

**Opinion on a notification for Prior Checking received from the Data Protection Officer
of the European Research Council Executive Agency regarding the use of the Early
Warning System by the European Research Council Executive Agency**

Brussels, 03/03/2014 (Case 2012-0823)

1. Proceedings

On 24 September 2012, the European Data Protection Supervisor ("**EDPS**") received from the Data Protection Officer ("**DPO**") of the European Research Council Executive Agency ("**ERCEA**") a notification for prior checking relating to the processing of personal data in the framework its use of the Early Warning System ("**EWS**").

Questions were raised on 31 October 2012 to which the ERCEA responded on 15 November 2012, on 20 November 2012 to which the ERCEA replied on 13 December 2012, on 21 December 2012 to which the ERCEA replied on 19 February 2013 and on 20 February 2013 to which the ERCEA replied on 12 April 2013. The draft Opinion was sent to the DPO for comments on 21 April 2013. The EDPS received a reply on 7 May 2013 and the comments on the draft Opinion were discussed in a meeting held on 21 June 2013. The revised draft Opinion was sent to the ERCEA on 30 September 2013 to which the ERCEA responded on 21 October 2013.

In 2006 the EDPS prior checked the Commission's EWS and an Opinion was adopted on 6 December 2006.¹ The processing notified in the current case only covers the procedures specific to the ERCEA's use of the EWS as operated by the Commission. Furthermore, the EDPS notes that the European Ombudsman conducted an inquiry into the Commission's EWS and recommended the revision of the current EWS' legal framework notably to enhance the right of to be heard of the persons listed in the EWS.² Therefore, the Commission's EWS might undergo further revision in the future and accordingly trigger a new Article 27 notification from the Commission. This Opinion thus merely focuses on the implementation of the existing legal framework for the EWS by the ERCEA and is without prejudice to the EDPS' position on the Commission's EWS or modifications that could be made to the general EWS as such.

¹ Case 2005-0120.

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

2. The facts

Purpose of the EWS

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

The purpose of the EWS is to ensure within the Commission and its executive agencies the circulation of restricted information concerning third parties who could represent a threat to the European Union's financial interests and reputation or to any other fund administered by the European Union. This concerns information on third parties with whom the Commission and its services have or are likely to have financial relations and for which a risk has been identified or which are suspected of, or have been confirmed of, having committed fraud or serious administrative errors or irregularities. The Central Exclusion Database ("**CED**") is a specific output of the EWS containing all entities which are in an exclusion situation as defined by Regulation (EU, Euratom) No 966/2012 of the European Parliament and the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 ("**Financial Rules**").³ The EWS and the CED are managed by the Commission's Accounting Officer who is the only authority able to enter, modify or remove EWS warnings based on requests by Authorising Officers of Commission services or agencies such as the ERCEA.

The architecture and use of the EWS as adopted and endorsed by the European Commission were notified to the EDPS for prior checking in 2005 (and for the CED in 2010).⁴ The use of the EWS by the ERCEA is based for the most part on the central database as operated by the Commission and prior-checked in the 2006 EDPS Opinion. As a consequence, this Opinion only covers processing operations of the ERCEA when implementing the current EWS or requesting an EWS flagging (and not the EWS as such) by the ERCEA Authorising Officer, as an Authorising Officer by Delegation ("**AOD**").⁵

Since the 2006 EDPS Opinion on the Commission's EWS, new legislation has been adopted: Commission Decision (2008/969/EC, Euratom) of 16 December 2008 on the "Early Warning System for the use of authorising officers of the Commission and the executive agencies" as amended by Commission Decision 2011/C 180/06 of 17 June 2011 ("**EWS Decision**"). In addition, as described above, a revision of the general EWS by the Commission could occur in the future. In view of this, the necessity of the EWS as such to be notified again for prior checking to the EDPS by the Commission needs to be reassessed. The findings and recommendations issued by the EDPS in such a future Opinion on the Commission's EWS will have therefore to be taken into account by the ERCEA insofar as applicable once such EDPS Opinion on the Commission's EWS will be adopted.

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

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

⁵ Certain warnings can however only be requested by the Accounting Officer of the Commission, OLAF or IAS.

Furthermore, the new Financial Rules were adopted after ERCEA's notification and entered into force on 1 January 2013. In the following, the present Opinion will make reference to the provisions of new Financial Rules (with references to the corresponding provisions of former Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities ("**Financial Regulation**") in brackets).

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

The ERCEA's procedures relating to the EWS

The processing operations of personal data related to the EWS within the ERCEA are based on the Commission's EWS Decision. This decision is binding upon the ERCEA as per Article 3 of the Delegation Act C(2008) 5694 that lists all the rules applicable to the ERCEA when performing the tasks entrusted to it.

Moreover, the Commission Decision on the EWS was adapted to the ERCEA environment through the ERCEA's own EWS Procedure formally approved on 13 October 2011 ("**ERCEA EWS Procedure**"⁶). The approval decision followed all the steps for formal validation required in the ERCEA and was validated by the Executive Director. The ERCEA EWS Procedure is available on the ERCEA intranet. The procedure is also based on the Commission's DG Research EWS Procedure and information available on BUDGWEB.

The ERCEA EWS specific procedure subject to this notification includes:

- the standard flowchart and circulation sheet used to notify or to request the removal of a warning (including information to be provided to a third party for W5a warnings);
- the workflow of information in the context of the legal, contractual, financial or other assessment of the case prior to its notification to the Commission;
- the internal coordination and follow-up of EWS cases.

