



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

Brussels, 6 December 2006 (Case 2005-120)

1. Proceedings

On 20 July 2004, the European Data Protection Supervisor (EDPS) wrote to the Data Protection Officers (DPOs) asking them to contribute towards making an inventory of data processing that might be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) No 45/2001. The EDPS asked to be informed of all processing operations subject to prior checking, including those begun before the Supervisor was appointed, for which checking could obviously not be regarded as prior, but which would be subject to "*ex post*" checking.

On 28 September 2004 the Data Protection Officer of the European Commission presented the list of cases that should be subject to such *ex post* checking, and underlined in particular the case of "*the Early Warning System*", since it contains *inter alia* data relating to processing operations for the purpose of excluding individuals from a right, benefit or contract (Article 27.2.d). The purpose of the EWS is to protect the EU's financial interests, by excluding individuals who could represent a threat to those financial interests.

In view of receiving this notification, a reminder was sent to the DPO of the European Commission on 20 May 2005.

Notifications within the meaning of Article 27(3) of Regulation (EC) 45/2001 concerning the "Early Warning System" and "LEF (Legal Entity File)" were sent by the Data Protection Officer of the European Commission, by e-mail on 4 May 2006.

The prior checking notification on the LEF system was sent to the EDPS because the notification on EWS referred to it. By regular mail on 23 May 2006, the Assistant EDPS informed the DPO that the notification for prior checking of "LEF" was not subject to prior checking as there did not seem to be any specific risks which would qualify the LEF for prior checking under Article 27.1 of Regulation (EC) 45/2001 and because there were also no relation with any of the types of processing operations listed in the Article 27.2 of Regulation. The relevant aspects of the LEF in relation to the EWS are to be handled in the present opinion.

Questions were put to the DPO of the European Commission in an e-mail dated 12 June 2006. Replies were given on 13 June 2006. Due to the complexity of the file, the EDPS has extended the delay by 2 months by e-mail of 26 June 2006. Others questions were asked by e-mail dated 14 July 2006. New information was given by the DPO by an e-mail dated 15 September 2006 which have consequences for the opinion of the EDPS. A meeting was set up on 29 September 2006 between DG BUDG, the DPO and the deputy DPO of the Commission and the EDPS. In view of this meeting, a draft was sent for comments on 21 September 2006.

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Replies to questions asked on 14 July were given on 26 October 2006. The EDPS received notably, after having asked for some more information, the last modifications in the EWS decision of the Commission made on 7 November 2006.

2. The facts

2.1 Purpose

The principal purpose of the EWS is to circulate information among all Commission departments about recipients of Community funds (beneficiaries) who have committed fraud, administrative errors or irregularities and about other circumstances related to these beneficiaries who could represent a threat to the Communities' financial interests.

The Commission, which is responsible for executing the general budget of the European Union and any other funds managed by the Communities, is under an obligation to counter fraud and any other illegal activities affecting the financial interests of the Communities.

The Financial Regulation (FR) sets out new obligations for the Commission concerning the award of contracts and grants to third parties in the context of centralised management of Community funds.

In particular Articles 93 and 114(2) FR set out an obligation to exclude third parties from participation in a procurement or award procedure where they are in one of the situations listed in Article 93 FR.

Articles 94 and 114(2) FR forbid the award of a contract or grant to third parties in a situation of conflict of interest or misrepresentation in supplying the information required by the contracting authority as a condition of participation in a procurement or award procedure.

Articles 96 and 114(3) FR further establish the possibility for the contracting authority to impose administrative and financial penalties on third parties who are in one of the cases of exclusion from participation or award provided for in Articles 93, 94 and 114 FR, in particular in the form of exclusion from the benefit of any Community fund for a period defined in the implementing rules of the FR.

Article 167 FR extends the application of these provisions to contracts signed by beneficiary third countries in the context of decentralised management.

Articles 74 and 75 of Commission Regulation 2343/2002¹ extend the application of the above provisions to all Community bodies² and to Union bodies covered by Article 185 FR.

Article 50 of the Commission Regulation on a standard regulation for the executive agencies requires the above-mentioned provisions of the FR applicable to the general budget to apply to contracts signed by Community executive agencies³.

¹ Commission Regulation (EC, EURATOM) N° 2343/2002 of 23 December 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, EURATOM) N° 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 357, 31 December 2002, p. 72).

² Including regulatory agencies.

³ Commission Regulation (EC) N° 1653/2004 of 21 September 2004 on a standard financial regulation for the executive agencies pursuant to Council Regulation (EC) N° 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes.

Articles 77 and 88(2) of the Financial Regulation of 27 March 2003 applicable to the 9th European Development Fund⁴ extend the application of the above-mentioned provisions of the FR applicable to the general budget to contracts and grants awarded under the EDF.

Finally, Article 95 FR sets an obligation on all institutions listed in Article 1(2) FR⁵ to establish a central database containing the relevant details of candidates, tenderers or applicants who are in a situation of exclusion and to give the other institutions access to these databases. The proposal in order to modify the Financial Regulation and the related implementing rules⁶ foresees in the new Article 134a of the implementing rules that "in compliance with the Community rules on the processing of personal data, the Commission shall, via a secured protocol and on a regular basis, provide validated data contained in the database to persons designated in the institutions, executive agencies, authorities and bodies referred to in paragraph 1". It confirms that the other institutions do not establish their own central database, but that they use the database of the Commission to exchange information with the latter. This is confirmed by the prior check on the EWS of the Court of Justice⁷.

The objective of the EWS is to aim at ensuring circulation of restricted information concerning third parties (natural or legal persons) who could represent a threat to the Communities' financial interests and reputation or to any other fund administered by the Communities, should the Commission enter, or if it has already entered a contractual/conventional relationship with them. The information may also include natural persons with powers of representation, decision making or control over given legal persons.

At authorising departments' request, a flag is entered against these recipients in the Commission's central legal entity file (LEF), indicating the category of warning and the originating department. Since 1 January 2005, the Commission has adopted a modernised accounting system : cornerstone of the new system is the centrally validated "Legal Entity File" the purpose of which is to have one single accounting position for each entity the Commission is in financial or contractual relation with. In order to be authorised and posted to an account in the general ledger, all financial and contractual transactions undertaken by Commission departments require the identification of a unique Legal Entity record corresponding to this account. Legal Entities can be individuals, private law bodies, public law bodies. Concerning individuals, the data elements collected and stored in the accounts are necessary to ascertain their legal existence and to be able to ascertain that no doubles exist in the file. Validation of these data and subsequent opening of the individual account are therefore taken on by a central dedicated team. At the end of the process each validated legal entity record is identified by a unique key. This key is then further used by authorising departments when preparing their financial and contractual transactions.

The Commission decision⁸ on the Early Warning System (EWS) has set up specific rules for the management of this system, which are described below. This decision has been published

⁴ OJ L 83, 1 April 2003, p. 1 – hereafter referred to as 'EDF'.

⁵ For the purpose of the FR, the Economic and Social Committee, the Committee of the Regions, the Ombudsman and the European Data-Protection Supervisor are to be treated as community institutions.

⁶ Modified proposal for a Council Regulation amending Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (COM(2006) 213 final) and the proposal for a Commission Regulation (EC, Euratom) amending Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (SEC(2006) 866 final)

⁷ The EDPS has received notification of the EWS of the Court of Justice (case 2006-397) for prior checking and should also receive such notification from the other institutions making use of the EWS system.

⁸ C(2004) 193/3 as modified by corrigendum C(2004)517 and last modified by the 2006 internal rules.

on the EUROPA website on 16 August 2006. At the date of the present opinion, it has not been published anywhere else.

