservation period for all the documents related to an EWS request until the final financial transaction. The EDPS notes in this context that the five year retention period for keeping the paper and electronic documents containing personal data related to the EWS warning should be calculated as from the time

²¹ See Case 2005-0120 for the EWS and case 2010-0681 for the CED.

²² Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union.

the EWS warning was deactivated²³. The EDPS therefore recommends reconsidering the data retention period.

3.6. Transfer of data

Article 7 of the Regulation applies to all transfers of personal data between EU institutions or bodies or within the same institution and stipulates that *"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 case of fraud, OLAF will be informed²⁴. As regards the transfers made in the context of the EWS procedure the EDPS notes that the REA EWS request form (annex 2 of the notification) contains a disclaimer: *"I certify that the information communicated was established **and transmitted in accordance with Regulation (EC) No 45/2001 of the European Parliament and of the Council concerning the protection of personal data**"* (emphasis added).

The EDPS considers that the data transferred as described above are in principle necessary for the tasks covered by the competence of the recipients mentioned and thus Article 7 of the Regulation is respected.

Further access to and transfers with regard to the EWS or CED have been assessed in the EDPS prior checking cases of the EWS and CED respectively²⁵.

3.7. Rights of access and rectification

Article 13 of the Regulation establishes a right of access and the arrangements for exercising it upon request by the data subject. It encompasses the right to be informed that information relating to him/her is processed by the controller and to obtain the communication of such data in an intelligible form. This is based on the need to respect the right to be heard and 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 under point 3.4. Although in most cases leading to a warning in the EWS, the data subjects may be aware of the facts leading to such a warning (e.g. on-going criminal proceedings), this does not mean that they should not be granted access to the information contained in the system which relates to them.

Pursuant to the EWS Decision, there exists only a right to request information from the Commission's Accounting Officer if a natural person is registered in the EWS (Article 8(3) of the EWS Decision). The Accounting Officer shall consult the service that requested the warning (in this case the REA) if the information can be communicated to the person concerned or if any of the restrictions laid down in Article 20(1) of the Regulation applies.

As elaborated further under point 3.8. below, with the exception for W5a requests for exclusion where a contradictory proceeding is held beforehand, data subjects are not actively informed by the REA or the Commission in case an EWS warning is issued for them or an entity for which they have powers of legal representation, decision-making or control. However, in the EDPS' view, without knowledge about their personal data being processed in the EWS through flagging, data subjects are not able to exercise their rights of access to or rectification of their personal data properly. The right of access is established under the Regulation and cannot be restricted other than for reasons mentioned in Article 20 of the

²³ Rather than as from the final financial transaction with the entity (which might be years after the deactivation).

²⁴ Processing with regard to OLAF's activities is not part of this Opinion.

²⁵ See Case 2005-0120 for the EWS and case 2010-0681 for the CED.

Regulation. The EDPS questions if the rights of the data subjects are adequately safeguarded in the current legal situation and refers to its recommendations under point 3.8. below.

Article 20 of the Regulation provides for certain restrictions on the obligation of the controller to give access, rectify or 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"*.

For instance, there might be reasons to restrict the right of access as well as to the right of information of the data subject concerning data of informants on alleged risks to the EU budget (e.g. fraud) where an investigation is at an early stage and informing the person concerned would prejudice the investigation (Article 20(1)(a) of the Regulation). It might also be justified to protect the personal data of the informant pursuant to Article 20(1)(c) of the Regulation in order to protect the rights and freedoms of others and to provide only partial access to the data subject concerned by the EWS warning. According to Article 20(1)(b) of the Regulation it may be necessary to restrict access or information in order to safeguard the financial interests of the EU. However, the restrictions to a fundamental right cannot be applied systematically. Indeed, as foreseen in Article 20 of the Regulation, the measure has to be "necessary". This requires that the "necessity test" has to be conducted on a case-by-case basis. Given the important consequences for entities flagged in EWS, these restrictions should be applied narrowly.

Should any of the restrictions of Article 20(1) of the Regulation be invoked, Article 20(3) of the Regulation has to be considered and respected by the REA: *"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 3.8.). 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) of the Regulation). Article 20(5) of the Regulation establishes that *"Provision of the information referred to under paragraphs 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect"*.

Article 14 of the Regulation provides the data subject with a right to rectify inaccurate or incomplete data without delay. Given the sensitivity, in most cases this right is of a key importance, in order to guarantee the quality of the data used, which, in this specific case, is connected to the right to be heard/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.

Article 8(2) of the EWS Decision and Article 19 of the REA EWS Procedure provide an obligation for the REA in case it has requested an EWS warning to respond to requests from data subjects concerned to rectify inaccurate or incomplete personal data. This concerns both personal data contained in REA's paper and electronic files for the preparation of an EWS request as well as personal data contained in the EWS. However, the REA EWS Procedure does not contain any detailed provisions on the procedure for rectifying or erasing personal data in REA's electronic or paper files and, according to the notification, requests for blocking or erasing personal data are treated by the REA within 15 working days (there are no time limits mentioned for requests vis-à-vis the Commission). The EDPS therefore recommends that the REA EWS Procedure should provide more detailed provisions on such

procedure and time limits in response to such requests for rectification or erasure in the EWS vis-à-vis the Commission as well as the obligation for REA to rectify incorrect or no longer justified data *without delay*.

