

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Research Council Executive Agency regarding the "Procedure on how to deal with information on scientific misconduct"

Brussels, 09 July 2014 (2014-0538)

1. PROCEEDINGS

On 16 May 2014, the European Data Protection Supervisor (**EDPS**) received a notification for prior checking relating to the processing of personal data "Procedure on how to deal with information on scientific misconduct" from the Data Protection Officer (**DPO**) of the European Research Council Executive Agency (**ERCEA**).

Questions were raised on 2 June 2014, to which the DPO of the ERCEA replied on 4 June 2014. The draft Opinion was sent to the DPO for comments on 30 June 2014. The EDPS received a reply on 7 July 2014.

2. FACTS

To ensure implementation of the highest standards of research integrity, the ERCEA has developed a procedure on how to deal with information it may receive concerning alleged scientific misconduct. This applies not only for the 7th Research Framework Programme (FP7), but also for the follow-up programme Horizon2020¹. Although the scope of "scientific misconduct" to date is not commonly agreed and defined in EU legislation, it is understood as a common risk to the science community to be prevented and mitigated. Scientific misconduct covers a large variety of possible cases of fraud and more². In the context of proposals submitted to the ERCEA or projects financed by an ERC grant³, the impact of scientific misconduct must be interpreted in a broad sense and be applicable whenever such a behaviour

¹ The procedure on scientific misconduct is related to the ERCEA proposal evaluation and grants management processes (case 2011-0845), though separate in its implementation.

² Fraud relates to the following intentional acts concerning the expenditure side of the budget: (1) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of EU funds; (2) non-disclosure of information in violation of a specific obligation; the misapplication of such funds for purposes other than those for which they were originally granted. Scientific misconduct further goes beyond financial implications as defined above and also includes e.g. (1) Falsification or fabrication of data or documents by applicants or beneficiaries when proposing, conducting or publishing research, plagiarism, unauthorised appropriation of authorship, unauthorised exploitation of the ideas of others, breach of confidentiality rules; (2) Elimination of primary data or non-elimination of data; (3) Inappropriate research methods, non-compliance with ethical standards; (4) Sabotage of research activities; (5) Unauthorized exploitation or communication of data or insights gained from reviewing confidential materials; (6) Breach of conflict of interest rules by independent experts; (7) Double funding.

³ The ERC is a combined entity that consists of the ERCEA and the ERC Scientific Council.

may jeopardise the value of science and in particular the reputation of scientists in the scientific community, as well as of the bodies funding or hosting these scientists.

The **purpose** of this procedure is to treat allegations of scientific misconduct, including conflicts of interest, received by the ERCEA related to proposals submitted to the ERC or projects financed by an ERC grant and to determine potential follow-up actions. This procedure aims to avoid that scientific misconduct jeopardises the value of science and in particular the reputation of the scientist in the scientific community, as well as of the bodies funding or hosting this scientist.

The **procedure** foresees the following steps:

1. Receipt of initial information

An ERCEA staff member may receive an allegation of a possible case of scientific misconduct in relation to a specific proposal submitted to the ERC or a project financed by an ERC grant in written, oral, or any other form from any source. He/she then sends it by e-mail, where possible⁴ using SECEM, to a functional mailbox maintained for that purpose by the ERCEA Integrity Standing Committee (**ISC**) that is located in the ERCEA's Department of Scientific Management. The Chair of the ISC immediately informs the ERCEA Director, the Chair of the ERC Standing Committee on Conflict of Interest, Scientific Misconduct and Ethical Issues (**CoIME**)⁵ and the ERCEA Legal Unit on any allegation received, by e-mail via the functional mailbox. The Chair of the ISC then sends by e-mail via the functional mailbox an acknowledgement of receipt of allegations⁶ to the informant (if known)⁷. Any e-mail exchange from or to the functional mailbox is sent by using SECEM (where possible) or by marking the e-mail as “private”.