The EWS Officer of the ERCEA is responsible for the practical implementation of the EWS in the ERCEA, in particular the preparation of a request for a flag. However only the ERCEA Director -as the controller's representative on behalf of the ERCEA- can request the activation of an EWS warning to the Commission at the end of the internal ERCEA procedure. When applicable, each ERCEA unit can nominate an EWS correspondent which is designated by the Head of Unit based on his adequate level of knowledge of administrative and financial procedures which will deal with the preparation of such a request at unit level. The list of the EWS correspondents' names in the units as well as that of the EWS Officer is attached as an Annex to the ERCEA EWS Procedure. The name of the EWS Officer is also notified to the Accounting Officer of the Commission.

The notification of a request for an EWS warning by the ERCEA to the Commission is done through a standardised form as foreseen in the Annex of the EWS Decision and contained in Annex II to the ERCEA EWS Procedure. The ERCEA can only request warnings of the following categories: W1c, W1d, W2b, W3b and W5a.⁷

⁶ Ref. Ares(2011)1093495.

⁷ A W1c flag is requested where investigations of the Court of Auditors, ERCEA's Internal Audit Capability (IAC) or any other audit or investigation made under the ERCEA's responsibilities or brought to the ERCEA's attention give sufficient reason to believe that final findings of serious administrative errors or fraud are likely to be recorded in relation to third parties, especially those who are benefiting or have benefited from Union funds

The ERCEA EWS Procedure contains a flowchart and provisions for internal circulation for the preparation of an EWS request. First the Project Officer, Financial Officer or other ERCEA staff informed of a situation that warrants a warning reports the facts to the unit's EWS correspondent. The source of such information can be any ERCEA staff member during his/her work or outside sources such as beneficiaries, contractors, the media, a claim (anonymous or not) or an external informant. Furthermore, an external auditor can be a source of information and indicate in case of a situation discovered during an external audit that the case may be subject to an EWS or to a notification to OLAF.

Then the EWS correspondent in the unit concerned fills in the standard form and forwards it to the Head of Unit in a confidential form. Only the EWS correspondent and the Head of the respective Unit are authorised to fill in, complete or verify the standard form for an EWS request. They are also the contact persons mentioned in the form and provide information related to the case upon specific request and to authorised users only. They work in close cooperation with the EWS Officer. The Head of Unit fills in the request, if not already done by the EWS correspondent, and validates it. Subsequently, the Head of Department is informed.

The ERCEA EWS Officer ensures the connection between the ERCEA service concerned and the Accounting Officer of the Commission, recommends in line with the case prior-assessment the actions to be taken and informs about consequences of an EWS warning. S/He monitors any warnings initiated by the ERCEA together with the EWS correspondent concerned.

The Director of the ERCEA verifies the case, signs the request form and sends it to the Accountant of the Commission. This is the end of the ERCEA's procedure and the Accounting Officer of the Commission is thereafter responsible for the examination of the EWS request and for the subsequent flagging of an entity in ABAC. As a result a warning is sent to all financial actors of the Commission and the agencies when validating a budgetary commitment or launching a payment in the accounting system that concerns the flagged entity. In case of an entity flagged with a W2, W3b or W5a warning, payments can only be made to such contractors on the basis of a reasoned confirmation addressed to the Commission Accounting Officer by the responsible Authorizing Officer. For further information on the functioning of the EWS system reference is made to the EDPS Opinion of the EWS case of the Commission.

under its responsibility. A W1d flag is requested when the ERCEA excludes a candidate, tenderer or an applicant from the award of a contract or grant in a given procedure in accordance with Article 107(a) [conflict of interest] or Article 107(b) [misrepresentation of failure to supply information] of the Financial Rules. A W2b flag is entered where the European Court of Auditors, ERCEA's IAS or any other audit or investigation made under its responsibility or brought to its attention have issued written findings of serious administrative errors or fraud in relation to third parties, especially those who are benefiting or have benefited from Union funds under its responsibility. A W3b flag is requested when third parties, especially those who are benefiting or who have benefited from Union funds under the ERCEA's responsibility, are known to be the subject of judicial proceedings for serious administrative errors or fraud. A W5a flag is requested where a third party is excluded in accordance with the Financial Rules (for reasons such as for bankruptcy, conviction for fraud, corruption, involvement in a criminal organisation or any illegal activity detrimental to the EU's financial interests, conviction for offences concerning the professional conduct or grave professional misconduct, failure to fulfil obligations relating to the payment of social security obligations, serious breach of contract for failure to comply with contractual obligations in other procurement/grant award procedure financed by EU budget, conflicts of interests). Such a W5a request must be preceded by a contradictory procedure giving the third party concerned the opportunity to express its views in writing within a deadline of at least 14 days. During such contradictory procedure a provisional exclusion warning shall be requested.

Pursuant to section 3.4 of the ERCEA EWS procedure, prior to an EWS request by the ERCEA the case is assessed internally with regard to the potential breach of the legal basis, contractual terms, financial provision etc. The case should be sufficiently documented and the final assessment recorded in writing (file note, meeting minutes, e-mail exchange) and added to the file.

