

NOTIFICATION FOR PRIOR CHECKING

DATE OF SUBMISSION: 8 AUGUST 2006

CASE NUMBER: 2006-397

NOTIFICATION OF: EUROPEAN COURT OF JUSTICE

LEGAL BASIS: ARTICLE 27-5 OF THE REGULATION CE N° 45/2001⁽¹⁾

INFORMATION TO BE GIVEN²

1/ NAME AND ADDRESS OF THE CONTROLLER

THE ACCOUNTING OFFICER OF THE COURT OF JUSTICE
OF THE EUROPEAN COMMUNITIES,
L-2925 LUXEMBOURG

2/ ORGANISATIONAL PARTS OF THE INSTITUTION OR BODY ENTRUSTED WITH THE PROCESSING OF PERSONAL DATA

Budget and accounting Division; Personnel and Finance Directorate

3/ NAME AND DESCRIPTION OF THE PROCESSING

Early Warning System (EWS)

According to Article 95 of the financial regulation applicable to the general budget of the European Communities (hereafter "FR"), each institution shall establish a central database containing details of candidates and tenderers (hereafter third parties) who are in one of the cases of exclusion provided for in Articles 93 and 94. Each institution shall have access to the databases of the other institutions. The present notification envisages the access to the database of the Commission by the Court of justice of the European communities as well as the updating of that

¹ OJ L 8, 12.01.2001.

² Please attach all necessary backup documents

database by the Court of justice upon transmission to the Accounting officer of the Commission the details of exclusions made by the Court of justice in the framework of Articles 93 and 94 of the FR.

Article 93 of the FR sets out an obligation to exclude third parties from participation in a procurement procedure where they are in one of the situations listed in Article 93 of the FR. The situations include cases where the third party:

- Is bankrupt or being wound up, having his/her affairs administered by the courts, having entered into an arrangement with creditors, having suspended business activities, being the subject of proceedings concerning those matters, or being in any analogous situation arising from a similar procedure provided for in national legislation or regulations (Art.93(1)a FR);
- Has been convicted by a judgement having the force of *res judicata* for an offence concerning his professional conduct (Art.93 (1)b FR);
- Has been guilty of grave professional misconduct proven by any means which the Authorising Officer can justify (Art. 93 (1)c FR);
- Has not fulfilled obligations relating to the payment of social security contributions/taxes in accordance with the legal provisions of the country in which he/she is established or with those of the country where the contract is to be performed (Art. 93 (1)d FR);
- Has been convicted by a judgement having the force of *res judicata* for fraud, corruption, involvement in a criminal organisation or any other illegal activities detrimental to the Communities' financial interests as defined under Article 133(3) IR (Art. 93(1)e FR);
- Has been declared to be in serious breach of contract for failure to comply with contractual obligations following another procurement procedure or grant award procedure financed by the Community budget (Art 93(1)f, FR).

Article 94 of the FR establishes that contracts may not be awarded to third parties, who during the procurement procedure:

- (a) Are subject to a conflict of interest;
- (b) Are guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the contract procedure or fail to supply this information.

Article 96 of the FR further establishes that administrative or financial penalties may be imposed by the contracting authority on third parties who are in one of the cases of exclusion provided in Articles 93 and 94 of the FR, after they have been given the opportunity to present their observations. These penalties may consist:

- (a) In the exclusion of the third party concerned from contracts and grants financed by the budget, for a maximum period of five years;
- (b) In the payment of financial penalties by the contractor in the case referred to in Article 93(1) (f) of the FR and by the third party in the cases referred to in Article 94 of the FR where they are really serious and without exceeding the value of the contract in question.

The penalties imposed shall be in proportion to the importance of the contract and the seriousness of the misconduct.

The table included in Annex 1 shows the possible duration of exclusions accorded by the Commission.

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

The procedure designed to exchange information between the Court of Justice and the Commission and vice-versa is described below.

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

Accounting Officers of all participating institutions provide the Commission with information on the cases of exclusion under Articles 93, 94 and 96 of the FR as encountered in their institution. This information is transmitted using the form included in Annex 1 accompanied by all relevant supporting documents for analysis by the Commission 'services', (i.e. sent by the Accounting Officer of the relevant institution to the Commission's Accounting Officer for registration in the database of the Commission).