2. Initial assessment of allegation

The initial assessment of the allegation is carried out by the ISC on behalf of the ERCEA Director, in consultation with the CoIME. The ISC may, if needed, delegate parts of the case analysis to other appropriate ERCEA staff members. Communication with third parties is organised solely through the functional mailbox and under control of the ISC. If needed, the ERCEA Legal Unit is consulted. The initial assessment aims to verify whether the grounds for suspicion are sufficiently founded and serious enough for the case to be considered significant:

- for insignificant cases or cases where the basic facts cannot be successfully verified, the Chair of the ISC, in consultation with CoIME, writes a note for the file on the conclusions that led to the closure of the case. This note will be registered in ARES and stored in a safe box in the office of the Chair of the ISC.
- where the received allegations point to a significant case, the ISC will inform the ERCEA Director, the CoIME and the ERCEA Legal Unit by e-mail. The Chair of the ISC or the ERCEA Director, after consultation with the ERCEA Legal Unit, will send an initial request for information and, where applicable, clarification by e-mail via the functional mailbox by which the parties possibly involved in the alleged scientific misconduct receive the opportunity to comment on the alleged facts.

⁴ Every staff member might receive relevant information; although ERCEA trains its staff respectively, not every staff member may immediately be aware of the need to use SECEM in such cases.

⁵ The consultation between the ERCEA and the COIME (consisting of members of the ERC Scientific Council) is currently not standardised and information is exchanged on a case-by-case basis; the reporting between COIME and the Scientific Council is based on the rules of procedure and code of conduct notified in case 2012-0831.

⁶ See appendix 2 of the procedure on scientific misconduct, annex 1 to the notification.

⁷ According to additional information provided by the DPO on 4 June 2014, a privacy statement informing the informant as data subject on his/her rights is attached to this confirmation.

3. Formal assessment of the allegations

The CoIME, in close collaboration with the ERCEA Director and supported by the ISC and the ERCEA Legal Unit, considers whether the evidence from the initial assessment is sufficient or whether an additional review of the information is needed in order to decide whether a breach of research integrity occurred. If necessary, the CoIME, supported by the ISC, may consult other members of the ERC Scientific Council and other ERCEA staff members. The CoIME may also nominate external independent experts that are then appointed by the ERCEA Director to advise the ERC in dealing with specific cases of scientific misconduct. Having reached a conclusion, the CoIME will inform the ERCEA Director in writing about its opinion regarding the seriousness of the case and will offer recommendations on how to handle it and the follow-up actions. Having received these conclusions and recommendations, the ERCEA Director, after consultation with the ISC and the ERCEA Legal Unit, will take the final decision on the case and on the follow-up actions to be taken according to his/her own discretion and judgement.

4. Notification to OLAF and to the Commission

Where appropriate (i.e. suspicion of fraud, corruption and any other illegal activities affecting the financial interests of the EU), the ERCEA Director shall notify the suspicions to OLAF, as soon as they come to his/her attention⁸. The notification explains the facts of the allegation and, if possible, follow-up actions envisaged by the ERCEA with copies of relevant documents. During the assessment procedure by OLAF, the latter may contact the ERCEA OLAF contact point in order to obtain clarifications and further documentation concerning the initial information.

5. Follow-up actions

Depending on the outcome of the formal assessment, and taking into account the recommendations or the feedback from OLAF (if any), the ERCEA Director may decide to put in place one or several of the following actions⁹:

- **Exclusion of the applicants' proposals**

The ERCEA Director may exclude any proposal during the submission, evaluation, or award procedure. Grants may not be awarded to applicants who at the time of the grant award procedure are found guilty of misrepresentation or false declaration in supplying the information required by the contracting authority as a condition of participation in the procedure as per Articles 106(1) (c) and 107(1)(b) of the Financial Regulation. For applicants excluded from the award of a grant, the ERCEA Director may additionally decide to explore, at a later stage, the possibility of having administrative or financial penalties imposed in accordance with Articles 106(1) (c) and 109 of the Financial Regulation.

A request for exclusion of the applicant from future contracts and grants financed by the EU budget can be submitted to the College of Commissioners, following consultation of the Commission's Legal Service and DG BUDG, and a contradictory procedure¹⁰.

⁸ To this end, the ERCEA will send via the ERCEA OLAF contact point a note registered in ARES and marked as "confidential-personal" to the OLAF Director-General and the Head of Unit OLAF/01; alternatively an e-mail may be sent by using SECEM to the Head of Unit OLAF/01. A simultaneous confidential notification is sent to the Director General of the parent DG.

⁹ These actions can take place already before OLAF's final report has been issued (where applicable) and do not depend on each other; they can be undertaken simultaneously or separately depending on the case.