2.2 Categories of warnings in the Early Warning System

1. A W1 flag is entered where information obtained gives sufficient reason to believe that findings of fraud, serious administrative errors or other irregularities will be recorded against third parties

Three categories of W1 are set up:

- W1a: OLAF (at the level of Director general or Director) is responsible for requesting the activation of a W1a warning by the service referred to under Article 8 after having informed the AOD(s)⁹ concerned, where its investigations give at an early stage sufficient reason to believe that findings of serious administrative errors or fraud will be recorded in relation to a third party benefiting or who has benefited from Community funds¹⁰.
- W1b: Warning requested by OLAF or IAS¹¹ during an investigation. AOD(s), OLAF and IAS (in both cases at the level of Director general or Director) are responsible for requesting the activation of a W1b warning after having informed the AOD(s) concerned, where their investigations give sufficient reason to believe that final findings of serious administrative errors or fraud will be recorded in relation to a third party benefiting or who has benefited from Community funds.
- W1c: Warning requested by responsible AOD on the basis of reports from the Court of Auditors, his/her IAC¹² or other. The AOD (or AOSD of the rank of Director) requests the activation of a W1c warning where investigations of the European Court of Auditors, his/her IAC or any other audit or investigation¹³ give sufficient reason to believe that final findings of serious administrative errors or fraud will be recorded in relation to a third party benefiting or who has benefited from Community funds under his/her responsibility.

2. A W2 flag is entered when third parties are subject to findings of serious administrative errors or fraud

Two categories of W2 are set up:

- W2a: OLAF and IAS (in both cases at the level of Director General or Director) are responsible for requesting the activation of a W2a warning where their investigations lead to findings of serious administrative errors or fraud involving a third party.
- W2b: The AOD (or AOSD of the rank of Director) requests the activation of a W2b warning where the European Court of Auditors, his/her IAC or any other

⁹ AOD and AOSD for authorising officer by delegation or by sub-delegation

¹⁰ Most entries by OLAF into the EWS come from external investigations by OLAF the procedure of which is to be prior checked by the EDPS. As for internal investigations see Prior check opinion 2005-0418

¹¹ IAS for internal auditor of Commission. The internal audit procedure is the object of a prior check opinion rendered by the EDPS 2006-298.

¹² IAC for internal audit capacity of every DG

¹³ Conducted at his/her request or brought to his/her attention.

audit or investigation¹⁴ have issued written findings of serious administrative errors or fraud in relation to third parties, especially third parties benefiting or who have benefited from Community funds under his/her responsibility.

3. A W3 flag is entered when third parties are subject to pending legal proceedings
Two categories of W3 are set up:
 - W3a: The Accounting Officer¹⁵ activates a warning W3a upon receiving notification by the Secretariat General of an attachment order related to a third party.
 - W3b: The AOD (or AOSD of the rank of Director) requests the activation of a W3b warning where third parties, especially third parties benefiting or who have benefited from Community funds under his/her responsibility, are known to be the subject of judicial proceedings for serious administrative errors or fraud. Where OLAF investigations lead to judicial proceedings or OLAF offers assistance or follows up proceedings (modifications of 7 November 2006), OLAF (at the level of Director General or Director) requests the activation of the corresponding W3b warning.
4. A W4 flag is entered when third parties are subject to recovery orders issued by the Commission exceeding a certain amount and on which payment is significantly overdue. The Accounting Officer¹⁶ activates and deactivates on his own initiative a W4 warning in relation to third parties who are the subject of recovery orders issued by the Commission exceeding a certain amount and on which payment is significantly overdue. In accordance with his duties under Article 61 FR, the Accounting Officer establishes internal guidelines as to the thresholds determining the relevant amounts and the delay for registration under W4 warnings.
5. A W5 flag is entered when third parties (candidates or tenderers) are excluded in accordance with regulatory provisions (Financial Regulation or Council Regulation (EC) N° 881/2002 of 27 May 2002 (OJ L 139 of 29 May 2002, p. 9)). A W5 warning with regard to a third party is activated upon request of the AOD (or AOSD of the rank of Director) or of the DG that leads for the legislation concerned:
 - a) Where the authorising department¹⁷ is faced with a third party that is in one of the situations listed under Article 93 or Article 94 FR¹⁸ or where the Authorising Officer

¹⁴ Conducted at his/her request or brought to his/her attention

¹⁵ Or, in accordance with Article 62 FR, subordinates of the Accounting Officer subject to the Staff Regulations of officials of the European Communities and Conditions of Employment of Other Servants of the European Communities.

¹⁶ Or, in accordance with Article 62 FR, subordinates of the Accounting Officer subject to the Staff Regulations of officials of the European Communities and Conditions of Employment of Other Servants of the European Communities.

¹⁷ Exclusions under Article 93(1)c and f as well as exclusions under Article 94a) FR shall be taken by the AOD (or AOSD of the rank of Director) after obtaining the opinion of the Central Financial Service. In the meantime, the AOD (or AOSD of the rank of Director) shall request the activation of a W2 warning pending decision on the merits of exclusion under Article 93(1) c, f, or 94 a) FR.

¹⁸ The situations include cases where the third party:

- i) 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);

(Commission) has, on the initiative of one or more AOD(s), excluded a third party from the benefit of contracts or grants financed by the Communities' budget in accordance with Articles 96 and 114(3) FR. For all these exclusions under the FR, a warning W5a is entered in the EWS.

W5a Warning requested by AOD in accordance with Financial Regulation has different classifications and has to specify under which provision it is adopted:

- W5a10: if a third party has been subject to a conflict of interest in a contract/grant award procedure (Art. 94a) FR); or has been guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the contract/grant award procedure or failed to supply this information (Art. 94b) FR) Exclusions from the award of a contract or grant in a given procedure in accordance with Article 94 FR shall merely be registered for information under W5a, without activation of the warning.
- W5a20: if 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 not fulfilled obligations relating to the payment of social security contributions or the payment of 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). Duration of registrations of exclusions from participation in a contract or grant award procedure in accordance with Article 93(1) a, b, d, and e FR should follow the duration of criminal records under national law.

Where certifications and evidence obtained by any authorising department in accordance with Article 93(2) FR on the occasion of another award procedure are not consistent with activated W5a warnings, the AOD/AOSD shall immediately inform the AOD/AOSD responsible for the warning, so that deactivation may be requested in accordance with Article 9(3).

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- ii) has been convicted by a judgement having the force of *res judicata* for an offence concerning his professional conduct (Art. 93(1)b FR);
 - iii) has been guilty of grave professional misconduct proven by any means which the Authorising Officer can justify (Art. 93(1)c FR);
 - iv) has not fulfilled obligations relating to the payment of social security contributions or the payment of 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);
 - v) 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).
 - vi) 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);
 - vii) has been subject to a conflict of interest in a contract/grant award procedure (Art. 94a) FR);
 - viii) has been guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the contract/grant award procedure or failed to supply this information (Art. 94b) FR).

- W5a30 Article 93(1) c, f FR: if a third party has been guilty of grave professional misconduct proven by any means which the Authorising Officer can justify (Art. 93(1)c FR); or 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). Exclusions from participation in a contract or grant award procedure in accordance with Article 93(1) c and f FR, based on the assessment by the AOD/AOSD after an adversarial procedure, shall, without prejudice to Article 9(2), give rise to active registration under W5a for a period of three months (renewable) pending a possible decision by the Authorising Officer (Commission) on exclusion in application of Article 96 FR.
 - W5a40 Article 96 FR: if penalties are imposed by the contracting authority on the candidates or tenderers who are in one of the cases of exclusion provided for in Articles 93 and 94 after they have been given the opportunity to present their observations. Any request for activation of a warning W5a in accordance with Articles 96 and 114 FR shall specify the period of application of this administrative penalty decided in accordance with Article 133 IR¹⁹.
- b) Where any natural or legal person, group or entity has been listed in accordance with a Council Regulation²⁰ imposing Common Foreign and Security Policy (CFSP) related financial restrictions and it is prohibited to make funds and economic resources available to that person, group or entity. In this case the warning W5b is entered in the EWS. The warning will remain as long as the designation of this person, group or entity remains valid. The warning shall mention the number of the Council Regulation imposing the restrictions or of the relevant implementing act. The Commissioner in charge of external actions has an empowerment to update- via EC Regulations- the relevant list. These regulations are published on the OJ and DG RELEX has set up a consolidated list.