The following internal staff within the ERCEA must be informed by e-mail (marked as personal/confidential) or by organising a personal meeting: EWS unit correspondent, the respective Head of Unit, the EWS Officer, Unit C3 (Auditing Unit) as External Fraud Officer, the IAO as Internal Fraud Officer, Unit D3 for legal advice, the DPO, where appropriate, internal information sources depending on the case and their expertise. According to section 3.4 of the ERCEA EWS Procedure these persons shall be involved and circulate the information in their possession in relation to fraud and audit among each other to streamline good practice, efficiency, avoid overlapping of responsibilities, insufficient file quality and delays whenever a case may lead to an EWS registration (or a OLAF case or a case to be presented to OLAF). Pursuant to section 3.2 of the ERCEA EWS procedure, information is circulated on a 'need-to-know' basis. Furthermore, pursuant to section 6 of the ERCEA EWS procedure, closer and timely cooperation in case of suspected irregularities between units is encouraged via the network of the EWS/fraud correspondents of the different ERCEA units. Issues concerning irregularities, fraud or the EWS are also included as part of the hand-over-procedures between units in case the activity concerned is taken over by another unit or changes of management within the unit.

After completion of the assessment, the EWS Officer sends information to the Commission's Directorate-General for Budget ("**DG BUDG**") following the flowchart described in the ERCEA EWS Procedure. The ERCEA Director signs the request form and sends it to the Accounting Officer of the Commission. In case of a W5a activation request, the ERCEA consults the Commission's Central Financial Service within DG BUDG for prior assessment and holds a contradictory procedure with the entity concerned prior to sending such a request.

In case of fraud, the ERCEA External Fraud Officer, who is part of the prior case assessment, proceeds as provided by Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Processing with regard to OLAF's activities is not part of this Opinion.

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

The ERCEA has access to the EWS through consultation of the EWS/CED databases which is standardised for Executive Agencies (automatic availability of data through ABAC - Accrual Based Accounting). The EWS flag attached to the LEF in ABAC is communicated to the ERCEA's financial actors when a financial transaction (commitment or payment) is created.

Controller

The controller of the processing is the ERCEA, represented by its Director who works in cooperation with the ERCEA Chief Accountant ("CAO") who acts as the EWS Officer of the Agency. The CAO is assisted by the Deputy Accounting Officer acting as the Deputy EWS Officer.

Data subjects

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

Categories of data processed

The personal data processed by the ERCEA include:

- identification and contact data (names and addresses, including e-mail addresses, and other contact data if any as well as telephone number) of
 - individuals, in the case of a EWS flagging related to a natural person or who have powers of representation, decision-making or control over a legal person to be flagged in EWS;
 - the person within the ERCEA requesting the warning to be registered including his/her function; and/or
 - the informant, if any;
- reasons for the warning request, if not confidential. This may comprise data relating to (suspected) fraud, insolvency, conviction of a serious professional misconduct or criminal offences that may be detrimental to the EU's financial interests;
- other data:
 - type of the EWS warning requested (W1c, W1d, W2b, W3b and W5a);
 - start and end date of the EWS warning (W3b);
 - service of the Agency that has requested the EWS flag to be set;
 - contact person in this service of the Agency; or
 - reference(s) of the service that requested the warning.

Recipients

In the framework of the EWS request the following staff members within the ERCEA can be involved on a 'need-to-know' basis:

- respective ERCEA staff member having/receiving information warranting a flagging,
- Financial or Project Officer,
- the Unit EWS Correspondent,
- the respective Head of Unit,
- the Head of Department,
- the ERCEA EWS Officer/Deputy EWS Officer,
- the Director of the ERCEA,
- Staff Members of the Auditing Unit (C3),
- the Internal Audit Officer,
- the Legal Unit (D3),
- the DPO,

- ERCEA EWS/fraud correspondents of other ERCEA units (via their network) on a need-to-know basis, and
- other ERCEA units through a 'hand over file' (in case of transfer of an activity to another unit or change in management) on a need-to-know basis.

Outside the ERCEA the data is only transferred to:

- the Accounting Officer of DG BUDG or a person appointed by her/him for EWS requests,
- OLAF⁸ or
- to DG BUDG Central Financial Service in case of an W5 request for prior advice.

Annex II of the ERCEA EWS procedure (which reproduces the standardised form contained in the Annex to the Commission's EWS Decision) contains the following disclaimer: "*I certify that the information communicated was established and transmitted in accordance with Regulation (EC) No 45/2001 of the European Parliament and of the Council concerning the protection of personal data*".

The ERCEA does not transfer personal data to recipients outside the EU institutions and bodies.

Further transfers of personal data are not done by the ERCEA itself but by the Commission in the framework of the general EWS and the CED which is also accessible to other EU institutions, and Member States Authorities, as well as third country authorities or international organisations when implementing EU funds. Notably, once an entity is flagged in the system through ABAC, all ERCEA staff members (as well as of the Commission and other agencies) who have access to ABAC for processing commitments, payment files or for controlling or auditing can see and access the EWS warning information. Under the responsibility of the Accounting Officer of the Commission, information in the CED are not only accessible to the EU Commission and other EU institutions and bodies, but partly also to Member States administrations and third country organisations involved in EU funding (based on Commission Regulation (EC, EURATOM) No 1302/2008 of 17 December 2008 on the central exclusion database). These transfers are not specific to the ERCEA's implementation of the EWS and were already assessed in the former EWS and CED cases of the EDPS⁹.

Information given to data subjects

Pursuant to the ERCEA EWS Procedure the ERCEA shall inform data subjects in the framework of public procurement procedures,¹⁰ calls for tender and calls for proposals¹¹ and, in the absence of calls, before the awarding of contracts or grants, that data concerning them may be included in the EWS and of the entities to which their data may be communicated.

The invitation to tender, according to the ERCEA, informs candidates that their personal data may be registered in the EWS or CED by the Accounting Officer of the Commission and provides links to the Commission's website of DG BUDG. These links refer to the LEF documents to be filled in by candidates and the Privacy Statement for the LEF as well as to the general information on the EWS and on the CED including a Specific Privacy Statement for CED.