¹⁰ For the purpose of the latter, and according to the Financial Regulation / Rules of Application, the applicant shall be given the possibility to explain in writing why, according to him/her, he/she did not commit any misconduct, which the ERCEA complies with by way of the information/consultation letter sent to the perpetrator of the alleged misconduct.

- **Termination of the expert's contract or task**

In compliance with contractual obligations (e.g. confidentiality rules, conflict of interest etc.) deriving from the contract or assignment of tasks, an independent expert's appointment can be terminated immediately if a violation of these rules is detected during the performance of his/her services.

- **Termination of the grant**

In compliance with contractual obligations¹¹, the ERCEA may decide to terminate the grant or the participation of one or more beneficiaries (as indicated in annexes 4 and 5 to this notification with examples of representative ERC model grant agreements).

- **Activation of a warning in the Early Warning System (EWS)**

The ERCEA Director may decide to activate an appropriate EWS 'warning' on the person(s) concerned by the allegation (i.e. experts, PIs, beneficiaries, grant applicants and, if they are legal entities, persons who have powers of representation, decision-making or control over them) by notification to the Commission's Accounting Officer¹².

- **Other possible follow-up actions**

The ERCEA Director might also take other measures ranging from letters to the host institution, asking for a withdrawal of the ERC's name and funding from pending publications, notifying specific persons who may be affected by the misconduct or requesting cancellation of dissemination activities involving the parties concerned¹³. He/she might also decide to suspend the evaluation process for the proposal concerned pending the completion of the assessment of the allegations concerning all parties concerned. He/she might further decide to apply the measures provided for in the relevant ERC Grant Agreement for cases of breach of contractual obligations (suspension of payments, suspension of implementation of the action, reduction of the grant, or issuance of a recovery order).

6. Final decision by ERCEA Director

Following consultation of the ERCEA legal unit, the ERCEA Director communicates the duly motivated final decision to the concerned party, including possible follow-up actions; the decision contains reference to the possibilities for redress. In addition, the following stakeholders are informed of any such decision and thereby of the closure of the case:

- The parent DG will be informed by the ERCEA Director;
- Experts contracted to support CoIME in the assessment are informed by the ISC. At the same time, they are requested to eliminate any documentation (electronic or other) provided or drafted for the purposes of the assessment;
- The ISC informs OLAF, in case OLAF has provided a report;
- The CoIME orally reports twice a year to the ERC Scientific Council. Before every report, the ERC Scientific Council is reminded of the confidential nature of the information provided and the security measures to take to ensure its continuous confidential treatment.

The **controller** is the ERCEA represented by its Director, together with the Head of Department B "Scientific Management" and Chair of the Integrity Standing Committee.

Processors are the Members of the Scientific Council in their function as experts contracted by the European Commission and other external experts contracted by the ERCEA on a case-

¹¹ These derive from the FP7 ERC Grant Agreement (Article II.35.1 and II.37.1 of the Single-Beneficiary and Multi-Beneficiary General Conditions respectively) and the FP7 ERC CSA Grant Agreement (Article II.38), as well as the Horizon2020 ERC Grant Agreement (Articles 34(1)(a), 34(4) and 50.3.1).

¹² Notified to the EDPS in case 2012-0823.

¹³ Such requests shall clearly state the timeframe for their implementation by the host institution.

by-case basis as well as external independent experts nominated by the CoIME for appointment by the ERCEA Director to advise the ERC in dealing with specific cases of scientific misconduct. The ERC model contracts for experts include confidentiality and privacy provisions governing the relation with the experts and clearly explain their obligations and duties (see annex 3 of this notification).

Data subjects concerned are the parties allegedly involved in the possible scientific misconduct¹⁴ and the informant(s), which could be ERCEA staff, member of the Scientific Council (ScC), panel members and other independent experts, applicants, beneficiaries, principal investigators, team members or any third parties concerned, including anonymous sources.

According to the notification, the **legal basis** of the processing operation is Commission Decision C(2013)9428 of 20 December 2013¹⁵ complemented in particular by the Decision of the Steering Committee of the ERCEA of 18 February 2009¹⁶, Commission Decision C (2011)7216 of 5 October 2011¹⁷ including the Code of conduct for independent experts in peer review evaluations and scientific follow-up as well as Commission Decision C(2013)8373 of 10 December 2013¹⁸ and the Research Fund for Coal and Steel Programme, including the Code of Conduct attached in Annex 1 to the model contract for experts for Horizon2020.

