



**Early Detection and Exclusion System Database
(EDES-DB)
Prior Checking Opinion
Case 2016-0864**

The EDES-DB is the new system established by the Commission to reinforce the protection of the Union's financial interests and to ensure sound financial management. It replaced the Early Warning System and the Central Exclusion Database as of 1 January 2016. The rules governing EDES can now be found in the revised Financial Regulation for the EU institutions. The EDPS recommends establishing an explicit limited retention period for the further uses of the EDES-DB information envisaged in the notification.

Brussels, 04 October 2017

1) Legal background

On 28 September 2016 the Data Protection Officer (DPO) of the European Commission notified for prior checking by the European Data Protection Supervisor (EDPS) the processing regarding “Entry of a Data Subject in the Early Detection and Exclusion System (EDES-DB)”. After verification and request for confirmation from the EDPS by email of 5 October 2016, the DPO of the European Commission confirmed that the EDES-DB is in operation since 1 January 2016.

The EDES-DB is not an entirely new system. It replaced, as from 1 January 2016, the previous Early Warning System (EWS) and Central Exclusion Database (CED), for which the EDPS issued opinions respectively on 6 December 2006 (Case 2005-120) and 26 May 2010 (Case 2009-0681). The previous EWS and CED were set up based on relevant provisions of the Regulation (EU, Euratom) N°966/2012 of the European Parliament and of the Council (hereinafter “FR”) of 2006 and further implemented by specific Commission Regulation 1302/2008 of 13 December 2008¹ and Commission Decision 2008/969² as repealed by Commission Decision 2014/792 of 13 November 2014³.

However, on 22 April 2015, the General Court found that Commission Decision 2008/969 on the EWS, unlike Regulation 1302/2008 on the CED, was lacking an appropriate legal basis⁴ because there were no provisions of primary or secondary law expressly conferring on the Commission the power to create and manage the EWS database. It also found that entry in EWS had legal consequences and that the rights of defence were not complied with.

Major amendments to the FR by Regulation (EU, Euratom) N°2015/1929, which entered into force on 1 January 2016⁵, consist in providing an explicit statutory basis for the creation and management of the renewed EDES-DB which is the object of the present opinion. Article 105a provides that “*In order to protect the Union’s financial interests, the Commission, shall set up and operate an early detection and exclusion system*”. Article 106 FR foresees the exclusion criteria and administrative sanctions, while Article 108 FR expressly provides that the European Commission is responsible to set up and manage the central database for the exchange of the early detection and exclusion information. These provisions are very detailed regarding the procedure for entry of an entity in the EDES-DB.

2) Description of EDES-DB

a) Purposes

The purpose of the early detection and exclusion system “shall be to facilitate : a) the **early detection** of risks threatening the Union’s financial interests; b) the **exclusion** of an economic

¹ Commission Regulation (EC, Euratom) No 1302/2008 of 17 December 2008 on the central exclusion database, OJ L 344, 20.12.2008.

² Commission Decision of 16 December 2008 on the Early Warning System for the use of authorising officers of the Commission and the executive agencies (2008/969/EC, Euratom), OJ L 344, 20.12.2008.

³ Commission Decision of 13 November 2014 on the Early Warning System to be used by authorising officers of the Commission and by executive agencies (2014/792/EU), OJ L 329, 14.11.2014.

⁴ General Court, 22 April 2015, *Planet AE v. Commission*, T-320/09.

⁵ Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union, OJ L 286, 30.10.2015, further referred to as “FR”.

operator⁶ which is in one of the exclusion situations listed in Article 106 (1)⁷; c) the imposition of a **financial penalty** on an economic operator pursuant to Article 106 (13)^{8,9}.

Early detection

The early detection of risks shall be based on the transmission of information from entities mentioned in Article 108 (2) FR (OLAF, authorising officer of the Commission, of a European office or of an executive agency, other institutions and agencies, and other entities implementing the budget (Members States)) about cases of presumed grave professional misconduct, irregularity, fraud, corruption or serious breach of contract.

