

(To be filled out in the EDPS' office)
REGISTER NUMBER: 899

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NOTIFICATION FOR PRIOR CHECKING

DATE OF SUBMISSION: 24/09/2012

CASE NUMBER: 2012-0823

INSTITUTION: EUROPEAN RESEARCH COUNCIL EXECUTIVE AGENCY (ERCEA)

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

INFORMATION TO BE GIVEN

1/ NAME AND ADDRESS OF THE CONTROLLER

PABLO AMOR

DIRECTOR

EUROPEAN RESEARCH COUNCIL EXECUTIVE AGENCY (ERCEA)

COV2 24/130

PLACE ROGIER 16, 1210 BRUSSELS

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

The Director of the ERCEA in cooperation with the ERCEA Chief Accountant (CAO)

3/ NAME OF THE PROCESSING

ERCEA Use of the Early Warning System (EWS)

4/ PURPOSE OR PURPOSES OF THE PROCESSING

¹ OJ L 8, 12.01.2001.

The general use and architecture of the Early Warning System have been notified by the European Commission to the EDPS (DPO-872.4 notification (EWS) and prior checked by the EDPS, case no. 2005-120). The present notification refers to the use of the EWS which is specific to the ERCEA.

The purpose of EWS warnings and the CED (Central Exclusion Database) is to inform the various services of the Commission, including the Executive Agencies, that third parties with whom the Commission and its services have or are likely to have financial relations are suspected of or have been confirmed of having committed fraud or serious administrative errors or irregularities, and to incite them to take the appropriate measures to protect the financial interests of the European Union.

The system tries to avoid that a possibly fraudulent third party can participate in a procurement, award or granting procedure of the Agency. 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.

5/ DESCRIPTION OF THE CATEGORY OR CATEGORIES OF DATA SUBJECTS

All individuals who have been registered via the Legal Entity File as well as natural persons with powers of representation, decision-making or control over given legal persons and who were included in the database of the Commission, including those notified by the AOSDs (Authorising Officers by Sub-Delegation) of the Agency to the Accounting Officer of the Commission.

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

*** Identification data:**

- names and addresses (including email addresses) and other contact data, if any and
- telephone numbers of the informant, the person requesting the warning to be registered and/or the individuals who have been registered
- function of the person requesting the warning to be registered

*** Other data:**

- type of EWS warning
- start and end date of the warning
- service of the Agency that has requested the EWS flag to be set,
- contact person in this service of the Agency,
- reference(s) of the service that requested the warning
- reasons for the warning request, if not confidential

7/ INFORMATION TO BE GIVEN TO DATA SUBJECTS

- An acknowledgment of receipt to the informant (except if the claim is made anonymously) is provided for each notification/claim.

- Section 5 of the ERCEA's EWS procedure provides that: *"In the calls for tender and calls for proposals and, in the absence of calls, before awarding contracts or grants, the AOD [Authorising Officer by Delegation] responsible or his staff shall inform 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. A privacy statement is mentioned in the contracts and invitations to tender. Where third parties are legal entities, the AOD responsible or his staff informs the persons who have powers of representation, decision-making or control within these entities. (see annexes 1 to 6, the notification on ERCEA public procurement, which will be notified to the EDPS for prior checking soon and the notification on IDEAS - Proposals Evaluation and Grants Management, which the EDPS for prior checked under case no. 2011-845.*

- In the context of a procurement process or a call for proposals, data subjects participating in the tender or call are informed that their personal data may be used by the Agency, not only for internal purposes related to the procurement process or call for proposals, but also communicated to other institutions in the context of Articles 93 and 94 of the Financial Regulations (FR) with the purpose of being included in the database of the Commission as foreseen by Article 95 of the FR. Thereby data subjects are informed of the possibility of being excluded from the participation in the procurement process or excluded from the award of a contract, if information on them is included in the [CED] database of the Commission.