The **categories of data** processed are, according to the notification, the following:

- Identity and contact details (e-mail, phone, fax, postal address) of parties allegedly involved in possible scientific misconduct and additional specific personal data as the case may be, such as personal identification numbers, professional path/career data, information on the data subject's family, leaves and absences, travels, publications or other data related to the allegations. The information processed relates to the different forms of scientific misconduct that may be encountered by the ERCEA and varies on a case-by-case basis;
- Identity and contact details (e-mail, phone, fax, postal address, personal identification numbers) of informant(s).

The **recipients** are

- authorised ERCEA staff members including those that are members of the ERCEA Integrity Standing Committee;
- Members of the ERC Scientific Council, some of whom form part of the CoIME¹⁹.

¹⁴ Allegations may concern any person involved in the life cycle of a proposal or project, regardless of their functions, such as applicants (during the selection, evaluation and grant award procedures), grant beneficiaries (a Principal Investigator or research team members) or independent experts (during both, the evaluation phase or project follow-up).

¹⁵ Commission Decision C(2013)9428 of 20 December 2013 on delegating powers to the European Research Council Executive Agency with a view to performance of tasks linked to the implementation of Union programmes in the field of frontier research.

¹⁶ Decision of the Steering Committee of the ERCEA of 18 February 2009 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests.

¹⁷ Commission Decision C (2011)7216 of 5 October 2011 adopting model appointment letters for the independent experts participating to the peer review evaluation of proposals to the European Research Council (ERC) under the Ideas Specific Programme implementing the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013).

¹⁸ Commission Decision C(2013)8373 of 10 December 2013 on the model contracts for experts for Horizon 2020 – The Framework Programme for Research and Innovation of the European Union (2014-2020), Research and Training Programme of the European Atomic Energy Community (2014-2018).

¹⁹ A Confidentiality Declaration is signed by authorised ERCEA staff members and any Member of the ERC Scientific Council before receiving any information or case details.

Additionally, as the case may be:

- appointed independent external experts;
- upon their request: European Court of Auditors and OLAF staff members (as part of the case review or as an auditing body);
- the European Commission (staff involved in the case or in its function of control body to the ERCEA or staff of the DG for Employment, Social Affairs and Inclusion and the DG for Regional Policy (in each case limited to the Auditors Unit), with the exception of Directorate H of the Employment, Social Affairs and Inclusion DG and Directorate J of the Regional Development DG;
- General Court and the Court of Justice;
- European Ombudsman;
- Managing Authorities and their Intermediary Bodies in the Member States, their Certifying Authorities and the Audit Authorities;
- competent Member State and/or third countries²⁰ authorities and bodies²¹.

The data subjects are **informed** of the processing operations by means of a privacy statement to be published on the ERC website, which contains all mandatory information under Articles 11 and 12 of the Regulation. The party/ies allegedly involved in misconduct is/are informed of the procedure concerning him/her through an e-mail or letter inviting him/her/them to provide clarification and enclosing the specific privacy statement (Annex 3 of the “ERC procedure to deal with information on scientific misconduct”) as soon as a case has been determined to be possibly significant. If a case is considered insignificant, the alleged party/ies are not informed of the proceedings.

Regarding the data subjects' **rights of access and rectification**, according to the specific privacy statement,

- data subjects wanting to access, verify, correct or delete any personal data must apply to the Chair of the ISC, by sending an e-mail giving details of their request to the functional mailbox;
- the person allegedly having acted in scientific misconduct has access to the information provided by the informant, however not to his/her name or to any element that would allow his/her identification, unless the informant has maliciously provided false information, or applicable national provisions regulating judicial/criminal procedure require such disclosure.

As regards the **conservation of the data**²², the following rules apply:

After a *case considered significant* has been closed, data are kept:

- if opened and closed with no follow-up action: three years for data that concerns a rejected proposal; ten years for data that concerns granted proposals and ten years for data that concerns experts;
- if there is a follow-up action, for 20 years;

²⁰ According to the notification, some personal data may be disclosed, in compliance with the relevant current legislation and established case law, and on a temporary basis to the competent third countries authorities and bodies that might be involved in the assessment of the misconduct; any contact with third parties takes place while ensuring the confidential treatment of the information provided or exchanged.

²¹ According to the notification, where a national/local authority/body could be entrusted with investigation or judicial powers on a case dealt by ERCEA, the latter might have the obligation to provide information/documents. Moreover, also the ERCEA could deem necessary to inform staff of national competent authorities/bodies in line with applicable law.