Exclusion

The FR provides for new grounds for exclusion under Article 106(1). It provides that the authorising officer shall exclude economic operators as defined in Article 101 (1) (g), (k), (l) of the FR (such as tenderers, candidates, contractors, grant applicants, beneficiaries, experts, etc.) who:

- are subject to insolvency or winding-up procedures, or in an analogous situation, pursuant to Article 106 (1) (a) of the FR; ·
- are in breach of their obligations relating to the payment of taxes or social security contributions, pursuant to Article 106 (1) (b) of the FR; ·
- are guilty of grave professional misconduct (Article 106 (1) (c) of the FR), including in particular of:
 - a) fraudulent misrepresentation of information,
 - b) distortion of competition,
 - c) violation of intellectual property rights,
 - d) influence of the decision making process within a procurement procedure,
 - e) attempt to obtain confidential information that may confer undue advantages in a procurement procedure;
- are guilty (Article 106 (1) (d) of the FR) of: a) fraud; b) corruption; c) participation in a criminal organisation; d) money laundering or terrorist financing; e) terrorist related offences; f) child labour or trafficking of human beings; ·
- have shown significant deficiencies in complying with main obligations in the performance of a contract financed by the Union's budget (Article 106 (1) (e) of the FR); ·
- have committed an irregularity (Article 106 (1) (f) of the FR).

For grounds under Article 106 (1) (c), (d) and (f) FR, a final judgement or a final administrative decision is required. In the absence of final judgement or final administrative decision in those cases as well as in cases under Article 106 (1) (e) FR (following checks, audits or investigations by OLAF etc.), economic operators shall be excluded on the basis of a preliminary classification in law of a conduct referred to in those points, having regard to other established

⁶ According to Article 101(1)(g), an 'economic operator' means any natural or legal person, including a public entity, or a group of such persons, which offers to supply products, execute works or provide services or immovable property".

⁷ Article 106 (1) FR lists 6 grounds for exclusion of an economic operator from a procurement procedure.

⁸ Article 106 (13) FR refers to the possibility to impose a financial penalty on an economic operator who has attempted to obtain access to Union funds by participating or requesting to participate in a procurement procedure while being, without having declared it [...], in one of the exclusion situation of Article 106 (1).

⁹ Article 105a (1) FR.

facts or other findings contained in the recommendation of the panel referred to in Article 108 FR (Article 106 (2) FR).

Financial penalty

In cases of Article 106 (1) (c), (d), (e) and (f) (such as grave professional misconduct, fraud, irregularity, corruption, criminal organisation, serious breach of contract etc.) and in order to ensure a deterrent effect, the authorising officer may impose a financial penalty on the economic operator in question, as an alternative to a decision to exclude or in addition to an exclusion, under the conditions mentioned in Article 106 (13) FR.

Publication online of exclusion decision

After the decision on exclusion and/or financial penalty has been taken in the cases referred to under Article 106 (1) (c), (d), (e) and (f) FR, and in order, where necessary, to reinforce their deterrent effect, the Commission shall publish on its internet site the relevant information relating to the exclusion decision, subject to a decision of the authorising officer (Article 16 (16) FR).

However, pursuant to Article 106 (17) (c) FR, where a natural person is concerned, personal data shall not be published, “*unless the publication of personal data is exceptionally justified, inter alia, by the seriousness of the act or its impact on the Union's financial interests. In such cases, the decision to publish the information shall duly take into consideration the right to privacy and other rights provided for in Regulation (EC) No 45/2001*”.

b) Categories of data subjects

If the content of the EDES-DB is expected to concern mainly legal persons (90% of the cases), personal data relating to natural persons, thus falling under the scope of protection of Regulation 45/2001, may also be concerned in the following situations: ·

- Natural persons that are economic operators under the meaning of Article 101, paragraph 1, (g) FR;
- Natural persons who are members of the administrative, management or supervisory body of the economic operator, or who have powers of representation, decision or control with regard to the economic operator which is in a situation listed in Article 106, paragraph 1, points (a) and (b), pursuant to Article 106, paragraph 4 of the FR;
- Natural persons who assume unlimited liability for the debts of that economic operator which is in a situation listed in Article 106, paragraph 1, point (a) or (b) pursuant to Article 106, paragraph 4 FR.