Registration²¹ of exclusions under Articles 93, 94, 96 and 114 FR notified by the Accounting Officer of other institutions and agencies to the Commission Accounting Officer in accordance with Article 95 FR as well as exclusions communicated by third countries in decentralised management to the responsible AOD and communicated by the latter to the Commission Accounting Officer, shall also be registered in the relevant W5a warning of the Commission EWS.

Any natural or legal person, group or entity listed in accordance with a Council Regulation imposing CFSP related financial restrictions shall be registered under W5b as long as the designation of this person, group or entity remains valid. The warning shall mention the number of the Council Regulation imposing the restrictions or of the relevant implementing act.

It must be pointed out that the obligation provided in Article 95 FR to establish a central database of entities who are in one of the situations described in Articles 93 and 94, only applies to candidates and tenderers. It does not apply to members of staff. However the EWS

¹⁹ See Table in Annex 2.

²⁰ Such as Council Regulation (EC) n° 811/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with with Usama bin Laden, the Al-Qaida network and the Taliban.

²¹ I.e. activation and deactivation thereof.

applies to all individuals registered in the LEF therefore including staff members. There are no W5 flaggings related to staff (and they are not registered in the central database, because indeed, they do not enter in procurement or grant award procedures) – but other flaggings (W4 e.g.) are of course possible.

2.3 Acting procedure and effects of the EWS flags

In the ABAC-workflow application, when Authorising Officers enter or validate transactions related to these flagged entities, a warning will be issued. The Authorising Officer must act upon these warnings as indicated in the EWS Decision, especially Articles 12 to 20 relating to effect of EWS warnings and specific consequences on the use of a Wx warning on contracts, grants procedures or agreements.

The AOD/AOSD checks the existence of warnings in the EWS in relation to the third party with regard to individual budgetary commitments, to global budgetary commitments when booking individual commitments to the global commitment, to provisional budgetary commitments, imprest accounts covering contracts other than contracts of small amounts and legal commitments related to the management of the EDF. Where the commitments cover the payment of staff and the reimbursement of travel expenditure related to participation in meetings and competitions, the obligation of prior checking of EWS registrations does not apply.

The AOD/AOSD conducts an additional prior check of the EWS when assessing exclusion criteria in any procurement or grant award procedure.

The obligation to check the EWS before entering into any legal commitment, set out under paragraphs 1 and 3, does not apply to administrative appropriations registered under Chapter 01 of the activity “External Relations” for the use of deconcentrated services when contracting with local third parties, where the AOD/AOSD has reasonable grounds to believe that the third party concerned is not likely ever to enter into contractual relations with other Commission delegations or services.

By virtue of Article 133(4) of the implementing rules of the Financial Regulation, these checks extend to potential co-contractors in case of multi-beneficiary grant and contract award procedures. The checks may also apply to natural persons with power of representation, decision making or control over the third party concerned, in particular in the following situations:

- a. Where such verification is deemed necessary by the AOD/AOSD on the basis of his/her analysis of risks;
- b. Where the documents requested by the AOD/AOSD, as satisfactory evidence that the third party concerned is not in one of the situations described in Article 93(1) of the Financial Regulation within a public procurement or grant award procedure, relate to natural persons according to the national legislation of the country in which the third party concerned is established.

Whether or not a third party is subject to a previous warning, the AOD (or AOSD of the rank of Director), or as the case may be, the Director General or a Director of OLAF or the IAS, who has identified conditions for an EWS warning, sends a request using the standard request form, addressed to the service referred to under Article 8, with copy to the EWS contact Officer of his DG/Service referred to under Article 10 of the EWS decision. Activation of a warning for a natural person with powers of representation, decision making or control over given legal persons requires an additional request, distinct from that aimed at the legal person

concerned. The request must specify in particular: the specific warning being requested²²; if appropriate, the duration for which the warning is to remain active; the contact person under his/her supervision for this specific warning.

The AOD (or AOSD of the rank of Director), or as the case may be, the Director General or a Director of OLAF or the IAS, who has requested an EWS warning notifies in the same manner any change of the information contained in the original request, including any change of the contact person for the specific warning.

The AOD (or AOSD of the rank of Director) who has requested an EWS warning is also responsible for:

- a) Coordinating consequences to be drawn from the warning in accordance with Articles 13 to 18 within the network of EWS Officers referred to under Article 10.
- b) Requesting that the warning be deactivated once the reason for the warning no longer applies. In this case the author of the original registration request sends a motivated note to the Service referred to under Article 8, to which a copy of the original registration request is attached.

W3a and W4 flags are set on the Accounting Officer's own initiative.

Effects of EWS warnings

Effects of W1 warnings:

According to Article 13 of the Commission decision, they entail no other consequence than measures of reinforced monitoring. They do not imply any specific consequences on contracts or grant agreements already signed. These warnings remain active for no longer than 6 months after which they are deactivated automatically. However in accordance with Article 20, deactivated warnings still entail consequences in the form of reinforced monitoring.

Effects of W2 to W4 warnings:

Payments due will always be made: they are just suspended for a matter of a couple of days mostly either to give the AOD the opportunity to check that all relevant monitoring procedures have been correctly applied, or to give the Accounting Officer the opportunity to set off (part of) the payment due against outstanding debts.

Consequences for AOD/AOSD:

The AOD/AOSD may, after due regard to the obligation to protect the Community's financial interests and image, the nature and seriousness of the justification for the warning, the amount, duration, and where applicable, the urgency to have the contract performed/action subsidised, and on the basis of coordination assumed by the EWS Officer(s) designated by the AOD(s) who requested the activation of the warning, adopt one or more of following solutions:

- Reinforced monitoring; preventively suspend time limit for payments; suspend performance of contract; termination of contract/grant agreement where already signed;
- Awarding of contract/grant agreement to third party despite entry in EWS (in which case reinforced monitoring); motivated decision to award contract/grant to another

²² Down to the exact sub-category, e.g. "W5a 10".

tenderer/applicant or close of procedure on the basis of an interpretation of selection and award criteria differing from that of the selection committee.

Effect of warnings on budget transactions:

Except for W3a warnings, payments proved to be actually due after verifications, remain to be executed. The Accounting Officer will release suspended payment only on receipt of motivated confirmation from AOD that payment due should be executed.

Where a third party is subject to a W3a warning corresponding to a preventive attachment order, all payments to this entity will remain suspended pending the final judicial ruling on the principal debtor's debt.

Where a third party is subject to a W3a warning corresponding to an executable attachment order, the AOD will execute the payment due by the Commission to the judgement debtor in favour of the judgment creditor, unless the attachment order would disrupt proper operation of the Commission, in which case AOD will invoke the Protocol on Privileges and Immunities.

Where the third party is subject to a W4 warning, the Accounting Officer will systematically examine the possibility of offsetting Community entitlements with payment due to this third party.

Effects of W5 warnings:

Consequences for AOD/AOSD:

The AOD/AOSD excludes the third party from the award of a contract/grant (94 FR) or from participating in the procedure at the stage of the assessment of exclusion criteria in accordance with (Articles 93 FR); or from the benefit of any Community funds (96 FR and Regulation 881/2002).

Effect of warnings on budget transactions:

Effect of W5a warnings: For contracts or grant agreements already signed, the Accounting Officer will release suspended payment only on receipt of motivated confirmation from AOD that payment due should be executed.

All new commitments are refused.