²² Cases of scientific misconduct will be reported in anonymous manner in the ERCEA Annual Activity Report and in the ERC Scientific Council Annual Report.

- if a warning is registered in the Early Warning System (EWS), the applicable data retention periods as foreseen in the Commission's Common Retention List SEC(2012)713 are followed.

Case files of *insignificant cases* are kept only until a case has been declared “insignificant”, thereby effectively closing the case.

Security measures:

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3. LEGAL ANALYSIS

3.1. Prior checking

The notified operations constitute a processing of personal data ("*any information relating to an identified or identifiable natural person*") in the sense of Article 2(a) of Regulation (EC) 45/2001 ("the Regulation"). It is performed by a body of the EU in the exercise of activities falling within the scope of the Treaties. The processing of the data is done, at least in part, through automatic means. Therefore, the Regulation is applicable.

Article 27(1) of the Regulation subjects to prior checking by the EDPS all "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes*". Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks. Letter (a) mentions among others processing data relating to suspected offences, offences and criminal convictions. Letter (b) mentions processing operations intended to evaluate personal aspects relating to the data subjects, including their conduct. In the case at hand, the processing operations involve data relating to suspected offences in the sense of Article 27(2)(a) of the Regulation and the evaluation of (mis-)conduct under Article 27(2)(b) of the Regulation.

The notification of the DPO was received on 16 May 2014. The draft Opinion was sent to the DPO for comments on 30 June 2014. The EDPS received a reply on 7 July 2014. According to Article 27(4) of the Regulation, the present Opinion must be delivered within a period of two months. In total, the case has been suspended for nine days. In consideration of all the periods of suspension, the Opinion must therefore be rendered no later than 25 July 2014.

3.2. Lawfulness of the processing

Under Article 5(a) of the Regulation²³, a two-step test needs to be carried out to assess: (1) whether either the Treaty or other legal instruments foresee a public interest task on the basis of which the data processing takes place (legal basis), and (2) whether the processing operations are indeed necessary for the performance of that task.

The legal instruments cited in section 2 above as legal basis represent a public interest task on the basis of which the data processing takes place, insofar as they entrust ERCEA with the task of ensuring highest standards of research integrity.

The notified processing operation for dealing with allegations of scientific misconduct, including conflicts of interest, received by the ERCEA related to proposals submitted to the ERC or projects financed by an ERC grant and to determine potential follow-up actions also appears necessary for this purpose.

²³ Article 5(a) of the Regulation authorises a processing that is "*necessary for 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*".

The notified processing operation is therefore lawful.

3.3. Processing of personal data on behalf of the controller

Members of the Scientific Council in their function as experts contracted by the European Commission and other external experts contracted by the ERCEA on a case-by-case basis as well as external independent experts nominated by the CoIME for appointment by the ERCEA Director to advise the ERC in dealing with specific cases of scientific misconduct carry out parts of the data processing on behalf of the ERCEA.

This activity is governed by a written contract (ERC model contract for experts provided as annex 3 of the notification), which stipulates in particular that the processor acts on instructions from the controller and contains written clauses setting out the obligations in Articles 21 and 22 of the Regulation, which are incumbent on the processor (see Article 11(2) of the ERC model contract for experts).

The ERCEA thus complies with Article 23 of the Regulation.

3.4. Data Quality

Article 4(1)(c) of the Regulation states that data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed. This includes that data must be kept accurate and up to date; every reasonable step must be taken to ensure that inaccurate or incomplete data are rectified or erased (Article 4(1)(d) of the Regulation).

According to the notification, the ERCEA may receive information or allegations concerning a possible case of scientific misconduct in whatever form (written, oral, or any other) and from whomever, including anonymously. In particular for information based on anonymous sources, the accuracy of the personal data cannot be assumed. Here, the ERCEA must take appropriate steps to ensure a high level of accuracy.