c) Categories of personal data

Categories of personal data that will be processed in EDES-DB are the following: ·

- Identification data: Name, surname, address, country, identity card number/ passport number/driving license (or other document proving identity), issuing country, date of birth, place of birth; ·
- Data on the link (if existing) with a legal entity file kept in the accounting system of the Commission;
- Data on early detection: summary of the risks detected or the facts in question; information that could assist the authorising officer in carrying out the verification or in taking a decision on exclusion; where applicable, any special measures necessary to ensure the confidentiality of the information transmitted, including measures for the

safeguarding of evidence to protect the investigation or the national judicial proceedings (Art. 108(3) FR); duration of early detection: starting date, end date, extension (according to Article 108(4) FR, the retention period shall not exceed one year)

- Data on exclusion: ground or grounds of the exclusion under Article 106(1), duration of exclusion;
- Data on the panel (Art. 108(6)): date of the panel, whether observations were submitted by the economic operator, whether recommendations of the panel were taken into account or revised etc.;
- Data on financial penalty; amount of the penalty, whether the penalty was paid
- Authorizing officer for the case;
- Contact person responsible for the case.

Pursuant to Article 106 (16) FR, the following data may be published on the internet site of the Commission, subject to the decision of the authorising officer:

- Identification data: name and address of the economic operator;
- Data on exclusion and grounds of exclusion (Article 106 (1) FR);
- Duration of exclusion;
- Data on financial penalty: amount and if it was paid.

Where the decision on the exclusion and/or financial penalty has been taken on the basis of a preliminary classification as referred to in Article 106 (2) FR, the publication shall indicate that there is no final judgment or, where applicable, final administrative decision. In those cases, information about any appeals, their status and their outcome, as well as any revised decision of the authorising officer, shall be published without delay¹⁰.

EDES-DB includes the processing of special categories of data according to Article 10(5)¹¹ of Regulation 45/2001. Indeed, pursuant to Article 106 (1) FR, the early detection and exclusion system involves the processing of:

- Data relating to insolvency or winding-up procedures, or an analogous situation;
- Data relating to the non-payment of taxes or social security contributions;
- Data relating to grave professional misconduct (fraudulent misrepresentation of information, distortion of competition, violation of intellectual property rights, attempt to influence the decision making process of the contracting authority during a procurement procedure, etc.)
- Data relating to fraud, corruption, participation in criminal organisation, money laundering, offences linked to terrorist activities, child labour or other forms of trafficking in human beings;
- Data relating to significant deficiencies in complying with main obligations in the performance of a contract;
- Data relating to an irregularity.

d) Information to be given to data subjects

Pursuant to Article 108 (1), 1st subparagraph FR and in accordance with the requirements of Articles 11 and 12 of Regulation (EC) No 45/2001, any economic operator subject to the early

¹⁰ Article 106(16) FR.

¹¹ Data relating to offences, criminal convictions or security measures.

detection and exclusion system shall have the right to be informed of the data stored in the database upon its request to the authorising officer. Before an eventual exclusion decision and/or financial penalty and /or the decision on publication of exclusion decision and/or of the financial penalty, the data subject will be notified without delay about the facts in question and their preliminary classification in law pursuant to Article 108 (8) (b) FR.

This notification may be deferred where there are compelling legitimate grounds to preserve the confidentiality of an investigation or of national judicial proceedings, until such compelling legitimate grounds to preserve the confidentiality cease to exist (see Article 108 (8) (d) FR). This deferral reflects the exception of Article 20 (1) (a) of Regulation 45/2001, which foresees that the rights of data subject may be restricted, "*where such restriction constitutes a necessary measure to safeguard: (a) the prevention, investigation, detection and prosecution of criminal offences. ...*"

In cases of publication online, Article 106 (16), 5th subparagraph FR provides that "*In accordance with Regulation EC No 45/2001, where personal data is concerned, the contracting authority shall inform the economic operator of its rights under the applicable data protection rules and of the procedures available for exercising those rights.*"

In order for the data subject to be informed, the following forms are available:

- Specific Privacy Statement on the Early Detection and Exclusion System (EDES) is accessible on line on the internet website of the Commission: http://ec.europa.eu/budget/library/explained/management/protecting/privacy_statement_edes_en.pdf;
- Prior information of data subjects is also ensured via standard clauses inserted in calls for tenders and calls for proposals;
- It is foreseen to inform data subjects at the beginning of the contradictory procedure about the facts in question and their preliminary classification in law before a possible exclusion decision (Article 108 (8) (b) FR);
- It is further foreseen to inform data subjects with the notification of the registration of the information on early detection and/or exclusion and /or financial penalty.

e) Data subject's rights

The FR ensures the rights of defence and to the protection of personal data as follows:

Rights of defence (contradictory procedure)

Data subjects subject to an exclusion decision may submit their observations to the panel referred to in Article 108 FR¹². This opportunity may only exceptionally be deferred in order to preserve the confidentiality of an investigation or of national judicial proceedings¹³. This deferral reflects again the exception of Article 20 (1) (a) of Regulation (EC) No 45/2001. In addition, when the authorising officer envisages a more severe decision than what was recommended by the panel, such decision will be taken with due respect for the rules on data

¹² Article 108(8)(c) FR.

¹³ Article 108(8)(d) FR.

protection¹⁴. Finally the Court will have unlimited jurisdiction to review an exclusion decision¹⁵.

Rights of rectification/blocking/erasure/access pursuant to Regulation (EC) No 45/2001

The rights of the data subjects enshrined in Articles 13 to 19 of the Regulation (EC) No 45/2001 are confirmed by the FR¹⁶ and data subjects are informed about them when the registration of the information on early detection and/or exclusion and/or financial penalty is notified. It is the authorising officer who entered into EDES-DB the information on early detection and/or exclusion and/or financial penalty, who is the responsible for the relations with the person whose data are introduced into the EDES-DB.

f) Categories of recipients

Recipients of the data from EDES-DB derive from Article 108 (2), (4) and (12) FR and Article 143 of the Rules of Application of the FR¹⁷:

- Authorised persons within the Commission and of the Executive Agencies for information concerning early detection, exclusion and financial penalty¹⁸;
- Authorised persons within all other Institutions, bodies, European offices and agencies for information concerning early detection, exclusion and financial penalty¹⁹;
- Members of the Panel referred to in Article 108 FR: a high level independent chair, two representatives of the Commission and a representative of the requesting authorising officer;
- Authorised persons from all entities participating in the implementation of the budget in accordance with Articles 59-60 FR²⁰ only for exclusion decisions;
- Public for cases which are made public on the website of the EDES related to exclusion and where applicable, the financial penalty²¹.
- European Court of Auditors, European Anti-Fraud Office (OLAF) for all data that are in the EDES database for audit /investigation purposes.

¹⁴ Article 108(9), second sub-paragraph: “Where the contracting authority envisages taking a more severe decision than what has been recommended by the panel, it shall ensure that such decision is taken with due respect for the right to be heard and for the rules of personal data protection.”

¹⁵ Article 108(11) FR.

¹⁶ Article 106(16), fifth sub-paragraph: “In accordance with Regulation EC No 45/2001, where personal data is concerned, the contracting authority shall inform the economic operator of its rights under the applicable data protection rules and of the procedures available for exercising those rights.” Article 106(17)(c) FR: There should not be publication online of an exclusion and/or financial penalty decision “where a natural person is concerned, unless the publication of personal data is exceptionally justified, *inter alia*, by the seriousness of the conduct or its impact on the Union’s financial interests. In such cases, the decision to publish the information shall duly take into consideration the right to privacy and other rights provided for in Regulation (EC) No 45/2001”.

¹⁷ Commission Delegated Regulation No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union as amended by Commission Delegated Regulation (EU) 2015/2462 of 30 October 2015, further referred to as “Rules of Application of the FR”. Consolidated version available at: http://ec.europa.eu/budget/biblio/documents/regulations/regulations_en.cfm.

¹⁸ Article 108(4), first sub-paragraph FR.

¹⁹ *Idem*.

²⁰ See Article 108(12) FR and Article 143 Rules of Application of the FR.

²¹ Article 106(16) FR.

g) Retention duration

Early detection

According to Article 108(4), sub-paragraph 3 FR, the information on early detection shall be retained for a maximum duration of one year. The notification specifies that the retention period starts from the moment that the relevant case is validated by the Commission and that the information is automatically removed at the end of the period.

The same Article further provides that “*if, during this period, contracting authority requests the panel referred to in Article 108 to issue a recommendation in an exclusion case, the retention period may be extended until such time as the contracting authority has taken a decision*”. In other cases, as soon as it is no longer justified, the information on early detection is removed by the authorising officer.

Exclusion

The retention duration of information relating to exclusion is based on the durations of exclusion established under Article 106(14) FR:

- a) the duration, if any, set by the final judgement or the final administrative decision of a Member State; As explained above, an economic operator shall be excluded as long he is in one of the exclusion situations referred to in points (a) and (b) of Article 106(1) FR²² (bankruptcy, insolvency or winding-up procedures, or an analogous situation, non-payment of taxes or social security contributions)²³;
- b) five years for cases referred to Article 106(1)(d) FR (in cases of fraud, corruption, participation in criminal organisation, money laundering, offences linked to terrorist activities, child labour or other forms of trafficking in human beings);
- c) three years for cases referred to in Article 106(1)(c), (e) FR (grave professional misconduct, significant deficiencies in complying with main obligations in the performance of a contract and irregularity).

Publications online

According to Article 106(16), fourth sub-paragraph FR, the information on exclusion published online shall be removed as soon as the exclusion has ended. The same Article provides that in case of a financial penalty, the publication shall be removed six months after payment of that penalty.

Further uses

According to the notification for prior checking, “removed” information on early detection, exclusion and/or financial penalty will remain accessible for audit, investigation purposes and for the purposes of the preliminary classification in law due to the fact that “recurrence” is a criterion to be taken into consideration for the recommendation of the panel and by the contracting authority adopting a decision of exclusion and/or financial penalty pursuant to Article 106 (3) FR²⁴. It is specified that the removed information shall not be visible for the other users of the EDES database.

²² Article 106(14) FR.

²³ Following Article 106(3) FR, any decision of the contracting authority or any recommendation of the panel referred to in Article 108 FR on the proposed duration of the exclusion shall be made in compliance with the principle of proportionality.

²⁴ “Any decision of the contracting authority taken under Article 106 to 108 or, where applicable, any recommendation of the panel referred to in Article 108, shall be made in compliance with the principle of proportionality and in particular taking into account the seriousness of the situation, including the impact on the Union’s financial interests and image, the time which has elapsed since the relevant conduct, its duration and its **recurrence**, the intention or degree of negligence, the limited amount at stake for point (b) of paragraph 1 of this

h) International transfers

Authorised persons from all entities participating in the implementation of the budget in accordance with Article 60 FR will have access to the information on exclusion decisions also for the part of the database that is not open to the public (see Article 108 (12) and 58 (1) (c) of the FR).

Those entities are the following:

- (i) third countries or the bodies they have designated;
- (ii) international organisations and their agencies;
- (iii) public law bodies;
- (iv) bodies governed by private law with a public service mission to the extent that they provide adequate financial guarantees;
- (v) persons entrusted with the implementation of specific actions in the CFSP pursuant to Title V of the TEU, and identified in the relevant basic act.

Specific clauses will be inserted in the delegation agreements in order to fully respect Article 9 of Regulation 45/2001.

i) Transition from EWS and CED to EDES-DB

As stated in the notification, the content of the previous EWS and CED databases did not automatically migrate to EDES-DB. Instead, a re-assessment of the cases took place in order to feed the new EDES-DB²⁵.

3) Legal analysis

This prior checking Opinion²⁶ under Article 27 of Regulation (EC) No 45/2001²⁷ (the Regulation) will focus on those aspects which raise issues of compliance with the Regulation or otherwise merit further analysis.

In particular, since most aspects of the EDES-DB are provided for by statutory legislation, the analysis of the EDPS focused mainly on the aspects where the notification and accompanying documentation provides for additional and/or complementary specifications. For aspects not covered in this Opinion, the EDPS has, based on the documentation provided, no comments.

a) Further uses and retention durations

Article 4(1)(e) of Regulation (EC) No 45/2001 provides that personal data “*must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.*”

The FR provides for explicit and detailed retention periods for each of the purposes of processing of EDES-DB (see above section 2. a)).