3.8. Information to the data subject

The Regulation states that data subjects must be informed of the processing of data relating to him/her and lists a range of compulsory items of information which must be provided (notably identity of the controller, categories of data concerned, purposes of processing, recipients, whether replies to the questions are obligatory or voluntary, origin of the data, right of access). Furthermore the data subject must be informed about its rights of access and rectifications of his/her personal data. Insofar as such information is necessary to guarantee the fair processing, additional information has to be supplied regarding the legal basis, time-limits and the right to have recourse at any time to the EDPS.

Some information used during the analysed processing stems from the data subject (in particular via the ABAC Legal Entity File) but was provided for the purposes of the LEF. Some personal data are nevertheless coming from other sources (notably the information on the reasons for the flagging can come from other Commission or REA services, etc.). Thus both Articles 11 and 12 of the Regulation apply in this case. With regard to personal data provided by the data subject, the information pursuant to Article 11 should be provided to him/her at the time of collection of data (i.e. at the latest when filling in the LEF). In the case of processing of personal data received from other sources, the data subject should be provided with the information pursuant to Article 12 at the time of recording of the data or if a disclosure to a third party is envisaged, no later than the moment when data are disclosed (i.e. at the time the REA wants to request a warning unless any of the exemptions of Article 20 of the Regulation apply).

A distinction should be made here as concerns (1) general information on the processing of personal data in the EWS and (2) specific information to be given to data subjects which are object of a warning flag.

3.8.1. General information on the mere existence of the EWS

With regard to the general information on processing in the EWS, Article 8(1) of the EWS Decision provides an obligation for the REA as the AOD to inform in the calls for tender and proposals and, in the absence of such calls, before awarding contracts or grants, third parties of the data concerning them that may be included in the EWS and of the entities to which the data may be communicated.

There are two situations where the REA would be responsible to provide the relevant information to the data subjects: (1) calls for tender (procurement proceeding) as well as calls for proposals (grant award) and (2) other contracts.

1) Procurement proceedings and grant awards

For procurement proceedings and grant awards, the REA clause inserted in the calls for tender or the call for proposal under Article 19 of the REA EWS procedure inform candidates that their personal data may be registered in the EWS or CED by the

Accounting Officer of the Commission. These documents provide furthermore links to the Commission's website of DG BUDG with more detailed information on the EWS and the CED. However, REA clause inserted in the calls for tender or the call for proposal under Article 19 of the REA EWS procedure does currently not contain all the relevant information under Articles 11 or 12 of the Regulation on the processing with regard to the EWS. In the EDPS' view in this context and at this early stage of calls for tender or proposals, it is sufficient for the REA to provide a short summary and refer candidates to the Commission's website for further information. However, the information on the Commission's website does not seem to provide complete information in line with Articles 11 and 12. Data subjects thus currently do not receive all the information as requested by the Regulation.

The links to the Commission's website notably refer to the LEF documents to be filled in by successful candidates and the Privacy Statement for the LEF as well as to the general information on the EWS and on the CED on BUDGWEB including a specific privacy statement for CED. The EDPS notes that the Commission does currently not provide for a specific privacy statement for the EWS (only for the CED). Also, the LEF privacy statement seems to be incomplete and does not provide any direct information with regard to the possible processing of the personal data provided in the LEF in the EWS.

In the EDPS' view, at the latest at the stage of filling in the LEF, the selected candidates/contractors should be given the complete information with regard to possible processing of his personal data pursuant to Articles 11 and 12 of the Regulation. If a candidate will enter into financial relations with the EU (and thus could potentially be included in the EWS), the candidate will be invited to fill in the LEF. The LEF as such as well as the privacy notices with regard to the LEF are managed by the Commission/DG BUDG. The LEF forms to be filled in by successful candidates/contractors contain a link to the LEF privacy statement. The Privacy Statement for the LEF of the Commission currently does not contain direct information on the EWS and the CED (but only rather indirectly who has access to LEF) and is thus not complete. This should thus be better clarified by the Commission in the LEF Privacy Statement in order to be in line with Articles 11 and 12 of the Regulation.

Furthermore on the DG BUDG website there should also be a privacy statement for the EWS (not only for the CED) to provide the complete information under Articles 11 and 12 of the Regulation.

DG BUDG is in charge of managing the LEF and the specific privacy statements for LEF, EWS and CED. The procedures of the Commission with regard to LEF and the EWS are, however, not subject to this Opinion and shall be covered in a future specific EWS Opinion by the EDPS on the issue once the EWS Decision will be revised. The EDPS therefore reserves its position in this respect and will follow this up directly with the Commission who is in charge of the management of the EWS and the LEF²⁶.

In addition, the EDPS recommends that the REA includes such general information and a link to the general EWS and CED information on the Commission's website also in the REA clause inserted in the calls for tender or the call for proposal under

²⁶ See also EDPS Opinion in case 2012-0823.

Article 19 of the REA EWS procedure. This clause should include information about who will have access to information relating to EWS.

2) Other cases

Article 19 of the REA EWS Procedure states that in the absence of a calls for tenders or proposals, before awarding contracts or grants, third parties shall be informed about the data concerning them that may be included in the EWS and of the entities to which the data may be communicated. The data subject would again be informed about the EWS when filling in the LEF as described above. In this respect, the EDPS also notes that utmost efforts should be taken to inform not only the legal entities about possible processing of personal data but also identified or identifiable natural persons concerned within the legal entity (see below).

For all above situations, where third parties are legal entities, pursuant to Article 8(1) EWS Decision, the information pursuant to Articles 11 and 12 of the Regulation needs to be given in particular also to the natural persons who have powers of representation, decision-making or control within these entities unless this proves impossible or involve a disproportionate effort pursuant to Article 12(2) of the Regulation. The EDPS recommends in this respect that the REA also informs such natural persons having powers of representation, decision-making or control within a legal entity (e.g. in the cover letter when sending out the LEF form to the respective legal entity).

3.8.2. Information on the flagging of a data subject

The information on the reasons for a warning in the EWS will in general not be obtained directly from the data subject but from other sources. The Regulation requires in such situation that data subjects whose personal data are being processed should be in principle individually informed at the latest at the time that their data is recorded or disclosure is envisaged to a third party pursuant to Article 12 of the Regulation. Even though for many EWS warnings the person concerned may be aware of the factual reasons for a flagging (e.g. of on-going court proceedings concerning them), this does however not imply that he/she is also aware of the issuance of a warning in the EWS against him/her. The absence of such information will have different consequences according to the status of the procedure and the interests at stake. In order to be able to exercise their right of defence and their rights as data subjects pursuant to the Regulation (such as access or rectification), data subjects should be informed about the fact that a warning is issued for them in the EWS and the reasons for that.

The EDPS notices that, based on the EWS Decision as well as on the REA EWS Procedure, information is only systematically given to data subjects if a W5a warning flag is issued (i.e. when an entity is excluded from further funding/payments for which a contradictory procedure is provided for). For all other warnings (W1-W4) neither the REA nor the Commission provide any information to the data subject proactively. However, any natural person has the right pursuant to Article 8(3) of the EWS Decision to enquire at the Commission's Accounting Officer if it is listed in the EWS. But there is no active obligation to provide this information pursuant to the EWS Decision.

The EDPS takes note that the REA implements the EWS Decision in its current form, to which it is bound by the Commission Delegation Act, which does not explicitly provide for such obligation for the AOD. However, the REA's obligation to inform data subjects can be directly based on Article 12 of the Regulation. In this respect, the EDPS recommended in case 2005-0120 on the Commission's EWS, that in particular natural persons whose personal data is included in the EWS (on the basis of any type of warning, W1 to W5) shall be informed

individually of the issuance of a warning against them in order for them to be able to exercise their rights pursuant to the Regulation (unless an exemption pursuant to Article 20 of the Regulation applies).²⁷

The EDPS therefore recommends that the REA reconsiders its approach and gives data subjects information if their personal data is processed in the framework of issuing an EWS warning for all categories of warnings (W1 to W5) on the basis of Articles 11 and 12 of the Regulation.

In the light of these considerations with regard to the right of defence, the Commission or the REA can limit the right of information only in specific cases pursuant to Article 20 of the Regulation. Any restriction to the right of information, 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 and should be the exception rather than the rule.

3.9. Security measures

...

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation (EC) No. 45/2001, provided the following recommendations are fully taken into account. The REA should:

- carefully consider the necessity of communicating the details on the reasons for flagging to the Commission for each case taking into account confidentiality restrictions as indicated in the request form;
- reconsider the necessity of the duration of the conservation period for EWS related documents held by the REA;
- include more detailed provisions on the procedure for rectifying or erasing personal data in the REA EWS Procedure, provide for time limits in response to such requests for rectification or erasure in the EWS vis-à-vis the Commission as well as the obligation for REA to rectify incorrect or no longer justified data *without delay*;
- include general information on the EWS also in the REA clause inserted in the calls for tender or the call for proposal under Article 19 of the REA EWS procedure;
- ensure that data subjects are fully informed about the processing of their personal data with regard to the EWS pursuant to Articles 11 and 12 of the Regulation at the latest when filling in the LEF and that references to the Commission's information on the EWS are complete;
- inform data subjects if their personal data is processed in the framework of an EWS warning for all categories of warning (W1 to W5), in particular when a warning shall be issued, on the basis of Articles 11 and 12 of the Regulation unless an exemption of Article 20 of the Regulation applies;
- apply any restriction to the rights of access, rectification and information narrowly;

²⁷ Informing the data subjects concerned is also in line with the findings and recommendations of the Ombudsman in its inquiry of the Commission's EWS who found that in order for the right to be heard to be respected, persons concerned should be given the opportunity to comment on the evidence to be used in a measure adversely affecting them before that measure is taken; Case OI/3/2008/FOR, Decision of 6 July 2012.

- implement adequate security measures as described above.

Done at Brussels, 22 July 2014

(signed)

Giovanni BUTTARELLI
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