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

i) Use of the database of the Commission by the administration of the Court of justice:

- Every time that a third party is involved in a procurement procedure or in the framework of a certain contract or procurement procedure to be awarded by the Court of justice, the AOSD of the Court of justice submits to the Accounting officer of the Court of justice a standard form (see Annex 2) that includes the relevant details ;
- Upon reception of the completed form by the Accounting officer it is compared with the details included in the latest list received from the Commission (which is provided through an encrypted file transmitted by e-mail. The password is transmitted separately upon request of the accounting officer of the Court of justice.

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

consulting the relevant Commission services of the reason for the inclusion of the third party on the list and so decide on the appropriate action to take (to exclude the third party from participating or to avoid awarding the contract to this party) and, if necessary, to impose the sanctions authorised by Article 96 of the FR. The AOSD of the Court of justice is also informed if the third party is not included on the list. In both cases the information should be provided within a week of the reception of the request from the AOSD of the Court of justice.

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

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

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

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

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

For all exclusions, a warning is entered into the system. However, in case of exclusions from the award of a contract in accordance with Article 94 of FR shall be merely registered for information, without activation of the warning (the inclusion in the database of the Commission is linked to the situations described under article 93 of the FR which are much more serious and dangerous for the financial interests of the institutions than those related to Article 94 of the FR. By being under Article 93 the third party is automatically excluded from the participation in a procurement procedure while in the case of Article 94 it is excluded from the award but not from participating in it.

The duration of storage in the Commission central database is the following (see Annex 1):

- Registrations of exclusions from participating in a contract procedure in accordance with Article 93 (1) a, b, d and e of the FR are based on a decision adopted by a national Court or Tribunal. Therefore the duration of storage in the Commission database is in line with such decision and follows the duration of criminal records under national law;

- The application of Article 93 (1) c and f of the FR requires an assessment by the Authorizing officer by delegation (AOD). Therefore, registration in the Commission database is subject to a prior adversarial procedure. After having heard the person concerned, in case the AOD considers that one of the situations of Article 93(1) c and f is present, registration is introduced for a period of three months. This period is renewable, pending a possible decision by the AOD on exclusion in application of Article 96 FR.

In the case of the Court of justice it is the AOSD who proposes to the Commission the precise duration of the storage. In order to give the same treatment to a third party in respect of the timing proposed by the Commission under Annex 1, the AOSD of the Court of justice will take into consideration that situation before proposing the exact duration of the storage.

Every time a third party is included in the database of the Commission following one of the situations described under Articles 93 and 94 of the FR, the AOSD of the Court of justice is obliged to introduce in the corresponding personal file related to that third party a copy of the notification made by the Accounting officer of the Court of justice.

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

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

4/ PURPOSE OR PURPOSES OF THE PROCESSING

The main objective is to avoid that a third party excluded from participation in a procurement or award procedure by the Commission can participate in a procurement or award procedure with the Court of justice and vice versa. This objective can be attained by comparing the details of third parties included in the database created by the Commission following Article 95 of the FR (third parties who are in one of the situations described in Articles 93 and 94 of the FR), with the details of third parties provided by the AOSD of the Court of justice.

The processing ensures that restricted information concerning third parties who could represent a threat to the Communities' financial interest and reputation or to any fund administered by the Communities is used in a targeted manner. This prevents the Commission or the Court of justice from entering a contractual/conventional relationship with these third parties.

5/ DESCRIPTION OF THE CATEGORY OR CATEGORIES OF DATA SUBJECTS

Third parties included in the database of the Commission or those to be included by AOSDs of the Court of justice upon notification to the Accounting officer of the Commission (including natural persons with powers of representation, decision making or control over given legal persons).

6/ DESCRIPTION OF THE DATA OR CATEGORIES OF DATA (*including, if applicable, special categories of data (Article 10) and/or origin of data*).

Full name (Surname and first name in case of natural persons with powers of representation, decision making or control over given legal persons)

Legal form

Full address

Additional information, if available, [for example VAT identification number or other national identification numbers for taxes, social security (in case of a legal person) and number of the identity card or passport in case of a natural person].

The cause of exclusion is not included in the information received from the database of the Commission. Therefore the AOSD of the Court of justice should contact the contact person at the Commission before taking a decision.

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

7/ INFORMATION TO BE GIVEN TO DATA SUBJECTS

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

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

8/ PROCEDURES TO GRANT RIGHTS OF DATA SUBJECTS

Data subjects can review the data recorded as noted under previous sections.

9/ AUTOMATED / MANUAL PROCESSING OPERATION

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

The process continues by comparing two items: the request made by the AOSD of the Court of justice containing the details of third parties selected under a procurement procedure (see Annex 2) and the information contained in the file received from the Commission. The internal procedure at the Court of justice for the transmission of the information from the AOSD to the accounting officer is based on a paper transmission through the normal mail system. The comparison can be made through an automated processing operation as it is feasible to search data inside the received file using the functionality "search or find".

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

10/ LEGAL BASIS AND LAWFULNESS OF THE PROCESSING OPERATION

Articles 93, 94, 95 and 96 of Council regulation (EC Euratom) N° 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

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

Article 5 (b) of Regulation (EC) N° 45/2001 of the European Parliament and of 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.

In addition the possibility of using the central database of the Commission and vice versa has been adopted by the Commission through the Commission internal Decision on the EWS (C(2004)193/3 as last modified by the 2006 internal rules – SEC(2006)131).

11/ THE RECIPIENTS OR CATEGORIES OF RECIPIENT TO WHOM THE DATA MIGHT BE DISCLOSED

CONTROLLER:

The Accounting officer of the Court of justice is the contact point for the reception of the encrypted EWS files from the Commission and an administrator from the Budget and Accounts division of the Court of justice is responsible for cross checking the information received from the AOSDs of the Court of justice with the data received from the Commission.

RECIPIENTS:

AOSDs of the Court of justice (only receive confirmation that the third party is already included in the database of the Commission as well as the name of the contact person at the Commission) and the Accounting officer of the Commission who receives all the details requested by him through the form included in Annex 1. Recipients are the natural persons or organisations to whom personal data may be disclosed. It could also be necessary to list the following categories of standard (potential) recipients:

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

12/ GENERAL INDICATION OF THE TIME LIMITS

FOR BLOCKING: up to five years following the final decision by the AOSD on the active registration of the third party in the database of the commission (in case of exclusions in accordance with article 93 (1), c and f it is envisaged an adversarial procedure which gives rise to active registration for a period of three months renewable pending a possible decision by the AOSD on exclusion in application of article 96 of the FR).

AND/OR

FOR ERASING: UPON RECEPTION FROM THE COMMISSION OF THE NEXT ENCRYPTED FILE THE PREVIOUS ONE IS DELETED (the encrypted files from the Commission are provided on a monthly basis).

OF THE DIFFERENT CATEGORIES OF DATA (Please, specify the time limits for every category, if applicable)

13/ HISTORICAL, STATISTICAL OR SCIENTIFIC PURPOSES

If you store data for longer periods than mentioned above, please specify, if applicable, why the data must be kept under a form which permits identification.

NOT APPLICABLE

14/ PROPOSED TRANSFERS OF DATA TO THIRD COUNTRIES OR INTERNATIONAL ORGANISATIONS

NOT APPLICABLE

15/ THE PROCESSING OPERATION PRESENTS SPECIFIC RISK WHICH JUSTIFIES PRIOR CHECKING
(Please describe):

AS FORESEEN IN:

Article 27.2.(a) In accordance with Article 93 (1) b and e of the FR

Processing of data relating to health and to suspected offences, offences, criminal convictions or security measures,

Article 27.2.(b) In accordance with Article 93 (1) c, d and f of the FR

Processing operations intended to evaluate personal aspects relating to the data subject,

Article 27.2.(c)

Processing operations allowing linkages not provided for pursuant to national or Community legislation between data processed for different purposes,

16/ COMMENTS

PLACE AND DATE: LUXEMBOURG, 26 JULY 2006

DATA PROTECTION OFFICER: MARC SCHAUSS

Institution or body: Court of justice of the European Communities