Article or any other mitigating circumstances, such as the degree of collaboration of the economic operator with the relevant competent authority and its contribution to the investigation as recognised by the contracting authority, or the disclosure of the exclusion situation by means of a declaration referred to in paragraph 10 of this Article”.

²⁵ Notification of EDES to the DPO.

²⁶ As this is an ex-post case, the deadline of two months for the EDPS to issue his Opinion does not apply. The notification was received on 28 September 2016. This case has been dealt with on a best-effort basis.

²⁷ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.01.2001.

The retention periods for the information relating to early detection, exclusion and publication online of exclusion and/or financial penalties are respectively provided under Article 108(4), subparagraph 3, Article 106(14) and Article 106(16), fourth sub-paragraph FR (see above section 2. g)).

However, the notification for prior checking further provides that the removed information on early detection, exclusion and/or financial penalty will remain accessible for ***audit, investigation*** purposes ***and for the purposes of the preliminary classification in law***. In that case, it is specified that the removed information shall no longer be visible for the other users of the EDES-DB. In practice, it implies that the information is blocked for the users, but remains accessible in case of audit and investigation and to the panel and the contracting authority when considering the adoption of a decision of exclusion on the ground of preliminary classification in law.

Although the further retention of the removed information on early warning for *audit and investigation* purposes was already foreseen in the Commission decision 2014/792/EU of 13 November 2014 on the Early Warning System²⁸ adopted to maintain the EWS pending the adoption of the new FR, the further retention of removed information ***for the purposes of the preliminary classification in law*** constitutes a new, additional further use.

Preliminary classification in law is, in accordance with the FR, one of the legal grounds for the adoption of an exclusion decision and/or financial penalty pursuant to Article 106(2) FR. It is destined to apply in the absence of a final judgement or, where applicable, of a final administrative decision establishing that the economic operator has committed certain offences and when the economic operator has shown significant deficiencies.

In those cases, it is provided that the contracting authority may take a decision to exclude an economic operator and/or adopt a financial penalty “only after having obtained a recommendation of the panel”²⁹. It is further provided that any decision made by the panel to establish its recommendation and the contracting authority adopting the final decision “*shall be made in compliance with the principle of proportionality and in particular taking into account the seriousness of the situation, including the impact on the Union’s financial interests and image, the time which has elapsed since the relevant conduct, its duration and its recurrence, the intention or degree of negligence [...]*” (emphasis added).

According to the notification, the further retention, beyond the retention durations expressly provided under Articles 108(4), third sub-paragraph, 106(14), and 106(16), fourth sub-paragraph FR, is necessary due to the fact that "recurrence" is a criterion to be taken into consideration for the recommendation of the panel and by the contracting authority adopting a decision of exclusion and/or financial penalty on the legal ground of preliminary classification in law.

The EDPS considers that the further use and retention of the information contained in the EDES-DB for audit and investigation purposes constitutes a further compatible use also expressly provided under the Rules of Application of the FR. It should be highlighted that Article 48 of the Rules of Application of the FR provides for the retention of supporting

²⁸ Article 17(4) of Commission Decision (2014/792/EU) of 13 November 2014 on the Early Warning System to be used by authorizing officers of the Commission and by the executive agencies, *Ibid*.

²⁹ Article 108(5) FR.

documents relating to and subsequent to budget implementation and budget implementation measures “for at least five years from the date on which the European Parliament grants discharge for the budgetary year to which the documents relate.”³⁰ In accordance with the data quality principle of Article 4 (1) (c) of Regulation (EC) No 45/2001, it is further provided that “[p]ersonal data contained in supporting documents shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes.”³¹

With respect to the further use and retention for the purpose of preliminary classification in law of the information contained in the EDES-DB, the EDPS considers that this purpose is obviously compatible with the purposes of the EDES-DB. The overall goal of the EDES-DB is to minimise the risks to the Union’s financial interests through the detection and exclusion of economic operators that might pose such a risk from procurement procedures. The further use, beyond the retention periods established by the FR, by a limited number of users (panel and contracting authority) of the information contained in the EDES-DB to check whether an economic operator has already been the object of an early detection or exclusion measure in the past may be relevant to the general purpose of protection of the Union’s financial interests.

However, the notification for prior checking does not provide for any retention period for the information stored in the EDES-DB and used for the further purposes of audit, investigation and preliminary classification in law. This implies that, in its current state, although past information (that is to say removed information following Articles 108(4), sub-paragraph 3, 106(14), and 106(16), 4th sub-paragraph FR) is only visible to a limited number of users (auditors, panel and contracting authority) under specific circumstances, all information relating to early detection, exclusion and financial penalties is nevertheless kept for an ***indefinite retention period***.

Article 4(1) e) of the Regulation (EC) No 45/2001 provides that personal data “must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected **or for which they are further processed**.” (emphasis added). It follows from this requirement that the retention of personal data should always be subject to ***limited retention periods***. If certain circumstances may justify the retention of information in a database for very long periods, the principle still remains one of limited retention.

In that context, the Commission should establish ***a limited retention period*** for the further uses of the EDES-DB information removed in accordance with Articles 108(4), third sub-paragraph, 106(14), and 106(16), fourth sub-paragraph FR for audit, investigation and preliminary classification in law purposes. This retention period should be strictly limited to the necessity to process these data for these further purposes.

The EDPS **strongly recommends** establishing ***a limited retention period*** for the further uses of the EDES-DB information removed in accordance with Articles 108(4), third sub-paragraph, 106(14), and 106(16), fourth sub-paragraph FR for audit, investigation and preliminary classification in law purposes. The EDPS expects to receive documentary evidence (updated notification) of implementation of this recommendation.

³⁰ Article 48, first sub-paragraph, lit. (d) of the Rules of Application of the FR.

³¹ Article 48 last paragraph of the Rules of Application of the FR.

b) Information

Article 11 and 12 of the Regulation (EC) No 45/2001 provides for an obligation of transparency with regard to data subjects from whom data are collected and processed, providing he/she should be informed about:

- “a) the identity of the controller;
- b) the purposes of the processing operation for which the data are intended;
- c) the recipients or categories of recipients of the data;
- d) whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply;
- e) the existence of the right of access to, and the right to rectify, the data concerning him or her;
- f) any further information such as:
 - (i) the legal basis of the processing operation for which the data are intended,
 - (ii) the time-limits for storing the data,
 - (iii) the right to have recourse at any time to the European Data Protection Supervisor,insofar as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.”

As outlined above (section 2.d)), in order for data subjects to be informed, several forms are available.

Following the previous recommendation, the EDPS considers that the data subjects should additionally be informed about the retention duration of the information on early detection, exclusion and/or financial penalty for further uses for audit and investigation purposes and preliminary classification in law purposes. Both the Privacy Statement on the EDES System and the information given with the notification of the registration of the information on early detection and/or exclusion and /or financial penalty contained in the standard letters addressed to economic operators should be revised accordingly.

The EDPS **recommends** revising the Privacy Statement and information given on early detection and/or exclusion and /or financial penalty contained in the standard letters addressed to economic operators so as to include reference to the retention period of the information for further uses for audit, investigation and preliminary classification in law purposes.

4) Recommendations

In this Opinion, the EDPS has made several recommendations to ensure compliance with the Regulation. Provided that these recommendations are implemented, the EDPS sees no reason to believe that there is a breach of the Regulation (EC) No 45/2001.

For the following **major recommendations**, the EDPS expects **implementation and documentary evidence** thereof within **three months** of the date of this Opinion:

1. Establish *a limited retention period* for the further uses of the EDES-DB information removed in accordance with Articles 108(4), third sub-paragraph, 106(14), and

106(16), fourth sub-paragraph FR for audit, investigation and preliminary classification in law purposes.

2. Revise the Privacy Statement and information given on early detection and/or exclusion and /or financial penalty contained in the standard letters addressed to economic operators accordingly.

Done at Brussels, 04 October 2017

Wojciech WIEWIOROWSKI