The EDPS welcomes the fact that the person allegedly acting in breach of good scientific conduct has the opportunity to comment on the alleged facts²⁴ and that, according to information additionally received on 4 June 2014, such data subjects are asked for comments on anything, which not only includes, but is specifically dedicated to the right to rectification. In this context, the EDPS notes that the letter requesting information/clarification from the person allegedly acting in breach of good scientific conduct states that²⁵ *"You have the right to access the personal data concerning you that is being processed in this case, and request it to be corrected and/or completed at any time. For more information on your personal data, please refer to the enclosed privacy statement"*. The EDPS further notes that the privacy statement to be published on the ERC website (see section 2) explicitly mentions that *"Prior to taking any step, the party/ies concerned will be informed and heard; they are invited to comment on the alleged facts in written format by means of a pre-information letter or prior contact"*.

These measures taken by the ERCEA would seem to be sufficient to ensure an appropriate degree of accuracy of the personal data.

3.5. Conservation of data / Data retention

²⁴ The last sentence under section 2, page 4 of the notification explains that: *"The Chair of the ISC or the ERCEA Director, after consultation with the ERCEA Legal Unit, will send an initial request for information and, where applicable, clarification by email via the FMB by which the parties possibly involved in the alleged scientific misconduct receive the opportunity to comment on the alleged facts."*

²⁵ See annex 2 of the procedure on how to deal with scientific misconduct.

The EDPS notes that, according to the notification, following the final decision by the ERCEA Director, any expert contracted to support CoIME in the assessment is requested to eliminate any documentation (electronic or other) provided or drafted for the purpose of the assessment.

In the light of this and the retention periods outlined in section 2 above, the EDPS has no reason to believe that personal data is kept in a form which permits identification of data of data subjects for longer than is necessary for which the data are collected and/or further processed in the sense of Article (4)(1)(e) of the Regulation. However, following a five year period, the EDPS would invite the ERCEA to re-examine the need for the 20 years retention period applicable to cases in which there is a follow-up action in the light of experience gained until then.

3.6. Transfer of data

Transfers of data to recipients subject to the Regulation are governed by Article 7 of the Regulation. Transfers to recipients subject to the national laws implementing Directive 95/46/EC are regulated by Article 8 of the Regulation and transfers to third country recipients are regulated by Article 9 of the Regulation:

- Article 7(1) establishes that data shall only be transferred within or between EU institutions and bodies if they are "*necessary for the legitimate performance of tasks covered by the competences of the recipient*". Article 7 transfers occur both within the ERCEA and to other EU institutions or bodies. Internal transfers may happen to the extent necessary for reaching funding decisions and internal control functions. According to the notification, transfers to other EU institutions and bodies concern transfers to OLAF and the European Court of Auditors upon request as well as the European Ombudsman and the European Commission (authorised staff within ERCEA's parent DG RTD, the Commission's Legal Service and DG BUDG). Where these transfers relate to the investigation of specific cases, they are in principle covered under Article 7(1) of the Regulation. A case-by-case analysis, however, has to be performed to evaluate whether the conditions for the transfer are actually fulfilled.
- Transfers to the Managing Authorities and their Intermediary Bodies in the Member States, their Certifying Authorities and the Audit Authorities are subject to Article 8 of the Regulation. Article 8(a) allows transfers of personal data to such recipients "*if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority*". This provision covers transfers to such Member State authorities in the context of fraud detection and prevention²⁶, but also for the task of ensuring highest standards of research integrity, which ERCEA carries out in the public interest under Commission Decision C(2013)9428 of 20 December 2013²⁷.
- Transfers to third country recipients under Article 9 of the Regulation in principle require an adequate level of protection is ensured at the receiving end (Article 9(1) and (2) of the Regulation).
According to the notification, transfers under Article 9 of the Regulation are foreseen in compliance with the relevant current legislation and established case law, while ensuring the confidential treatment of the information provided or exchanged, and on a temporary

²⁶ See e.g. EDPS Opinion in case 2013-0340.

²⁷ Commission Decision C(2013)9428 of 20 December 2013 on delegating powers to the European Research Council Executive Agency with a view to performance of tasks linked to the implementation of Union programmes in the field of frontier research.

basis to the competent third countries authorities and bodies that might be involved in the assessment of an alleged scientific misconduct. To the understanding of the EDPS, these transfers to third countries are limited and ad hoc (i.e. not systematic).

Under Article 9(6)(d) of the Regulation, "*By way of derogation from paragraphs 1 and 2, the Community institution or body may transfer personal data if ...the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; ...*".

In the case at hand, the involvement of competent third countries authorities and bodies in assessing a case of alleged scientific misconduct serves the important public interest ground of ensuring highest standards of research integrity and thus helps the ERCEA to carry out its respective task under Commission Decision C(2013)9428 of 20 December 2013²⁸.