⁸ Processing with regard to OLAF's activities is not part of this Opinion.

⁹ See Case 2005-0120 for the EWS and case 2010-0681 for the CED.

¹⁰ Case 2012-0921 on Public Procurement in the ERCEA.

¹¹ Case 2011-0845 concerning the ERCEA's proposals evaluation and grants management.

ERCEA informs the applicants for grants of the possibility of their personal data being included in the EWS/CED in the Guides for Applicants for the different schemes or the conditions for a call. The Guide for Applicants contains a link to the DG BUDG website which provides information on the EWS and a Special Privacy Statement for processing concerning the CED.

Furthermore, when filling in the LEF in case an entity/contractor enters into financial relations with an EU institution following a standard template provided by DG BUDG the entity/contractor receives a privacy statement (which currently does not contain information on possible processing of personal data in the framework of the EWS and the CED). The information given to data subjects in this respect is part of the general Commission's EWS procedure, which has been and should in the future be assessed in the framework of assessing the Commission's processing of personal data for the EWS and is thus not part of this prior check by ERCEA.

Should a contract or grant be provided without a call (namely in the case of named beneficiaries that the Work Programme might include) the same privacy statement would be available through the LEF registration form.

Apart from the information provided to the candidates as part of a proposal for a grant or call (who are most of the time legal persons), natural persons who have powers of representation, decision-making or control are informed about the ways their personal data are processed by signing the proposal or tender which according to the ERCEA makes them aware of the possible processing of their data in an EWS context.

Furthermore, pursuant to the ERCEA's EWS Procedure (and Article 8(2) of the EWS Decision) the ERCEA is responsible for the relations with the data subject concerned in case it requests an EWS warning. This obligation for the institution/body requesting the EWS warning is provided for by Articles 8(2) and 14(3)(a) of the EWS Decision. With regard to W5a warnings it requests that the ERCEA shall inform the data subject concerned about the request for activation, updating and removal of such an EWS warning. For the remaining W1-W4 warning requests, there exists no such obligation in the current EWS Decision and the ERCEA does thus not inform the data subject concerned about the fact that he/she will be flagged in EWS.

Moreover, a duly identified natural person can request from the Accounting Officer of the Commission information on whether he/she is registered in the EWS flag, who may then direct the data subject to the contact person in the institution concerned. The Accounting Officer of the Commission informs the person in writing or by electronic means whether he/she is registered in the EWS subject to the decision of the service that requested the registration of the EWS warning (e.g. the ERCEA) whether restrictions laid down in Article 20(1) of Regulation 45/2001 apply. The Accounting Officer shall also attach the data stored in the EWS concerning that person (see Section 5 of the ERCEA EWS Procedure and Article 8.3 EWS Decision).

An (non-anonymous) informant informing the ERCEA about alleged reasons for issuing an EWS warning for an entity is given an acknowledgement of receipt within 15 days.

Rights of access and rectification

Article 8(2) of the EWS Decision provides that the ERCEA has the obligation to respond to requests from data subjects concerned to rectify inaccurate or incomplete personal data and to

any other requests or questions from those subjects pursuant to Article 8(2)(b) of the EWS Decision.

Upon request of a data subject, access is given in accordance with Article 13 of the decision adopting implementing rules concerning the DPO of the ERCEA available on the ERCEA's website.

According to the notification, any requests for blocking or erasing personal data on justified legitimate grounds are treated immediately and appropriate action would be taken to request the deactivation of the warning if necessary.

In cases where the request by the data subject refers to data registered in the databases/systems managed exclusively by the Commission (most of the time) the ERCEA forwards the request to the latter.

Data conservation policy

The (maximum) time limits for which the ERCEA can request an EWS warning or after which a flag shall be deactivated in the EWS are defined by Articles 10 to 14 of the EWS Decision and the Commission's EWS has been assessed in Case 2005-120.¹² Therefore, this is an aspect derived directly from Commission's practice on which the ERCEA has no influence.

With regard to the ERCEA request for flagging and the supporting documents, the ERCEA keeps EWS files (electronic and paper) for the administrative retention period of 5 years after the file is closed pursuant to the Common Commission Level Retention List (SEC(2007)970) point 4.2.3. "*Management of third party files (FEL/BAF) and EWS*", to which the ERCEA is bound. EWS files are considered closed by the ERCEA when the final financial transactions involving the data subject are completed in accordance with Article 136 of the Financial Rules.

Data are not kept for historic, statistical or scientific purposes.

Security

[...]

3. Legal analysis

3.1. Prior checking

The notification relates to processing of personal data in the terms of Article 2(b) of Regulation (EC) No 45/2001 of the European Parliament and the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data ("**Regulation 45/2001**" or the "**Regulation**") as it concerns any "*information relating to an identified or identifiable natural person*" pursuant to Article 2(a). Although many entities listed in LEF are legal persons, the data included and processed in the framework of the EWS and CED warnings include data relating to natural persons either (i) in their capacity as an individual entity entered into the LEF and liable to be subject to an evaluation under the EWS, or (ii) if they have the powers of representation, decision-making or control in a legal person in LEF.

¹² See case 2005-0120 on the EWS.

Regulation 45/2001 applies to the processing of personal data by the ERCEA (as an executive agency) as such processing is carried out in the exercise of activities all or part of which fall within the scope of EU law (Article 3(1) of the Regulation).