Effect of W5b warnings: all operations refused.

Procedure laid down as "Referral to the Commission"

W1 to W4: In exceptional circumstances, in particular where the risk involved is also of reputational and political nature, the AOD shall, where previous options do not provide an adequate solution, and after having informed the Secretariat General, refer to the Internal Auditor, to DG BUDGET and to the Member of the Commission in charge of the policy area concerned any matter involving contracts/grants already signed or yet to be signed or awarded. The Secretariat General will be kept informed of all relevant exchanges. The Member may in turn refer the matter together with the opinion of the Internal Auditor and DG BUDGET

Consequences of a deactivated warning

Information of a deactivated warning may lead the AOD/AOSD to:

1. Re-examine and check again the conformity of the tender/application with selection and award criteria in any award procedure;

2. Resort to appropriate measures of reinforced monitoring in accordance with recommendations in Annex 7.

2.4 Data Subject(s) concerned

All individuals who at one time, have (had) contractual and/or financial dealings with one of the Commission's services are registered in the Commission's Legal Entity File: service providers, staff, experts, beneficiaries of grants.²³ All persons (legal or natural) subject to a warning are included in the EWS. These could also include persons who at one time, have (had) contractual and/or financial dealings with another institution or body.

2.5 Description of the data or categories of data:

The following information is included in the EWS system: Name and address of the individual, Type of EWS-warning, Start date - end date of active warning, Commission service that has requested the EWS flag to be set, contact person in this service.

2.6 Information to be given to data subjects

Since 16 August 2006, a general description of the EWS is provided on the EUROPA website with a link to the Commission decision C (2004) 193/3. This decision was not published in the Official Journal nor anywhere else on the basis of Article 4 of Regulation 1049/2001. No specific information is provided to individuals subject to flagging.

The Council regulation imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban is public (see footnote 15).

2.7 Procedures to grant rights of data subjects (rights of access, to rectify, to block, to erase, to object)

Article 8 § 3 of the EWS Decision stipulates that on official written request of individual third parties who have duly "*identified themselves*" or proven their power of representation on the legal entity concerned, the Accounting Officer of the Commission may communicate to this third party the information whether or not it is registered in the central database set out for exclusion cases in accordance with Article 95 FR (cases corresponding to W5a warnings) and the author of the alert to be contacted for further information.

No other rights are granted to the data subjects. In the notification for prior checking, the Commission considers that this is justified by Article 20, b) of Regulation (EC) 45/2001, in order to safeguard "an important economic or financial interest of ... the European Communities".

2.8 Automated / Manual processing operation

Pursuant to the Commission Decision, EWS warnings are entered (and - except for cases of automatic removal after 180 days - removed) centrally by DG BUDG, in the Commission's legal entity file (LEF), after receipt of a formal letter sent by the responsible authorising officer (or by an authorised officer in other Commission services). No changes are made to

²³ Legal references for all potential beneficiaries of payment or addressees of debit notes need to be registered before a financial or contractual transaction that concerns them can be initiated. Once these references have been registered and validated they become available for use in these transactions.

the legal entity record until such a letter is received. If no record for the legal entity exists in the file, then the authorising department that has obtained information about the entity must first request the creation of a new entry in the LEF, following the appropriate procedure, and then request entry of an alert against that record.

EWS flaggings are activated and, where appropriate, deactivated by the Accounting Officer's services in DG BUDG. These flaggings are visible in the Commission's accounting system and one category of warnings (W5a) is made available, via a secured protocol, to outside bodies specifically mentioned in the EWS Decision.

2.8.1 Automated Processing operation(s):

The EWS flags set centrally in the SAP²⁴ part of ABAC, managed by the Accounting Officer, are made available automatically to the "Workflow" part of the application to which all ABAC users in the Commission (all DG of the Commission and the CCR) and other bodies (some agencies already use ABAC, many of them will use it in January 2007. It will be also the case for the Committee of Regions and the Economic and Social Committee) using ABAC have consultation access. Also by standard interfaces these data are made available to local management systems. The access rights are defined via the ABAC security modules.

Depending on the nature of the warning entered, de-activation of the EWS flags is carried out either automatically after a fixed period, or must be requested explicitly by the initiator of the warning.

2.8.2 Manual Processing operation(s):

Requests for flagging are always made to the Accounting Officer using a standard form. This form is a "RESTREINT UE" document, signed by the Authorising Officer by Delegation (or by subdelegation with a rank no lower than Director); in accordance with Commission security Notice N° 2 of 13 July 2004 on "Creation, Handling & Storage of EU Restricted information", it is sent to the Accounting Officer under a "single closed envelope" and it is archived, after its processing, in a secured safe.

Pursuant to Articles 95 of the Financial Regulation and 21 of the Commission's EWS Decision (access to EWS), the list of entities flagged in application of article 7 of this Decision (W5 warnings), is made available, via a secured protocol, to the bodies mentioned in this same Article 21.

2.9 Storage media of data

The EWS flags are set and stored in the Commission's ABAC accounting system. The transmitted request forms, after processing, are archived in a secured safe.

2.10 Recipients of the data:

EWS flaggings concerning data subjects falling under categories 1 to 4 are meant to be an internal tool available to Commission authorising services only in order to help them in safeguarding the financial interests of the Commission.

²⁴ SAP is a data base in charged of "la Gestion des entités légales, Comptabilisation, Gestion des crédits, dépenses et recettes au niveau central"

EWS related data is to be made available to certain bodies, listed in Article 21 of the EWS Decision, subject to Article 4 of Regulation 1049/2001 regarding exceptions to public access to Community Institutions documents:

- a) All Commission services in accordance with Articles 8 and 9, including services managing funds on behalf of the Communities and executive agencies (either directly or according to the modalities set up by the supervising Authorising Officer)
- b) With regard to W5a warnings:
 - i) To deconcentrated services and beneficiary third countries in decentralised management according to the modalities fixed by the responsible AOD;
 - ii) Under the responsibility of the service referred to under Article 8, via a secured protocol, to:
 - EWS contacts designated by the other Community institutions²⁵, including the Economic and Social Committee, the Committee of the Regions, the Ombudsman and the European Data-Protection Supervisor and;
 - EWS contacts designated by European and Community bodies receiving grants charged to the Community budget in accordance with Article 185 FR and communicated by the responsible AOD to the service referred to under Article 8;
 - EWS contacts designated by the bodies referred to under Articles 53(2) and 54(2)c FR and communicated by the responsible AOD to the service referred to under Article 8;
 - On the request of the AOD where no *ex ante* control is exercised by the Commission in decentralised management, to the National Authorising Officer and the Implementing Agency designated by the Commission.

EWS warnings of category 5.a are transmitted, once a month, via a secured protocol, to these bodies.

According to the LEF notification²⁶, the Commission considers that Internal (IAS) and external auditors (Court of Auditors), as well as duly authorised investigation authorities are granted access when requested under the exception specified under Article 2(g) of Regulation (EC) 45/2001.

2.11 Category(ies) of recipients:

Commission staff dealing with contractual and financial matters, and who have been granted access to local management systems that retrieve these data in order to be able to initiate contracts, grant decisions, payments and other such transactions. The access has been granted based on Note n° 54213 of Mr Romero, Director General BUDG, to DGs of 22 April 2004.

Recipients of EWS warnings of category W5a are the designated representatives of the bodies mentioned in Article 21 b) of the EWS Decision: EU Institutions, Agencies, and on request of the respective Authorising Officers by Delegation the other bodies mentioned in the same Article 21 b). Communication of W5a warnings is made according to the modalities laid down also in Article 21. (See point 2.7 above)

2.12 Retention policy of (categories of) personal data

²⁵ EWS of the Court - case 2006-397.

²⁶ See "1. Proceedings"

Depending on the category of warning, an active time limit can be applied to the EWS warning. In such cases, the EWS flag is deactivated as soon as the fixed time period has elapsed.

Any W1 warning remains active for a maximum of six months, after which it is deactivated automatically. If the alert in the EWS needs to remain and cannot be replaced with another type of warning within this period, then a new request shall be made in accordance with paragraph 1, 2 or 3 of Article 3.

A W2 warning shall remain active for a maximum of six months, after which it will be deactivated automatically. If the warning in the EWS needs to remain and cannot be replaced with another type of warning within this period, a new request shall be made in accordance with paragraph 1 or 2 of Article 4.

W3 warnings remain active until a judgment having the force of res judicata is rendered or the case has been otherwise settled.

Any W4 warning remains active as long as the debt is outstanding.

In these cases (W3 and W4 flags), as soon as it is no longer justified, the EWS flag is deactivated on demand of the service that had initiated the original request to flag. Deactivated warnings remain available for consultation pursuant to Article 20 of the EWS Decision.

W5a10 registrations are introduced for consultation purposes only as exclusion for conflict of interest and misrepresentation are related to a given procedure.

W5a20 registrations of exclusions from participation in a contract or grant award procedure in accordance with Article 93(1) a, b, d, and e FR should follow the duration of criminal records under national law.

W5a30 exclusions from participation in a contract or grant award procedure in accordance with Article 93(1) c and f FR, based on the assessment by the AOD/AOSD after an adversarial procedure, shall, without prejudice to Article 9(2), give rise to active registration under W5a for a period of three months (renewable) pending a possible decision by the Authorising Officer (Commission) on exclusion in application of Article 96 FR.

W5a40 registrations shall specify the period of application of this administrative penalty decided in accordance with Article 133 IR.

W5b warnings shall be registered as long as the designation of the person, group or entity remains valid in the relevant Council Regulation imposing CFSP financial restrictions.

2.13 Time limits for blocking and erasure of the different categories of data - Time limit to block/erase data on justified legitimate request from the data subjects

According to the notification to the EDPS, this processing has to be evaluated against Article 20, b) of Regulation (EC) 45/2001, in order to safeguard "an important economic or financial interest of ... the European Communities". The Commission considers that time limit should be evaluated for every individual request.

2.14 Proposed transfers of data to third countries or international organisations

Article 167 FR²⁷ and Articles 77 FR²⁸ and Article 88.2 of the 9th European Development Fund Financial Regulation²⁹ foresee transfers to recipients in third countries or international organisations.

2.15 Security measures³⁰

[...]

3. Legal aspects

3.1. Prior checking

The notification received on 4 May 2006 relates to processing of personal data in the terms of Article 2 (b) of Regulation (EC) 45/2001 ("any information relating to an identified or identifiable natural person" - Article 2(a)). Indeed, the Early Warning System (EWS) includes data relating to natural persons not only in their capacity to represent a legal person, but also in their capacity as individual entity entered into the LEF and liable to be subject to an evaluation under the EWS.

While the EWS is mainly based on first pillar activities, W5b flags relate to the second pillar (Council Regulations imposing CFSP related financial restrictions). Since the Regulation (EC) 45/2001 applies to the processing of personal data by Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law (Article 3.1), the EDPS is competent to render his opinion on the EWS system which falls mainly under the scope of the first pillar.

Processing in the registration procedure of the Early Warning System is at least partially automated within the meaning of Article 3.2 of Regulation (EC) No 45/2001. EWS warnings are entered and - except for cases of automatic deactivation after 180 days - deactivated centrally by DG BUDG, in the Commission's legal entity file (LEF), after receipt of a formal letter sent by the responsible authorising officer. This processing is manual, but the content is intended to form part of an automated system, because these flaggings are visible in the Commission's accounting system and one category of warnings is made available, via a secured protocol, to outside bodies. The Regulation therefore applies in accordance with Article 3.2.

Article 27.1 of Regulation (EC) No 45/2001 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 including, in Article 27.2.d "processing operations for the purpose of excluding individuals from a right, benefit or contract". The registration of a legal or natural person in the EWS can lead notably to the exclusion from a contract, granting of an award or refusal of funds and therefore is covered by Article 27.2.d and as such subject to prior checking by the EDPS.

The Regulation also subjects to prior checking: "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and

²⁷ Procurement in the framework of external action

²⁸ Central database containing details of candidates in a situation that excludes them from participation in procedures for the award of contracts relating to operations financed by the European Development Fund

²⁹ Candidates ineligible under the Community rules applicable to public procurement

³⁰ NOT TO BE PUBLISHED

conduct" (Article 27.2.b). The EWS is clearly linked to an evaluation procedure by the Commission notably as concerns the financial conduct of a person and to this effect must be prior checked³¹.

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

The formal notification was received by e-mail on 4 May 2006. Further information was requested by e-mail on 12 June 2006. Pursuant to Article 27.4 of Regulation (EC) No 45/2001, the two-month period within which the EDPS must deliver an opinion was suspended. Replies were sent by e-mail on 13 June 2006. Due to the complexity of the file, the European Data Protection Supervisor has extended the delay by 2 months by e-mail of 26 June 2006. Others questions were asked by e-mail dated 14 July 2006. A meeting was set up on 29 September 2006 between DG BUDG, the DPO and the deputy DPO of the Commission and the EDPS. In view of this meeting, a draft was sent for comments on 21 September 2006. Replies to questions asked on 14 July were given on 26 October 2006. The EDPS received, notably, after having asked for some more information, the last modifications in the EWS decision of the Commission made on 7 November 2006.

The EDPS should therefore deliver an opinion by 20 December 2006 (i.e. 5 July plus the 105 days suspension plus two months of extension period).

3.2. Lawfulness of the processing

The lawfulness of the processing must be considered in the light of Article 5.a of Regulation (EC) No 45/2001 which provides that personal data may be processed only if the processing is "*necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution...*". Article 5.b provides that personal data may be processed if the "*processing is necessary for compliance with a legal obligation to which the controller is subject*". Furthermore, data concerning offences, criminal convictions or security measures are qualified as "*special categories of data*" under Article 10.5 of the Regulation (see 3.3 Special categories of data).

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

A number of legal instruments support the processing of personal data in relation to W5a warnings:

³¹ Processing of data by other institutions on the basis of information gathered from the Commission EWS will also be subject to prior checking on the basis of Article 27§2 b). See for example prior checking of the European Court of Justice processing of data in its EWS (2006-397)

- Commission Decision C(2004) 193/3 of 3 March 2004 as last modified by the 2006 Internal rules (SEC(2006)131), relating to the Early Warning System (hereinafter "Commission Decision relating to the EWS").
- Article 95 Financial Regulation (FR): "Each institution shall establish a central database containing details of candidates and tenderers who are in one of the situations described in Articles 93 and 94. The sole purpose of the database shall be to ensure, in compliance with Community rules on the processing of personal data, the correct application of articles 93 and 94. Each institution shall have access to the databases of the other institutions."
- Article 167 FR : "The provisions of Article 56 and of Chapter 1 of Title V of part one relating to the general provisions on procurement shall be applicable to contracts covered by this Title subject to the special provisions relating to thresholds and the arrangements for awarding external contracts laid down in the implementing rules."
- Articles 74 & 75 of Commission Regulation 2343/2002 (Implementing rules of the financial regulation): "As regards procurement, the relevant provisions of the general FR and the detailed rules for implementing that Regulation shall apply." - "Where the Community body may award grants in accordance with its constituent instrument, the relevant provisions of the general FR and the detailed rules for implementing that regulation shall apply."
- Article 50 of Reg. 1653/2004: "As regards procurement for the operation of the agency, the provisions of the general FR and Reg. (EU, Euratom) N° 2342/2002 shall apply."
- Articles 77 and 88(2) of the FR of 27 March 2003 applicable to the 9th EDF³² (OJ L83 of 1 April 2003)

As for W5b warnings, Council Regulations implementing Common positions adopted on the basis of Article 15 of the Treaty on the European Union (CFSP) which prohibit that any funds and economic resources be made available directly or indirectly to, or for the benefit of, designated natural or legal persons, groups or entities serve as legal basis for the registration such warnings³³.

The FR (Article 95) provides for the establishment of a data base concerning candidates and tenderers who are in one of the situations described in Articles 93 and 94 FR. However the Commission decision relating to the Early Warning System provides for the issuance of warnings (W1 to W4) in other situations than those provided for in Articles 93 and 94 FR, and concerning other parties than those mentioned in Article 93 and 94 FR notably staff members³⁴.

Therefore the only legal basis for warnings W1 to W4 is the Commission decision relating to the Early Warning System itself. This decision was initially not published in the Official Journal on the basis of Article 4 of Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council

³² European Development Fund

³³ See notably Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban.

³⁴ For reminder, there is no W5 warning for staff members.

and Commission documents. Since 16 August 2006 it has been made publicly available on the EUROPA website. The Regulation (EC) 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents sets up in its Article 13 the list of documents which shall be published in the Official Journal. Article 13.3 says specifically: "Each institution may in its rules of procedure establish which further documents shall be published in the Official Journal". As it has now been specifically decided that this Commission decision "should be brought into line with the result of the discussions on the advisability of granting public access to this document, by foreseeing the publication of the EWS itself³⁵", the EDPS recommends the publication of this decision in the Official Journal.

3.3. Processing of special categories of data

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

As described in above (point 3.2), the processing activities as concerns W5 warnings are carried out on the basis of the legal instruments referred to (Financial Regulation and its implementing rules, Commission decision on the Early Warning System) and Council Regulation 881/2002 imposing CFSP related financial restrictions and therefore complies with Article 10.5 of the Regulation (EC) 45/2001.

As for other types of warnings (W1 to W4), as mentioned above (3.2), the EDPS underlines the fact that they were based initially on a non published decision (Commission decision relating to the Early Warning System). Since 16 August 2006, this decision has been made publicly available on the Europa website. The EDPS recommends the publication of the Commission decision in the Official Journal (see point 3.2 above).

3.4. Data Quality

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

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

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

³⁵ See Memorandum to the Commission - Changes to the commission decision on the EWS - C(2006)5201 of 27 October 2006.

found in the data subject's right to be informed and to have access to data relating to him/her (see below 3.8 and 3.9).

Data must be "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*" (Article 4.1.c). The processed data described at the beginning of this opinion should be regarded as satisfying these conditions. The data required are administrative in nature (Name and address of the individual, type of EWS warning, start and end date of active warning, Commission service that has requested the EWS flag to be set) and are necessary for the proper functioning of the various stages of the procedure for EWS. The EDPS considers that Article 4.1.c of Regulation (EC) No 45/2001 is respected.

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 in accurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified".

The EDPS would like to question in general the accuracy of the information as concerns deactivated warnings. As mentioned above, deactivated warnings imply reinforced monitoring. They therefore entail that the legal or natural persons to whom such warnings are associated are classified as "at risk". However in some cases warnings are deactivated either because investigations do not lead to anything (W1 flags) or because a judgement having force of *res judicata* clears the person concerned (W3 flags). At this point it must be underlined that the EWS system is based on an accounting system, and that therefore some "traces" of any accounting information must be kept for audit reasons at least for as long as the FR so requires. The EDPS therefore recommends that any trace of a flag which is subsequently removed on the basis of an investigation or a judgement be made invisible to the common user of the EWS system, and only be kept in a form accessible to a limited number of users for audit reasons. Such audit trails may not be kept for longer than is necessary according to the provisions of the IR (Article 49).

Although the precise relationship between a legal person and a natural person is not altogether clear, Article 4.1.d of the Regulation implies that any modification of status of a legal person should be reflected in the status of the natural persons linked to this legal person in the EWS.

As concerns W5 warnings, Article 7§2 ii) of the Commission decision provides that "where certifications and evidence obtained by any authorising department in accordance with Article 93(2) FR on the occasion of another award procedure are not consistent with activated W5a warnings, the AOD/AOSD shall immediately inform the AOD/AOSD responsible for the warning, so that deactivation may be requested in accordance with Article 9(3)". This provision leaves scope for the correction of data that have become inaccurate or out dated. Once again however, deactivation does not lead to removal from the system. The EDPS also recommends that these deactivated warnings are made inaccessible to the common users of the system in the same way as mentioned in the previous paragraph. The accuracy of data also means that any rectification of inaccurate or incomplete data outside the system should be reflected in the EWS.

As concerns W5b warnings, it is important to underline that the Court of First Instance stressed, with regard to sanctions imposed in the frame of the Council Regulation (EC) No 881/2002 on the freezing of funds in accordance with the CFSP, the importance of the right for individuals to present a request to the Sanctions Committee for a review of the person's case through the Government of the country in which he is living or of which he is a

national³⁶. The CFI stressed the importance for the respect of the fundamental rights of the person concerned. Since the EWS W5b warnings stem from such sanctions, it is important to ensure that such rectified data are upgraded into the EWS when duly modified.

A specific mention should be made as to the quality of data, for the subcategory W5a10 (exclusion in accordance with Article 94 FR: conflict of interest or guilty of misrepresentation) which, according to the EWS request form, has to be mentioned and not activated by the system. The EDPS would like to question the value of such information since as soon as a person is mentioned in the system under a W5 flag, this has a legal affect. Therefore the value of a non activated but visible warning must be questioned.

The right of access as provided by Article 13 of Regulation 45/2001 should serve to guarantee the quality of data. This will be further discussed below (see point 3.8).

3.5. Conservation of data

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

According to the Commission Decision C(2004) 193/3, different periods of deactivation are foreseen depending on the type of EWS flags . From the start, it must be underlined that the Commission decision refers to deactivation after the specified periods mentioned below, but Article 20 provides that deactivated warnings can still be consulted and may entail certain consequences such as reinforced monitoring. This means that the data, although deactivated, is still present in the system. It also means that there are no determined conservation periods leading to the erasure of the data after a given time. Furthermore, flags which have been entered on the basis of suspicion or pending a legal decision, once deactivated on the basis either of lack of grounds for suspicion or following a legal decision which clears any grounds for condemnation, should leave no trace in the system. The EDPS considers that as a principle deactivated flags should be removed from the system and should entail no legal consequences. This point is linked to the quality of data (see above 3.4), but is also linked to the fact that a conservation period should be established. As mentioned above, the EDPS therefore recommends that any trace of a flag which is subsequently deactivated be made invisible to the common user of the EWS system, and only be kept in a form accessible to a limited number of users for audit trail reasons. Such audit trails may not be kept for longer than is necessary according to the provisions of the IR (Article 49).

Article 3 of the Commission decision provides that W1 warnings remain active for a maximum of six months and are automatically deactivated at the end of this period. But should these suspicions of fraud or serious administrative errors or others irregularities not exit any more before those 6 months, it should be foreseen to erase those W1 warnings before this period. As mentioned above, in the event of inaccurate data, the flags should be made invisible from the system before the end of the six month period. The trace of such a warning may only be kept for audit trail purposes for a period not exceeding that provided for by Article 49 IR.

W2 warnings concerning cases where investigations lead to findings of serious administrative errors or fraud shall remain active for a maximum period of 6 months after which it shall be deactivated. Article 4 of the Commission decision however provides that this is without

³⁶ See notably, Case T-253/02 and Case T-49/04

prejudice to Article 9§2 whereby the AOD/AOSD, the Director General or a Director of OLAF or the IAS who has requested an EWS warning notifies any change of information in the original request. This seems to point to the fact that W2 warnings must be removed when no longer accurate. The EDPS recommends that W2 warnings are made invisible from the system before the end of the six month period when it can be demonstrated that they are not accurate. The trace of such a warning may only be kept for audit trail purposes for a period not exceeding that provided for by Article 49 IR.

For categories W3 and W4, the data retention period is linked to the object of the flag itself. Until a judgment having the force of *res judicata* is rendered or the case has been otherwise settled (W3) or the payment of the recovery order is made (W4), the flags still remain active. The EWS flags are deactivated "as soon as it is no longer justified". The EDPS recommends that should the judgement be in favour of the third party or should there be an error as concerns the recovery order, the data should be rendered invisible. The trace of such a warning may only be kept for audit trail purposes for a period not exceeding that provided for by Article 49 IR.

For W5 warnings and linked sub-categories, two major types of regulations are involved: the Financial Regulation and Regulations relating to application of Common Positions adopted on the basis of the CFSP. For all matters related to exclusion in accordance with the FR, the period of application of the administrative penalty which has to be specified is determined by Article 133 IR (implementing rules of the FR). The delays laid down vary between one to five years depending on the Article of the FR referred to³⁷. As for warnings based on CFSP financial restrictions, the W5b flag remains as long as the designation of the person, group or entity is still valid. Here again, any warning introduced on erroneous findings should be removed.

Article 4.1.e provides that personal data may be stored for longer periods notably for statistical reasons in an anonymous form or, if that is not possible, with the identity of the data subjects encrypted. The notification submitted by the Commission in the frame of the prior checking procedure mentions that monthly reports on category 5 EWS flags are transferred to the authorised bodies after having been encrypted.

3.6. Compatible use / Change of purpose

The Regulation (EC) 45/2001 (Article 4.1.b) provides that personal data must be collected for specified, explicit and legitimate purposes and not be further processed in a way incompatible with those purposes. The EWS system uses the data collected in the LEF (legal entity file) since the flags are entered into the LEF. However the EDPS does not detect any incompatible use of the data since they both contribute to the general framework of sound financial management of the Community funds.

3.7. Transfer of data

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

Article 7 applies to all transfers of personal data between Community institutions or bodies or even within one same institution. Article 7.1 of the Regulation stipulates: "*Personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

³⁷ The revised version of the IR provides for a time limit of 5 years for Article 93(3) warnings, extendable to 10 years in certain cases.

The recipients of data provided in the EWS are multiple. All users of the Commission's accounting system ABAC have access to the EWS system. The visible data are the type of flag, code, EW reference, EW contact person within the Commission service that has requested the EWS flag to be set and the telephone number of this person (see annex 5 of the notification). A note of Budget Director General was sent on 22 April 2004 to Directors-General and Heads of Service, relating to the Implementation of restrictions on the visibility of Personal Data related to Staff in SI2 (to be, or already, replaced by ABAC workflow - depending of the Institutions). Although the EDPS welcomes this enhancing of personal data protection within SINCOM 2 (to be, or already, replaced by ABAC - depending of the institutions), it should be noted that if private addresses and bank account information of staff are to be protected, those data still remain available to some users granted with specific access and who are able to see "sensitive data".

The same statement is to be made to the limited number of ABAC users, who have been granted a specific EWS related security profile in order to be able to draw global queries and reports on EWS flagged entities. This also applies to the restricted Commission staff group who has access to the scanned supporting documents outside the ABAC application (a special Windows group).

The ABAC security modules define the right of access of the ABAC users (see facts). However the EDPS recommends that the right of access of other users are duly defined.

According to Article 21 §1 of the Commission decision, as regards the warnings W1 to W4, the restricted information shall be made available to all Commission services, including services managing funds (such as the European Development Fund) and executive agencies. Regarding W5a flags, information could be given to deconcentrated services, to EWS contacts designated by other Community institutions, by European and Community bodies. The EDPS considers that these transfers comply with Regulation (EC) 45/2001 as they are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*"

The EDPS recommends that the decision should also provide in this respect that the recipient shall only process the personal data for the purposes for which they were transmitted.

Article 2.g of Regulation (EC) 45/2001 defines the "recipient" as "*natural or legal person, public authority or any other body to whom data are disclosed, whether a third party or not; however authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients*". The exact scope of this provision and whether it applies to transfers of data to such instances as the IAS and duly authorised investigation authorities (such as PIF for example³⁸) will be examined below, (3.9 Information to the data subject). However, it must be mentioned here that should the exception of Article 2 (g) apply to such authorities, the exception is to be understood as an exception to the right to information and not to the provisions of Article 7 and following of the Regulation as concerns transfers of data. The above mentioned recommendations therefore also apply to transfers to such authorities.

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

³⁸ In this respect see Prior check opinion 2005-0407

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

In the case of W5a flag, the *restricted* information shall be made available to recipients subject to the national law as EWS contacts designated by the bodies referred to under Article 53.2 FR (national public sector bodies and external private-sector entities or bodies) and 54.2.c FR (national public sector bodies or bodies governed by private law with a public-service mission providing adequate financial guarantees ...) ³⁹.

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

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

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

The legal foundation of this transfer is to be found in Article 167 FR (procurement in the framework of external action) and Articles 77 FR (central database containing details of candidates in a situation that excludes them from participation in procedures for the award of contracts relating to operations financed by the EDF) and Article 88.2 (candidates ineligible under the Community rules applicable to public procurement) of the 9th European Development Fund Financial regulation⁴⁰. To this extent and providing that the transfer is necessary to comply with the abovementioned provisions, Article 9 of Regulation 45/2001 is respected.

3.8. Right of access and rectification

The right of access is the right of the data subject to be informed that information relating to him or her is processed by the data controller and to obtain the communication of such data in an intelligible form. As a matter of principle, this right has to be interpreted through the concept of personal data. Indeed, the Regulation has adopted a broad concept of personal data. This is based on the need to respect the right of defence, in general; and in the very field of personal data protection, the respect of the rights of access and rectification is directly linked to the data quality principle as described above (3.4). Although in most cases leading to a

³⁹ This will be changed in the modified version of the FR (Article 95.2) See in this respect opinion of EDPS on modified proposal (to be issued).

⁴⁰ This will be changed in the modified version of the FR (Article 95.3) See in this respect opinion of EDPS on modified proposal (to be issued).

warning in the EWS the data subjects are aware of the facts leading to such a warning, this does not mean that they should not be granted an access to the information contained in the system which relates to them.

As a general point as will be examined below (point 3.9), it must be underlined that when filling in the legal entity form to be registered in the LEF, information on the EWS system is not provided and so persons are not aware that a flag exists. Not being aware of these flags notably entails that persons will not request a right of access.

Article 8.3 of the Commission decision provides that, on the basis of an official written request, a third party concerned may request from the Commission, communication of information as to whether or not this third party is registered in the central database under a W5a warning. The EDPS would like to make a first point as concerns the discretion left to the Commission to grant this information or not ("may"). The right of access is established under Regulation (EC) 45/2001 as a right and the Commission should not have the power of restricting this right other than for reasons mentioned in Article 20. The Commission decision may not override the fundamental principles established by Regulation 45/2001 and should therefore be reviewed in order to grant an unconditional right of access for, at least, the natural persons concerned (see scope of Regulation 45/2001 in point 3.1. of this opinion)

Furthermore, Article 8.3 only seems to foresee a right of access in so far as the persons have duly proven their identity or their power of representation of the legal entity concerned. This seems to imply that only natural persons representing a legal entity have a right of access and that they do not have such a right *pro se* when they are concerned. The problem seems to be a matter of drafting. What is in fact meant in 8.3 is that whenever a lawyer, for example, sends a request to the Commission's Accounting Officer to check whether a Legal Entity (natural or legal person) is registered in the Article 95 database, he/she has to provide proof that he lawfully represents the Legal entity concerned. As mentioned above (3.1 Prior checking), personal data mentioned in the EWS may relate both to individuals being flagged as a result of their power of representation of a legal entity and to individuals who has been flagged in their individual capacity without any relation to a legal person. Article 8.3 must therefore be redrafted so as to afford a right of access for all data subjects to data concerning them personally and irrespectively of whether or not they act in their individual capacity or as a representative of a legal entity as is now foreseen.

The Commission decision does not provide a right of access to information relating to W1, W2, W3, W4 and W5b warnings. As mentioned above, affording a right of access to the data is based on the need to respect the right of defence, in general; and in the very field of personal data protection, is directly linked to the data quality principle. The EDPS therefore recommends that a right of access be introduced concerning these warnings at least for all physical persons concerned.

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

As mentioned above, Article 20 provides for certain exemptions or limitations to the right of access notably when such a restriction constitutes "*measures to safeguard an important economic or financial interest of ... the European Communities, including monetary, budgetary and taxation matters*" or restrictions constitutes a necessary measure to safeguard "*the national security, public security or defence of the Member States*" (article 20.1.d of the Regulation).

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

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

Paragraph 5 of Article 20 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."* It may be necessary for the Commission to defer such information in accordance with this provision, in order to safeguard the financial interests of the Community. It has to be borne in mind that 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. Then, for instance, the nature of certain cases, will not always justify the denial of access and rectification during the processing.

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

As mentioned above, as concerns W5 warnings, Article 7§2 leaves scope for the correction of inaccurate or out dated data by the AOD/AOSD. However it does not provide for such a right for the person concerned. Furthermore, in order to be able to bring evidence of inaccuracy, the person concerned should be informed in the first place of the mere existence of the warning which is not the case (see below, right to information).

As concerns W1 to W5a warnings, direct access should be given to data subjects particularly in order to let the subject to exercise his rights of defence. The right of access should be completed by a right of rectification in case of errors or wrong evaluation. The exception of restrictions to the rights of the data subject could not be set up as a rule, and should remain the exception.

3.9. Information to the data subject

Article 11 of Regulation (EC) 45/2001 specifies that the controller must provide information to the data subject except where he or she already has it. This information covers at least the identity of the controller, the purposes of the processing operation for which the data are intended, the recipients or categories of recipients, whether replies to questions are obligatory or not as well as the possible consequence of a failure to reply and the existence of a right of access to, and right to rectify the data concerning him/her. Further information may also have to be provided such as the legal basis of the processing operation, the time-limits for storing the data and the right to have recourse at any time to the EDPS. When personal data are collected directly from the data subject, the information should be provided at the time of collection of this data. Since data are notably collected directly from data subjects in the LEF, Article 11 applies. The provisions of Article 12 (*Information to be supplied where the data*

have not been obtained from the data subject) are also applicable, due to the fact that Commission can collect information also from the Commission itself or from other relevant authorities. In this case, the information must be provided to the data subject at the time of recording of the data or no later than the moment when data are disclosed to a third party, unless the person concerned already has this information.

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

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

As mentioned in the facts, general information on the EWS is provided on the EUROPA website since 16 August 2006. However the EDPS would like to underline the fact that most of the information related to the processing of personal data is not provided. All information included in Articles 11 & 12 should be provided in the relevant EUROPA web pages.

In order to comply with Regulation 45/2001, the EDPS recommends that general information on the mere existence of the EWS must be provided to all persons mentioned in the LEF data base. Indeed, their inclusion in this data base makes them potentially liable to be included in the EWS system. This information should contain the items listed in Article 11 of the Regulation and should be given at the time of collection of the data in the LEF form. The Privacy statement of the LEF must be revised so as to include the legal basis.

Furthermore, the fair processing of personal data in detections and investigations implies the exercise of the right of defence. In order to exercise that right, officials or applicants must normally be in a position to know when proceedings/suspensions have been initiated against them. Even though for most EWS warnings, which only reflect ongoing proceedings to which the entity concerned is party, the person concerned is aware of the facts, this does not necessarily imply that he/she is aware of the existence of a warning in the EWS. The absence of providing such information will have different consequences according to the status of the procedure and the interests at stake. A warning issued during the award of a contract or grant will not be brought to the attention of the person concerned and consequently the person will not be in a position to defend his position. A warning issued as concerns ongoing contracts and grants will have as effect that the payment will not be made immediately⁴¹; the person concerned will therefore be alerted that something is wrong. However since he is not aware of the EWS and does not always have a right of access to it, he will not be in a position to defend his rights.

The implementing rules of the FR (IR) of 20 July 2005 and in particular the new paragraph 3 of Article 149 provide that in the case of contracts awarded by the Community institutions on their own account, under Article 105 of the FR, the contracting authority shall inform all unsuccessful third parties, simultaneously and individually, as soon as possible after the award decision and within the following week at the latest, by mail, fax or email, that their

⁴¹ See Art 12 of Commission decision: payments due will always be made, they are just suspended for a matter of a couple of days mostly either to give the AOD the opportunity to check that all relevant monitoring procedures have been correctly applied, or to give the Accounting Officer the opportunity to set off (part of) the payment due against outstanding debts

application or tender has not been accepted; specifying in each case the underlying reasons. This supports the fact that the persons concerned should be informed at least of the reasons underlying the issuance of a warning against him/her. This information must therefore be completed by information on the existence of a EWS warning.

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

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

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

Nevertheless, an important consideration to take into account here is the relationship between the EWS and other investigation procedures such as these carried out by OLAF or the PIF⁴² or others. Once the deferral of information based on Article 20 has been lifted in these procedures, there is no reason to refrain from informing data subjects in the frame of the EWS.

The Commission is therefore expected to give information to data subjects on the EWS in general and on a base of case by case basis, subject to restrictions according to Article 20 of the Regulation (EC) 45/2001.

3.10. Automated individual decisions

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

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

3.11. Security measures

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

⁴² On those cases see Prior check opinions of EDPS respectively 2005-0418 and 2005-0407

Conclusion:

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

- the possibility of publishing the EWS decision in the Official Journal is taken into account,
- any trace of a flag which is subsequently removed on the basis of an investigation or a judgement be made invisible to the common user of the EWS system, and only be kept in a form accessible to a limited number of users for audit reasons. Such audit trails may not be kept for longer than is necessary according to the provisions of the IR (Article 49),
- any modification of status of a legal person is reflected in the status of the natural persons linked to this legal person in the EWS,
- any rectification of inaccurate or incomplete data outside the system is reflected in the EWS, and that rectified data according to the Sanctions Committee are upgraded into the EWS when duly modified,
- the value of a non activated W5a10 which has to be "mentioned and not activated" is duly clarified,
- the rights of access of other users of ABAC are duly defined in the context of the ABAC security modules,
- the decision provides that the recipient shall only process the personal data for the purposes for which they were transmitted,
- Article 8.3 of the Commission decision is reviewed in order to grant an unconditional right of access for, at least, the natural persons concerned, and that it is redrafted so as to afford a right of access for, all data subjects to data concerning them personally and irrespectively of whether or not they act in their individual capacity or as a representative of a legal entity as is now foreseen,
- a right of access is introduced concerning the W1, W2, W3, W4 and W5b warnings at least for all physical persons concerned,
- the right of access is completed by a right of rectification in case of errors or wrong evaluation,
- any restrictions to the rights of the data subject are not set up as a rule, and remain the exception,
- all information included in Articles 11 & 12 is provided in the relevant EUROPA web pages,
- the Privacy statement of the LEF is revised so as to include the legal basis,
- information is given to data subjects on the EWS in general and on a base of case by case basis, subject to restrictions according to Article 20 of the Regulation (EC) 45/2001, and that, as a rule, the person concerned is informed of the issuance of a warning against him/her.

Done at Brussels, 6 December 2006

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