For further details, see notification DPO 12-2012 (which will be notified to the EDPS for prior checking soon) on Public Procurement, Contracts and SLAs, and the following links to the model grants agreement:

- <http://erc.europa.eu/sites/default/files/content/erc-guide-for-applicants-starting-grant-2013-call.pdf>

- http://erc.europa.eu/sites/default/files/document/file/erc_guide_for_applicants_advanced_grant_2013_call.pdf

- The ERCEA's EWS procedure also establishes rules for the relations between the initiating Agency service and the data subject. The ERCEA as the service that requested the registration of an EWS warning is responsible for the relations with the natural or legal person whose data are introduced into the EWS (hereinafter 'the data subject concerned'). It shall

(a) *"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;"*

(b) *"respond to requests from data subjects concerned to rectify inaccurate or incomplete personal data and to any other requests or questions from those subjects."*

- The ERCEA Guide for Applicants (annex 7) informs potential candidates that the registration of a legal entity includes a check of the Commission's EWS and CED databases and that negative findings might lead to a registration in the database:

"To protect the EU's financial interests, the Commission uses an internal information tool, the Early Warning System (EWS), to flag identified risks related to beneficiaries of centrally managed contracts and grants. Through systematic registration of financial and other risks the EWS enables the Commission services to take the necessary precautionary measures to ensure a sound financial management.

EWS registrations are not publicly disclosed. However, registrations will be transferred to the Central Exclusion Database (CED) if they relate to entities that have been excluded from EU funding because they are insolvent or have been convicted of a serious professional misconduct or criminal offence detrimental to EU financial interests. The data in CED are available to all public

authorities implementing EU funds, i.e. European institutions, national agencies or authorities in Member States, and, subject to conditions for personal data protection, to third countries and international organisations.

The Work Programme informs you that the details of your organisation (or those of a person who has powers of representation, decision-making or control over it) may be registered in the EWS and the CED and be shared with public authorities as described in the relevant legal texts. More information on the EWS and CED can be found here:

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

8/ PROCEDURES TO GRANT RIGHTS OF DATA SUBJECTS

(Rights of access, to rectify, to block, to erase, to object)

- For data subject requests concerning an W5a warning within the Agency the ERCEA's EWS procedure specifies in section 5:

"The service that requested the registration of a EWS warning shall be responsible for the relations with the natural or legal person whose data are introduced into the EWS (hereinafter 'the data subject concerned'):

(a) 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;

(b) it shall respond to requests from data subjects concerned to rectify inaccurate or incomplete personal data and to any other requests or questions from those subjects."

- The ERCEA's EWS procedure also contains information on requests directed to the ERCEA from within the Commission and general rules concerning the removal of warnings from the EWS, both applicable also to warnings notified by the ERCEA's services (see section 5 of the EWS procedure and the Commission prior checking notification, case no. 2005-120):

"A duly identified natural person can request from the Accounting Officer of the Commission information on whether s/he is registered in the EWS, who may direct the data subject to the contact person in the institution concerned. Subject to the decision of the service that requested the registration of the EWS warning on whether restrictions laid down in the Data Protection Regulation apply, the Accounting Officer informs the person in writing or by electronic means whether s/he is registered in the EWS."

9/ AUTOMATED / MANUAL PROCESSING OPERATION

1. General information

The ERCEA Authorizing Officer, in order to ensure protection of the EU's financial interests, uses the Early Warning System. The ERCEA has approved an "ERCEA EWS procedure", which is based on the Commission's (DG RTD) EWS procedure, information available on BUDGWEB, and on the Commission's legal framework related to the subject.

The Commission in notification DPO-872.4, which has been prior checked by the EDPS (case no. 2005-120), already notified the *Registering of a Data Subject in the general Early Warning System (EWS)* and in this notification explains the general features of the system.

What differs from one institution to another is the interaction and handling of EWS data of beneficiaries within the organisation(s). The notification at hand therefore only specifies the internal rules of the ERCEA.

On the one hand, the ERCEA can consult the EWS/CED databases. Consultation is standardised for Executive Agencies (automatic availability of data through ABAC).

On the other hand, the ERCEA can notify EWS warnings to the Accountant of the Commission. Such notification is also standardised (pre-defined form, see annex 3).

The Agency can consult all five categories of EWS warnings (W1 to W5) and their sub-categories, see annex 1 to the notification and articles 10 to 14 of Commission Decision (2008/969/EC, Euratom) of 16.12.2008 on the Early Warning System for the use of authorising officers of the Commission and the executive agencies² (the "EWS Decision").

The ERCEA, however can only notify warning in some of these (sub-)categories: W1 c, W1 d, W2 b, W3 b and W5 a.

2. Implementation

The EWS Officer of the Agency (see Annex IV of the EWS procedure) responsible for the practical implementation of the EWS is the ERCEA Chief Accounting Officer and notified to the Accountant of the Commission as such. Responsible Controller is the Director of the Agency as only he can request the activation of an EWS warning for the Agency, see the table attached in annex 2 to this notification (Annex I to the EWS procedure, "Consequences and Duration of an EWS Activation") which provides the details on who is authorized to request the activation of a warning for which category.