The processing of personal data with regard to the warnings in the EWS or CED is at least partially automated and if manually forms part of a filing system within the meaning of Article 3(2) of Regulation 45/2001. EWS warnings are entered and deactivated centrally by DG BUDG in the LEF, after receipt of a formal letter sent by the responsible authorising officer such as the one of the ERCEA. This processing is thus electronic and manual, but the content is intended to form part of a filing system accessible according to specific criteria. The ERCEA has electronic access to these databases. The Regulation therefore applies in accordance with Article 3(2).

Article 27(1) of the Regulation subjects to prior checking by the EDPS processing operations likely to present specific risks to the rights and freedoms of data subjects. Article 27(2) contains a list of processing operations likely to present such risks. Pursuant to the notification the ERCEA EWS Procedure is subject to prior checking on the basis of Articles 27(2)(a), 27(2)(b) and 27(2)(d) of Regulation 45/2001. Article 27(2)(d) sets out that "*processing operations for the purpose of excluding individuals from a right, benefit or contract*" should be subject to prior checking. The registration of a legal or natural person in the EWS and ultimately in the CED can lead notably to the exclusion from a contract or the granting of an award or to a refusal of a transfer of funds. The processing -including the preparations for an EWS flagging at the ERCEA level- is therefore covered by Article 27(2)(d) and as such is subject to prior checking by the EDPS. A notification is also required on the ground of Article 27(2)(b) covering "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". The EWS is intended to evaluate notably the financial or professional conduct of a person and to this effect must be prior checked. Finally, given the fact that also information on alleged fraud or (suspected) offences might be processed, also Article 27(2)(a) may apply (processing of data relating to "*suspected offences, offences, criminal convictions or security measures*").

Since prior checking is designed to address situations that are likely to present certain risks, the Opinion of the EDPS should be given prior to the start of the processing operation. In this case however the processing operation by the ERCEA has already been established.¹³ The recommendations issued by the EDPS should however be fully implemented in particular in view of the planned revision of the ERCEA EWS Procedure. As this is considered an ex-post notification, the two-month period within which the EDPS must deliver an Opinion pursuant to Article 27(4) of Regulation 45/2001 does thus not apply to this notification, which has been treated on a best effort basis.

The ex-post notification was received by e-mail on 25 September 2012. Further information was requested by e-mail on 31 October 2012 to which the ERCEA replied on 15 November 2012, on 20 November 2012 to which the ERCEA replied on 13 December 2012, on 21 December 2012 to which the ERCEA replied on 19 February 2013 and on 20 February 2013 to which the ERCEA replied on 12 April 2013. The draft Opinion was sent to the DPO for comments on 21 April 2013. The ERCEA submitted comments on the draft Opinion on 7 May 2013 which were discussed during a meeting held on 21 June 2013. A revised draft Opinion was sent to the ERCEA on 30 September 2013 to which the ERCEA responded on 21 October 2013.

¹³ The ERCEA informed however that so far no EWS case has as yet been notified by the ERCEA to the Commission.

3.2. Lawfulness of the processing

The lawfulness of the processing must be considered in the light of Article 5(a) of Regulation 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 or body*".

Pursuant to the notification, the processing of personal data in the framework of the EWS by the ERCEA and the ERCEA EWS Procedure is supported by the following legal instruments adopted on the basis of the Treaties establishing the European Union:

- Articles 106, 107, 108 and 109 of European Parliament and Council Regulation (EU, Euratom) N° 966/2012 of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002);
- Articles 141 to 145 of Commission Delegated Regulation (EU) N° 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) N° 966/2012 on the financial rules applicable to the general budget of the Union;
- Commission Decision C(2008)5694 of 8 October 2008 delegating powers to the European Research Council Executive Agency with a view to performance of tasks linked to implementation of the specific programme Ideas in the field of research comprising in particular implementation of appropriations entered in the Community budget, namely Articles 3 and 9;
- Standard Financial Regulation for the Executive Agencies (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);
- Commission Decision (2008/969/EC, Euratom) of 16 December 2008 on the Early Warning System for the use of authorising officers of the Commission and the executive agencies, amended by Commission Decision (2011/C/ 180/06) of 17.06.2011;
- Commission Regulation (EC, EURATOM) 1302/2008 of 17 December 2008 on the Central Exclusion Database, applicable also to the Executive Agencies.

Article 108 of the Financial Rules (former Article 95 of the Financial Regulation) provides for the establishment of a database concerning candidates and tenderers who are in one of the situations described in Articles 106 and 107 of the Financial Rules (former Articles 93 and 94 Financial Regulation, i.e. W5a flags) only. The implementation of the EWS by the ERCEA with regard to warning W5a and W1 to W4 (which are not provided for directly by the Financial Rules) is based on the EWS Decision, the Commission decision relating to the Early Warning System itself. As the Ombudsman stated in its Decision W1-4 and W5b warnings do not seem to have an explicit legal basis and thus could only derive as an implicit power based on Articles 317, 325 TFEU and Article 30 of the Financial Rules (former Article 27 of the Financial Regulation) and according to the Union Courts such implicit powers can only be exceptionally recognised to exist.¹⁴ Furthermore, the General Court also found that the EWS Decision makes no reference to primary or secondary law expressly conferring on the Commission the power to create, carry out and manage a database relating to legal and natural

¹⁴ Case OI/3/2008/FOR, Decision of 6 July 2012, para. 89-91.

persons suspected of representing a risk to the financial interests of the European Union.¹⁵ The EDPS takes note of this but reserves its position on the sufficient legal basis of the EWS Decision as such which needs to be assessed when prior checking the revised EWS Decision following the future review planned for 2013¹⁶ and the outcome of the ongoing Court proceedings.