In the light of the above, the ERCEA appears to transfer personal data in line with the requirements stipulated in Articles 7 to 9 of the Regulation.

3.7. Rights of access and rectification

Articles 13 and 14 of the Regulation establish that data subjects shall be able to access and rectify data stored about them at any time.

According to the specific privacy statement (provided as Annex 3 of the “ERC procedure to deal with information on scientific misconduct”):

- data subjects wanting to access, verify, correct or delete any personal data must apply to the Chair of the ISC, by sending an e-mail giving details of their request to the functional mailbox;
- the person allegedly having acted in scientific misconduct has access to the information provided by the informant, however not to his/her name or to any element that would allow his/her identification, unless the informant has maliciously provided false information, or applicable national provisions regulating judicial/criminal procedure require such disclosure.

The EDPS takes note of the restriction applicable to the right of access of person allegedly having acted in scientific misconduct. Article 20(1)(c) of the Regulation stipulates that "*The Community institutions and bodies may restrict the application of ...Articles 13 to 17...where such restriction constitutes a necessary measure to safeguard: ... (c) the protection of the data subject or of the rights and freedoms of others; ...*". The EDPS welcomes²⁹ that special attention is paid to other possible data subjects such as informants. Their identity should indeed be kept confidential in as much as this does not contravene national rules regarding judicial proceedings.

As highlighted in his Guidelines on the Rights of Individuals with regard to the Processing of Personal Data³⁰, any restriction to the right of access should be in line with Article 20 of the Regulation.

²⁸ Commission Decision C(2013)9428 of 20 December 2013 on delegating powers to the European Research Council Executive Agency with a view to performance of tasks linked to the implementation of Union programmes in the field of frontier research.

²⁹ Guidelines on the Rights of Individuals with regard to the Processing of Personal Data, p. 32, available under https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/14-02-25_GL_DS_rights_EN.pdf.

³⁰ See Guidelines on the Rights of Individuals with regard to the Processing of Personal Data, p. 27.

Therefore, if the ERCEA applies the above restriction under Article 20(1)(c) of the Regulation, the EDPS recalls that data subjects have to be informed of the principal reasons for this restriction and of their right to have recourse to the EDPS under Article 20(3) of the Regulation³¹.

3.8. Information to the data subject

As regards *informants*, their identity and contact details are provided by themselves; they must thus be informed in accordance with Article 11 of the Regulation. The specific privacy statement (provided as Annex 3 of the “ERC procedure to deal with information on scientific misconduct”) to be published on the ERC website contains all mandatory information under Article 11 of the Regulation.

Where data is not collected from the data subject as is the case for *any party allegedly involved in a case of possible scientific misconduct*, the information to be provided to the data subject must comprise at least the elements mentioned in Article 12 of the Regulation. The specific privacy statement contains all the required pieces of information, but according to the notification, it is only provided to the data subject as soon as a case has been determined to be possibly significant.

If a case is considered insignificant, the party allegedly involved in a case of possible scientific misconduct is not informed of the proceedings, which makes it unlikely that such data subjects will consult the specific privacy statement on the ERC website.

Article 12 of the Regulation stipulates that the controller shall "*at the time of undertaking the recording of personal data...*" provide the data subject with the respective information. In order to determine whether a case is significant, the personal data of the party allegedly involved in a case of possible scientific misconduct will have been recorded by the ERCEA in that sense.

The EDPS therefore recommends informing parties allegedly involved in a case of possible scientific misconduct by means of the specific privacy statement even if a case is considered insignificant.

3.9. Security measures

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4. CONCLUSION

There is no reason to believe that there is a breach of the provisions of Regulation (EC) 45/2001 providing the considerations contained in this Opinion are fully taken into account. In particular, the ERCEA should:

- following a five year period, re-examine the need for the 20 years retention period applicable to cases in which there is a follow-up action in the light of experience gained until then;
- inform parties allegedly involved in a case of possible scientific misconduct by means of the specific privacy statement even if a case is considered insignificant;

³¹ Idem.

- inform data subjects of the principal reasons for restricting their right of access under Article 20(1)(c) of the Regulation and of their right to have recourse to the EDPS under Article 20(3) of the Regulation.

Done at Brussels, 09 July 2014

(signed)

Giovanni BUTTARELLI