The EWS flag attached to the Legal Entity File in ABAC is communicated to the Agency financial actors when a financial transaction (commitment or payment) is created. Detailed information can be found on pages 14 to 16 of the ERCEA Early Warning System procedure of 14/10/2011, see annex 1.

EWS warnings can be activated (or deactivated) by the service of the Commission's Accounting Officer only, on basis of a request sent by a Commission service. This request shall contain sufficient information as listed in the standard form attached to this notification. No warning shall be activated without such a form duly filled in and one request must be completed per warning.

For confidentiality reasons Commission Decision (2008/969/EC, Euratom) of 16.12.2008 on the Early Warning System for the use of authorising officers of the Commission and the executive agencies³ requires that each request must be sent in conformity with the procedure for classified information RESTREINT EU. For the sending of such a request no document can be attached to the ARES file. Documents may, instead, be sent in the form of hard copies by normal internal mail, or by national mail services within the EU (registered post). They are to be sent sealed into a single opaque envelope. The envelope must not bear any indication of the nature/security classification of its contents such as "warning", "alert", "exclusion". It is not necessary for a receipt to be provided by the addressee of the document. Addressees are the persons designated by the Accounting Officer of the Commission as recipients for EWS inscription requests.

² As amended by Commission Decision (2011/C 180/06) of 17 June 2011

³ As amended by Commission Decision (2011/C 180/06) of 17 June 2011

Moreover, internal communication inside the Agency or by the Agency with the relevant units from the Commission's DGs must take into consideration that:

- Information is to be circulated on a 'need-to-know' basis only.
- Documents are to be kept locked up in a safe place.
- For emails on the topic the outlook option "private" has to be used as a no encrypting solution (SECEM) is available in the Agency.

Each ERCEA unit can nominate an EWS correspondent, which is designated by the Head of Unit based on his/her adequate level of knowledge of administrative and financial procedures. The list of "EWS correspondents and EWS Officer" is added as Annex V to the ERCEA EWS procedure.

3. Flowchart and internal ERCEA circulation

The information and standard form is processed by:

* The Project and/or Financial Officers and/or other ERC Staff informed of the situation that warrants a warning: identification of weaknesses/suspicion of fraud and reporting of the facts to the unit's EWS Correspondent and Head of Unit. The source for such information can be any ERC staff member during the course of its work but also outside sources: beneficiaries, contractors, the media, a claim (anonymous or not), an external 'Informant'. Acknowledgment of receipt to the informant (except if the claim is made anonymously) is provided for each notification/claim within 15 days.

* In case of a case discovered during an external audit, the auditor in charge will indicate in the file that the following is required: 1) a classification as sensitive case and/or 2) *an indication in the Early-Warning-System (EWS)* and/or 3) notification to OLAF, if applicable.

* The EWS correspondent then fills in the standard form and forwards it to his/her Head of Unit in a confidential form. The EWS correspondent and the Head of Unit are the only persons in the unit authorized to fill in/complete/verify the standard form. They are the contact persons specified in the standard request form, and make information related to the case available upon specific request and to authorized users only. They work in close cooperation with the EWS Officer of the Agency.

* The Head of Unit fills in the request, if not already done by the EWS correspondent, and validates it.

* The Head of Department is informed subsequently.

* The EWS Officer of the Agency ensures the connection between the ERCEA service concerned and the Accountant of the Commission. S/he recommends the actions to be taken and informs about the consequences of such a warning. S/he monitors any warnings initiated by the Agency together with the EWS Correspondent concerned.

* The Director verifies the case, signs the request form and sends it to the Accountant of the Commission.

* The Accountant of the Commission is responsible for the examination of the EWS request and for the subsequent flagging in ABAC. As a result of the registration a warning will be sent to financial actors when validating a budgetary commitment or launching a payment in the accounting system that concerns the flagged legal entity (natural persons cannot be marked by an EWS warning for themselves, only in relation as representative of a legal entity or if they can be considered as "third parties" in the meaning of article 2 of the EWS Decision).

*** In case of the authorisation of a payment order in favour of contractors bearing a W2, W3b or W5a EWS flag, a reasoned confirmation must be addressed to the Commission Accountant by the responsible Authorizing Officer. However, while the Accountant of the Commission remains the formal addressee s/he no longer needs to receive those authorisation notes personally. Instead, they must be delivered as per the explanations provided in Ares note (2010)905519 of 06/12/2010 to the Accounting Officer (see annex 2 to this notification).**

4. Case assessment

Before proceeding with a request for EWS activation, a prior assessment of the case as regards the potential breach of legal basis, contractual terms, financial provisions, etc. must take place. The case must be sufficiently well documented and the final assessment recorded in writing (file note, meeting minutes, email exchange) and added to the file.

For efficiency in the decision making process and proper circulation of information to relevant staff, the following staff members of the ERCEA must be contacted either by email (marked as personal/confidential) or by organizing a personal meeting:

- EWS Correspondent concerned and his/her Head of Unit,
- EWS Officer (CAO),
- A staff member of
 - Unit C3 (Auditing Unit) as External Fraud Officer,
 - the IAO as Internal Fraud officer,
 - Unit D3 as legal officer,
 - the Data Protection Officer (DPO), where appropriate,
 - internal information sources depending on the case and their expertise.

To streamline good practice, efficiency, avoid overlapping of responsibilities, insufficient file quality and delays, it is recommended that the above mentioned actors are circulating the information they possess in relation with fraud and audit among each other whenever a case is an OLAF case or is meant to be presented to OLAF and/or may lead to an EWS registration (see Section 3.4 of the ERCEA EWS procedure).

Any dialogue is conducted on a "need-to-know basis" and closer timely cooperation in case of suspected irregularities between units via the Unit EWS/fraud network of correspondents is encouraged. Irregularities/fraud/EWS issues are also included as part of the hand-over procedures between units.

After the assessment has completed successfully, the CAO will send the information to DG BUDGET following the flow chart; in case of fraud, the OLAF Officer will receive the file before it is sent to the Director, and the External Fraud (Agency) officer sends the file to OLAF. Finally, the Commission's DG RTD (FAIR contact point unit for external cases/Internal Audit Capability for internal cases) shall be informed of fraud cases and their modalities simultaneously when they are reported to OLAF. If applicable, an EWS file is sent to the Commission's Accounting Officer.

5. Consequences of the activation of an EWS warning

The consequences of the EWS registration depend on the category of the warning (article 15 to 22 of the EWS Decision), for details see annex 2 and the Commission notification to the EDPS, case 2005-120.

- EWS flags are set and stored in the Commission's ABAC accounting system that automatically displays data of the EWS/CED database. For the use of ABC in the context of EWS warnings, please refer to Commission's DPO notifications 1256.8 (ABAC) and 872.4 (EWS), which has been prior checked by the EDPS, case no. 2005-120.
- CED database: the warnings stored in ABAC are mirrored in an online database (the CED database). For more information please refer to the Commission's notification on the "Central Exclusion data base", prior checked by the EDPS under case no. 2009-681.
- Paper files and copies of the request forms sent to the Commission are stored in locked cabinets located in the Deputy Accounting Officer's Office (also Deputy EWS Officer) and accessible to the EWS Officer and Deputy only.
- The ERCEA e-mail system, provided by the Commission, is used to exchange "confidential" e-mails.

11/ 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 FR 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 FR applicable to the general budget of the European Communities as amended by Commission Regulation (EC, Euratom) N° 1261/2005 of 20 July 2005.
- Commission Decision C(2008)5694 of 8/10/2008 delegating powers to the European Research Council Executive Agency with a view to performance of tasks linked to implementation of the specific programme Ideas in the field of research comprising in particular implementation of appropriations entered in the Community budget, namely article 3 and 9.
- Standard Financial Regulation for the Executive Agencies (Commission Regulation (EC) n° 1653/2044 of 21 September 2004 on a standard Financial Regulation for the executive agencies pursuant to Council Regulation (EC) n° 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes).
- Commission Decision (2008/969/EC, Euratom) of 16.12.2008 on the Early Warning System for the use of authorising officers of the Commission and the executive agencies, amended by Commission Decision (2011/C/ 180/06) of 17.06.2011 (see annex 8).
- Commission Regulation (EC, EURATOM) 1302/2008 of 17 December 2008 on the Central Exclusion Database, applicable also to the Executive Agencies.
- 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 EWS database of the Commission had been opened through the Commission internal Decision on the EWS (C(2004)193/3), which was repealed by Commission Decision (2008/969/EC, Euratom).

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

*** Information already registered in the EWS (ABAC):**

- All staff members of the Agency and of the Commission having access to ABAC for processing commitments, payment files, or for controlling, auditing. Access is strictly controlled through User-ID and password.

- The Chief and Deputy Accounting Officer of the Agency who is also the (Deputy) EWS Officer of the Agency.

- Commission services and other institutions (such as OLAF), Member States administrations having been granted access to the CED.

*** Information not yet registered in the EWS (ABAC):**

Project and/or Financial Officers and/or other ERC Staff informed of the case, EWS Correspondents, Heads of Unit, Heads of Department, EWS Officer of the Agency and Deputy, the Agency's Director and the Accountant of the Commission (for inscription in the EWS data base), the ERCEA External and Internal Fraud Officers, ERCEA legal advice, DPO (if applicable), OLAF staff (in case of fraud) and DG RTD (in case of fraud).

Transfer of data other than to the Commission Accountant and OLAF is not done by the Agency itself but by the Commission in the frame of the Early Warning System (ABAC) and the Central Exclusion data base (see Commission notification to the EDPS number 2009-681).

13/ RETENTION POLICY OF (CATEGORIES OF) PERSONAL DATA

The time limit of EWS warnings in the EWS system is defined in DPO notification 872.4, which has been prior checked by the EDPS (case no. 2005-120): Data saved in the EWS and CED databases are stored during the periods defined in Articles 10 to 14 of Commission Decision (2008/969/EC, Euratom) of 16/12/2008 on the EWS, depending on the category of EWS warning.

Subject to the Commission Common Retention List (SEC(2007)970), point 4.2.3., "Management of third-party files (FEL/BAF) and EWS", the administrative retention period applied by the ERCEA is 5 years after the file has been closed (see annex 2 to this notification). EWS files are considered closed when the final financial transactions involving the data subject are completed.

13 A/ TIME LIMIT TO BLOCK/ERASE ON JUSTIFIED LEGITIMATE REQUEST FROM THE DATA SUBJECTS

(Please, specify the time limits for every category, if applicable)

If a data subject was to claim that the data introduced were wrong, therefore invalidating the grounds for which the warning was requested by the ERCEA Service, the request would be treated immediately and appropriate action taken if a warning has to be deactivated.

The information provided by the data subject in regards to his claim would be added to the existing paper file.

According to Article 8.4 of Commission Decision 2008/969/EC⁴, "*Removed warnings shall be accessible for audit and investigation purposes only and shall not be visible for the users of the EWS. However, personal data contained in warnings referring to natural persons shall remain accessible to such purposes only for five years after the removal of the warning.*"

14/ 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

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

Not applicable

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

The processing of personal data in the context of the EWS has the purpose of processing data directly related to suspected fraud, insolvency, convictions of a serious professional misconduct or criminal offences that may be detrimental to the EU's financial interests.

Example: a W3 b warning is registered "*when third parties are known to be the subject of judicial proceedings for serious administrative errors or fraud*".

Accordingly, when the warning is registered by the Agency,

- certain personal data relating to suspected offences, offences, criminal convictions or security measures may be (article 27(2)(a) of Regulation (EC) 45/2001) and**
- personal aspects relating to the data subject concerning his or her ability, efficiency and conduct may be evaluated (article 27(2)(b) of Regulation (EC) 45/2001) .**
- As a consequence of registration, individuals may be excluded from a right, benefit or contract as per article 27(2)(d) of Regulation (EC) 45/2001.**

17/ COMMENTS

Since the processing operations have already been established (since 13/10/2011), the present notification concerns an ex-post prior check.

⁴ As amended by Commission Decision (2011/C 180/06) of 17 June 2011

List of attachments:

- 1. ERCEA Early Warning System procedure of 14/10/2011 - Ares(2011)1093495**
- 2. Annex I to the EWS procedure: "Consequences and Duration of a EWS Activation", including the note to the Accounting Office, Ares(2010)905519**
- 3. Annex II to the EWS procedure: "Standard Form"**
- 4. Annex III to the EWS procedure: "DG RTD Early Warning System procedure"**
- 5. Annex IV to the EWS procedure: "EWS Correspondents and EWS Officer"**
- 6. Annex V to the EWS procedure: "FAQ"**
- 7. Guide for applicants, version July 2013.**
- 8. 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 (2008/969/EC, Euratom), amended by Commission Decision of 17/06/2011 (2011/C 180/06)**

PLACE AND DATE: **Brussels, 24/09/2012**

DATA PROTECTION OFFICER: **KOLLOCZEK, NADINE**

INSTITUTION OR BODY: **ERCEA**