The delegation by the Commission to ERCEA established that the EWS Decision is binding upon the ERCEA. These procedures have been adapted to the ERCEA through a formally validated procedure. The internal ERCEA EWS Procedure (Reference Ares(2011)1093495) has been formally adopted on 13 October 2011 and published on the ERCEA intranet.

3.3. Processing of special categories of data

Among other data, the EWS processes special categories of data as mentioned in Article 10(5) of the Regulation as it may concern "*data relating to offences, criminal convictions or security measures*".

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

3.4. Data Quality

Article 4 of Regulation 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) of the Regulation). The lawfulness of the processing has already been discussed (see point 3.2. above). As regards fairness, this relates to the information given to the data subjects (see point 3.8. below on this point).

Personal data should be collected for "*specified, explicit and legitimate purposes*" (Article 4(1)(b) of the Regulation). This provision requires that processing of personal data may only be carried out for a determined purpose. It also implies that a balanced approach must be carried out between the need to process personal data and the intrusion it may cause in the private lives and other legitimate interests of the individuals concerned. The benefits of the processing of the data must be weighted against any possible adverse impact. It is in the legitimate interests of the institutions and bodies to set up and operate an EWS in order to preserve the financial interests and reputation of the European Union. However, the introduction of a warning against a person can have serious adverse effects for a data subject and for this reason specific safeguards must be in place to uphold the data subject's legitimate interests. These safeguards should notably be found in the data subject's right to be informed and to have access to data relating to him/her (see below points 3.7. and 3.8.).

Data must be "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*" (Article 4(1)(c) of the Regulation). The processed data described at the beginning of this Opinion should be regarded as satisfying these

¹⁵ See the order on admissibility in ongoing court proceedings; Order of the General Court of 13.04.2011, Case T-320/09, Planet v Commission, paragraphs 40 and 41 (upheld on appeal, see Case C-314/11P).

¹⁶ See Ombudsman case summary "Commission agrees to modify the Early Warning System", <http://www.ombudsman.europa.eu/en/cases/summary.faces/en/11799/html.bookmark>.

conditions. The data required are necessary for the proper functioning of the various stages of the procedure for the EWS. However, the ERCEA shall carefully consider the necessity of communicating detailed information on the reasons for the flagging of an entity when requesting an EWS flag in ABAC, as these reasons might be confidential (as explicitly stated in the form for an EWS request as an exception with regard to the required information to be filled in).

Under Article 4(1)(d) of the Regulation, data must be "*accurate and, where necessary, kept up to date*". Furthermore, "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified*". As described above, the procedure leading to an ERCEA request for flagging an entity in the EWS requires that numerous persons within the ERCEA are involved in order to assess the justification of such a flagging in more detail. The EDPS would like to point out that the ERCEA is not only responsible for requesting the activation of flags but also for requesting their deactivation as soon as possible. In order to safeguard that data is accurate and up to date, adequate procedures should also be put in place that the ERCEA requests that flags are removed which are no longer accurate or justified so that any trace of the flag is removed from the EWS and no longer visible for the common users. The ERCEA should therefore notify the Commission Accounting Officer without delay once the flags requested by the ERCEA are no longer accurate or justified and regular monitoring with regard to the justification of the flagging of persons/entities by the ERCEA should be introduced. Furthermore any change concerning the status of a legal person in the EWS should be reflected in the status of the natural persons linked to this legal person in the EWS to ensure accuracy of the data by the Commission.

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 3.7.).

3.5. Conservation of data/Data retention

Article 4(1)(e) of Regulation 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*".

The different periods for which the EWS warning remains active are determined by the EWS Decision (and the EWS as such is not subject to this notification).¹⁷ These periods must be differentiated from the time during which relevant data are kept by the ERCEA.

The ERCEA keeps all data it processed for requests of an EWS warning for the administrative retention period based on the Commission Common Retention List, to which the ERCEA is bound, for a duration of 5 years after the file has been closed. In the ERCEA's view a transaction is only closed once the final financial transactions involving the data subject are completed, as all financial dealings with that entity with regard to a specific financial obligation are considered as a single transaction for it.

The ERCEA argues that all the documents related to the EWS requests it made need to be kept for such long period in line with Article 136 of the Financial Rules and Article 48 of the Commission Delegated Regulation¹⁸. The latter article makes an explicit reference to the fact

¹⁷ See Case 2005-0120 for the EWS and case 2010-0681 for the CED.

¹⁸ Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union.

that “*personal data contained in supporting documents shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes*”. The EDPS has not enough evidence to assess the justification of 5 year conservation period for all the documents related to an EWS request until the final financial transaction. Notably the EDPS questions if calculating the 5-year retention period for keeping the paper and electronic documents containing personal data related to the EWS warning as from the final financial transaction with the entity (which might be years after the deactivation) and not as from the time the EWS warning was deactivated is justified. The EDPS therefore recommends reconsidering the data retention period.

3.6. Transfer of data

Article 7 of the Regulation applies to all transfers of personal data between EU institutions or bodies or within the same institution and stipulates that “*personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*”.

Data processed in the framework of the EWS warnings are forwarded on a need-to-know basis within the ERCEA's respective units in charge (including internal and external audit units, legal unit, external fraud officer) and from the ERCEA EWS Officer or Deputy EWS Officer to the Accounting Officer of DG BUDG. In case of fraud also OLAF will be informed.¹⁹ Furthermore information may be shared within the EWS Fraud Network of the ERCEA across units or to another ERCEA unit in case of a handover of a file. The ERCEA does not transfer personal data relating to EWS warnings to any other recipients.

As regards the transfers made in the context of the EWS procedure the EDPS notes that the ERCEA's EWS request form (annex II of the ERCEA EWS procedure) contains a disclaimer: “*I certify that the information communicated was established **and transmitted in accordance with Regulation (EC) No 45/2001 of the European Parliament and of the Council concerning the protection of personal data***”.

The EDPS considers that the data transferred as described above are in principle necessary for the tasks covered by the competence of the recipients mentioned and thus Article 7 of the Regulation is respected. However, the EDPS recommends that the recipient should be reminded that he/she shall only process the personal data for the purposes for which they were collected. In this respect the EDPS welcomes the planned clarification of the ERCEA EWS Procedure.

Further access to and transfers with regard to the EWS or CED have been assessed in the EDPS prior checking cases of the EWS and CED respectively.²⁰

3.7. Rights of access and rectification

Article 13 of the Regulation establishes a right of access and the arrangements for exercising it upon request by the data subject. It encompasses the right to be informed that information relating to him/her is processed by the controller and to obtain the communication of such data in an intelligible form. This is based on the need to respect the right to be heard and the right of defence in general, and in the very field of personal data protection, the respect of the rights of access and rectification is directly linked to the data quality principle as described above under 3.4. Although in most cases leading to a warning in the EWS the data subjects

¹⁹ Processing with regard to OLAF's activities is not part of this Opinion.

²⁰ See Case 2005-0120 for the EWS and case 2010-0681 for the CED.

may be aware of the facts leading to such a warning (e.g. ongoing criminal proceedings), this does not mean that they should not be granted access to the information contained in the system which relates to them.

Pursuant to the EWS Decision, there exists only a right to request information from the Commission's Accounting Officer if a natural person is registered in the EWS (Article 8(3) of the EWS Decision). The Accounting Officer shall consult the service that requested the warning (in this case the ERCEA) if the information can be communicated to the person concerned or if any of the restrictions laid down in Article 20(1) of Regulation 45/2001 applies.

As elaborated further under point 3.8. below, data subjects are not actively informed by the ERCEA or the Commission in case an EWS warning is issued for them or an entity for which they have powers of legal representation, decision-making or control (with the exception for W5a requests for exclusion where a contradictory proceeding is held beforehand). However, in the EDPS' view, without knowledge about their personal data being processed in the EWS through flagging, data subjects are not able to exercise their rights of access to or rectification of their personal data properly. The right of access is established under Regulation 45/2001 and cannot be restricted other than for reasons mentioned in Article 20 of the Regulation. The EDPS questions if the rights of the data subjects are adequately safeguarded in the current legal situation and refers to its recommendations under point 3.8. below.

Article 20 of Regulation 45/2001 provides for certain restrictions on the obligation of the controller to give access, rectify or inform notably where such restriction constitutes a measure necessary to safeguard: "*a) the prevention, investigation, detection and prosecution of criminal offences; b) an important economic interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters; c) the protection of data subjects or the rights and freedoms of others*".

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

Should any of the restrictions of Article 20(1) be invoked, Article 20(3) of the Regulation has to be considered and respected by the ERCEA: "*If a restriction provided for by paragraph 1 is imposed, the data subject shall be informed, in accordance with Community law, of the principal reasons on which the application of the restriction is based and of his right to have recourse to the European Data Protection Supervisor*". Concerning the right to information, this provision has to be read jointly with Articles 11 and 12 of the Regulation (see below point 3.8.). If a restriction to the right of access is imposed, the data subject has a right to request indirect access through recourse to the EDPS (Article 20(4) of the Regulation). Article 20(5) establishes that "*Provision of the information referred to under paragraphs 3 and 4*

may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect”.

Article 14 of the Regulation provides the data subject with a right to rectify inaccurate or incomplete data without delay. Given the sensitivity, in most cases this right is of a key importance, in order to guarantee the quality of the data used, which, in this specific case, is connected to the right to be heard/right of defence. Any restriction, as provided in Article 20 of the Regulation, has to be applied in the light of what has been said regarding the right of access in the paragraphs above.

Article 8(2) of the EWS Decision provides an obligation for the ERCEA in case it has requested an EWS warning to respond to requests from data subjects concerned to rectify inaccurate or incomplete personal data. This concerns both personal data contained in ERCEA’s paper and electronic files for the preparation of an EWS request as well as personal data contained in the EWS. While the ERCEA should ensure that this right can be exercised by data subjects, the ERCEA EWS Procedure does not contain any detailed provisions on the procedure and time limits for rectifying or erasing personal data in ERCEA’s electronic or paper files or for requests made by ERCEA to the Commission on behalf of data subjects with whom the ERCEA is in direct contact. The EDPS therefore recommends that the ERCEA EWS Procedure should provide more detailed provisions on such procedure and time limits in response to such requests for rectification or erasure in the EWS by ERCEA or vis-à-vis the Commission as well as the obligation to rectify incorrect or no longer justified data without delay in its Section 5 on Data Protection.

3.8. Information to the data subject

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

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

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

3.8.1. General information on the mere existence of the EWS

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

There are three different situations where the ERCEA would be responsible to provide the relevant information to the data subjects: calls for tender (procurement proceeding), calls for proposals (grant award) and other contracts.

For procurement proceedings and grant awards, the ERCEA's specific privacy statements do currently not contain all the relevant Article 11 or 12 covering the information on the processing with regard to the EWS. However, the ERCEA's invitation to tender as well as the ERCEA's Guide for Applicants for grants inform candidates that their personal data may be registered in the EWS or CED by the Accounting Officer of the Commission. These documents provide furthermore links to the Commission's website of DG BUDG with more detailed information on the EWS and the CED. In the EDPS' view in this context and at this early stage of calls for tender or proposals, it would suffice for the ERCEA to provide a short summary and refer candidates to the Commission's website for further information. However, the information on the Commission's website does not seem to provide complete information in line with Articles 11 and 12. Data subjects thus currently do not receive all the information as requested by the Regulation.

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

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

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

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

In addition, the EDPS recommends that the ERCEA includes such general information and a link to the general EWS and CED information on the Commission's website also in the ERCEA's specific privacy statements for procurement and grants. These privacy statements should include information about who will have access to information relating to EWS.

The ERCEA EWS Procedure states that in the absence of calls for tender or proposals, the Director of the ERCEA (or his staff) should before awarding contracts or grants inform third parties of the data concerning them that may be included in the EWS and of the entities to which the data may be communicated. The data subject would again be informed about the EWS when filling in the LEF as described above.

In this respect the EDPS also notes that utmost efforts should be taken to inform not only the legal entities about possible processing of personal data but also identified or identifiable natural persons concerned within the legal entity (see below).

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

3.8.2. Information on the flagging of a data subject

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

The EDPS notices that, based on the EWS Decision as well as on the ERCEA EWS Procedure, information is only systematically given to data subjects if a W5a warning flag is issued (i.e. when an entity is excluded from further funding/payments for which a

contradictory procedure is provided for). For all other warnings (W1-W4) neither the ERCEA nor the Commission provide any information to the data subject proactively. However, any natural person has the right pursuant to Article 8(3) of the EWS Decision to enquire at the Commission's Accounting Officer if it is listed in the EWS. But there is no active obligation to provide this information pursuant to the EWS Decision.

The EDPS takes note that the ERCEA implements the EWS Decision in its current form, to which it is bound by the Commission Delegation Act, which does not explicitly provide for such obligation for the AOD. However, the ERCEA's obligation to inform data subjects can be directly based on Article 12 of the Regulation. In this respect, the EDPS recommended in case 2005-120 on the Commission's EWS, that in particular natural persons whose personal data is included in the EWS (on the basis of any type of warning, W1 to W5) shall be informed individually of the issuance of a warning against them in order for them to be able to exercise their rights pursuant to Regulation 45/2001 (unless an exemption pursuant to Article 20 of the Regulation applies).²¹

The EDPS therefore recommends that the ERCEA reconsiders its approach and gives data subjects information if their personal data is processed in the framework of issuing an EWS warning for all categories of warnings (W1 to W5) on the basis of Articles 11 and 12 of Regulation 45/2001.

In the light of these considerations with regard to the right of defence, the Commission or the ERCEA can limit the right of information only in specific cases pursuant to Article 20 of Regulation 45/2001. Any restriction to the right of information, as provided in Article 20 of the Regulation, has to be applied in the light of what has been said regarding the right of access in the paragraphs above and should be the exception rather than the rule.

3.8.3. Information provided to informants

In the framework of EWS warnings the ERCEA may also deal with personal data of informants who provide information that an entity in LEF might be in one of the situations that might trigger an EWS flagging. The ERCEA currently provides these persons with an acknowledgement of receipt but not with any information pursuant to Article 11 of the Regulation. Notably informants are not informed which of their personal data (in particular data concerning their identity) may be processed and how. The EDPS recommends that the ERCEA establishes a standard privacy notice or statement providing information pursuant to Article 11 of the Regulation to informants (which could be sent jointly with the acknowledgement of receipt).

3.9. Security measures

[...]

²¹ Informing the data subjects concerned is also in line with the findings and recommendations of the Ombudsman in its inquiry of the Commission's EWS who found that in order for the right to be heard to be respected, persons concerned should be given the opportunity to comment on the evidence to be used in a measure adversely affecting them before that measure is taken. Case OI/3/2008/FOR, Decision of 6 July 2012.

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 ERCEA should:

- carefully consider the necessity of communicating the details on the reasons for flagging to the Commission for each case taking into account confidentiality restrictions as indicated in the request form;
- include provisions on the procedure and time limits for deactivating a flag in EWS in the ERCEA EWS Procedure including regular monitoring with regard to the accuracy of a flag;
- Reconsider the necessity of the duration of the conservation period for EWS related documents held by the ERCEA;
- in case of a transfer within the ERCEA or to another EU institution/body remind the recipient that personal data may only be processed for the purposes for which they were collected;
- include more detailed provisions on the procedure and time limits for rectifying or erasing personal data in the ERCEA EWS Procedure;
- Include general information on the EWS also in the specific privacy statements for procurement and grants;
- ensure that data subjects are fully informed about the processing of their personal data with regard to the EWS pursuant to Articles 11 and 12 of the Regulation at the latest when filling in the LEF and that references to the Commission's information on the EWS are complete;
- inform data subjects if their personal data is processed in the framework of an EWS warning for all categories of warning (W1 to W5), in particular when a warning shall be issued, on the basis of Articles 11 and 12 of the Regulation unless an exemption of Article 20 of the Regulation applies;
- apply any restriction to the rights of access, rectification and information narrowly;
- establish procedures on the processing of personal data of informants and provide them with a privacy notice or statement in addition to an acknowledgement of receipt;
- [...].

Done at Brussels, 03/03/2014

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor