

(To be filled out in the EDPS' office)
REGISTER NUMBER: 1402

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NOTIFICATION FOR PRIOR CHECKING

DATE OF SUBMISSION: 28/09/2016

CASE NUMBER: 2016-0864

INSTITUTION: EDES-DB

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

INFORMATION TO BE GIVEN²

1/ NAME AND ADDRESS OF THE CONTROLLER

CONTROLLER : GIL CASADO VICTORIA

E-MAIL:

DELEGATE : RONGVAUX BENOIT

E-MAIL:

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

THE EUROPEAN COMMISSION

DG BUDG - DIRECTORATE D.2

3/ NAME AND DESCRIPTION OF THE PROCESSING

NAME: Entry of a Data Subject in the Early Detection and Exclusion System (EDES-DB)

Pursuant to article 108 (1) of the Regulation (EU, Euratom) N° 966/2012 of the European Parliament and of the Council as amended by Regulation (EU, Euratom) No 2015/1929 (hereinafter "the Financial Regulation" or "FR") which entered into force on 1 January 2016[1], a new database is set up by the Commission for the purposes of the early detection and exclusion system (hereinafter "EDES"). The EDES replaced as from 1st January 2016 the previous Early Warning System (hereinafter EWS)[2] and the previous Central Exclusion Database (hereinafter CED)[3], for which

¹ OJ L 8, 12.01.2001.

the opinion of the EDPS was received on 26 May 2010 (Case 2009-0681). The content of the previous databases (EWS and CED) did not automatically migrate to EDES regarding the verification warnings. A re-assessment of cases took place in order to feed the content of the EDES database.

The purpose of EDES is the protection of the Union's financial interests. The procedure relating to the EDES is the following:

- Information on early detection and/or exclusion and/or financial penalty is entered in the EDES database by the relevant authorising officers of the Commission or of its executive agencies, by other Institutions, bodies, European offices and agencies. The European Commission controls and validates the cases that the Institutions, bodies, European offices and agencies create.

i. Exclusion

The new grounds for exclusion pursuant to the Financial Regulation are the following:

The authorising officer shall exclude economic operators as defined in article 101 (1) (g), (k), (l) of the Financial Regulation (such as tenderers, candidates, contractors, grant applicants, beneficiaries, experts, etc.) who: ·

- are subject to insolvency or winding-up procedures, or in an analogous situation, pursuant to article 106 (1) (a) of the Financial Regulation; ·

- are in breach of their obligations relating to the payment of taxes or social security contributions, pursuant to article 106 (1) (b) of the Financial Regulation; ·

- are guilty of grave professional misconduct (article 106 (1) (c) of the Financial Regulation), including in particular of:

a) fraudulent misrepresentation of information,

b) distortion of competition,

c) violation of intellectual property rights,

d) influence of the decision making process within a procurement procedure,

e) attempt to obtain confidential information that may confer undue advantages in a procurement procedure;

- are guilty (article 106 (1) (d) of the Financial Regulation) of: a) fraud; b) corruption; c) participation in a criminal organisation; d) money laundering or terrorist financing; e) terrorist related offences; f) child labour or trafficking of human beings; ·

- have shown significant deficiencies in complying with main obligations in the performance of a contract financed by the Union's budget (article 106 (1) (e) of the Financial Regulation); ·

- have committed an irregularity (106 (1) (f) of the Financial Regulation).

For grounds under 106 (1) (c), (d) and (f) a final judgement of final administrative decision is required. In the absence of final judgement or final administrative decision in those cases as well as in case under 106 (1) (e) FR (following checks, audits or investigations by OLAF etc.), economic operators shall be excluded on the basis of a preliminary classification in law of a conduct referred to in those points, having regard to other established facts or other findings contained in the recommendation of the panel referred to in article 108 (article 106 (2) FR).

ii. Early Detection

In cases of presumed grave professional misconduct, irregularity, fraud, corruption or serious breach of contract, this information is transmitted by the entities referred to in article 108 (2) FR (such as OLAF, an authorising officer, another Institution) to the Commission for the early detection of risks threatening the Union's financial interests.

iii. Financial penalty

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

-After the decision on exclusion and/or financial penalty has been taken and in order, where necessary, to reinforce their deterrent effect, the Commission will publish on its internet site the relevant information, subject to a decision of the authorising officer (article 16 (16) of the FR).

The database

- The database is set up and operated by the Commission (Article 108 (1) Financial Regulation). - The content of the EDES database is expected to concern mainly legal persons (around 90% of the cases) and much less natural persons (10% estimated cases).

The present notification

-This notification merges and replaces the two previous notifications on EWS (ref: 872.5) and on CED (ref: 3004 2).

- This processing is subject to prior-checking by the EDPS (Article 27(2) (a), (b) and (d) of Regulation (EC) 45/2001). The EDPS was consulted by the Commission on the proposal of the Financial Regulation (COM (2014) 358) and expressed an opinion on 3 December 2014 (ref: GB/FP/cpl/D(2014) 2424 C2014-0301).

[1] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.286.01.0001.01.ENG [2] Notified to the DPO under notification n° DPO-872.5-BUDG: Register a Data Subject in the Early Warning System

[3] Notified to the DPO under notification n° DPO-3004.2-BUDG: Registration of a Data Subject in the Central Exclusion Database.

4/ PURPOSE OR PURPOSES OF THE PROCESSING, AND PROCESSORS

The purpose of the processing operation is the protection of the Union's financial interests by means of detection of risks and imposition of administrative sanctions. Pursuant to article 105a (1) of the Financial Regulation, the purpose of entering a data subject in the EDES is: ·

- the early detection of risks threatening the Union's financial interests; ·
- the exclusion of an economic operator which is in one of the exclusion situations listed in Article 106(1) of the FR; ·
- the imposition of a financial penalty on an economic operator pursuant to Article 106(13) of the FR; ·
- the publication on the Commission's internet site of information related to the exclusion and where applicable the financial penalty, in order to reinforce their deterrent effect (106(16) and 106(17) of the FR).

PROCESSORS:

There are no processors involved in this processing operation

5/ DESCRIPTION OF THE CATEGORY OR CATEGORIES OF DATA SUBJECTS

Data subjects may be: ·

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

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

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

- Identification data: Name, surname, address, country, identity card number/ passport number/driving license (or other document proving identity), issuing country, date of birth, place of birth; ·

- Data on the link (if existing) with a legal entity file kept in the accounting system of the Commission; ·

- Data on exclusion or early detection or financial penalty; ·

Ground (in the case of exclusion): the grounds of the exclusion are mentioned under article 106 (1) of the Financial Regulation, such as final judgement that the data subject is guilty of fraud, corruption, etc. ·

- Data on the duration of the exclusion or early detection: starting end, ending date, extension; · Data on the panel (108 (6) of FR): if the case is submitted to the panel, date of the panel, if observations were submitted by the economic operator, if the recommendation of the panel was taken into account, revision of the panel's recommendation, etc. ·

- Data on the financial penalty: amount, if the amount was paid; ·

- Authorising officer responsible for the case;

- Contact person responsible for the case.

Pursuant to article 106 (16) of the FR, the following data may be published subject to the decision of the authorising officer: ·

- Identification data: name and address of the economic operator; · Data on exclusion and grounds of exclusion (article 106 (1) of the FR); ·

- Duration of exclusion; ·

- Data on financial penalty: amount and if it was paid;

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

Special categories of personal data may be processed, pursuant to article 106 (1) of the Financial Regulation: ·

- Data relating to insolvency or winding-up procedures, or an analogous situation; ·

- Data relating to the non-payment of taxes or social security contributions; ·

- Data relating to grave professional misconduct (fraudulent misrepresentation of information, distortion of competition, violation of intellectual property rights, attempt to influence the decision making process of the contracting authority during a procurement procedure, etc.) ·

- Data relating to fraud, corruption, participation in criminal organisation, money laundering, offences linked to terrorist activities, child labour or other forms of trafficking in human beings; ·
- Data relating to significant deficiencies in complying with main obligations in the performance of a contract; ·
- Data relating to an irregularity;

7/ INFORMATION TO BE GIVEN TO DATA SUBJECTS

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

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

8/ PROCEDURES TO GRANT RIGHTS OF DATA SUBJECTS

Pursuant to article 108 (1), 1st subparagraph of the Financial Regulation and in accordance with Regulation (EC) No 45/2001, any economic operator subject to the early detection and exclusion system shall have the right to be informed of the data stored in the database upon its request to the authorising officer. Before an eventual exclusion decision and/or financial penalty and /or the decision on publication of exclusion decision and/or of the financial penalty, the data subject will be notified without delay about the facts in question and their preliminary classification in law pursuant to article 108 (8) (b) of the Financial Regulation. This notification may be deferred where there are compelling legitimate grounds to preserve the confidentiality of an investigation or of national judicial proceedings, until such compelling legitimate grounds to preserve the confidentiality cease to exist (see article 108 (8) (d) of the Financial Regulation). This deferral reflects the exception of article 20 (1) (a) of Regulation 45/2001, since it foresees that the rights of data subject may be restricted, "where such restriction constitutes a necessary measure to safeguard: (a) the prevention, investigation, detection and prosecution of criminal offences;"

Pursuant to the Financial Regulation, the information on early detection shall be also notified to the data subjects.

The Financial Regulation ensures the rights of defence, the rights to privacy and to the protection of personal data (see recitals n°9 and 28 of the FR).

- Rights of defence (contradictory procedure): Data subjects subject to an exclusion decision may submit their observations to the panel referred to in article 108 of the Financial Regulation (see article 108 (8) (c) of the Financial Regulation). This opportunity may only exceptionally be deferred in order to preserve the confidentiality of an investigation or of national judicial proceedings (article 108 (8) (d) of the Financial Regulation). This deferral reflects again the exception of article 20 (1) (a) of Regulation 45/2001. In addition, when the authorising officer envisages a more severe decision than what was recommended by the panel, such decision will be taken with due respect for

the rules on data protection (article 108 (9), second subparagraph of the Financial Regulation). Finally the Court will have unlimited jurisdiction to review an exclusion decision (article 108 (11) of the Financial Regulation).

- Rights of rectification/blocking/erasure/access pursuant to Regulation No 45/2001: The rights of the data subjects enshrined in Articles 13 to 19 of the Regulation (EC) 45/2001 are confirmed by the Financial Regulation (articles 106 (16), 5th subparagraph, 106 (17), 108 (1), 1st subparagraph) and they are reminded to the data subject when the registration of the information on early detection and/or exclusion and/or financial penalty is notified. It is the authorising officer who entered into EDES the information on early detection and/or exclusion and/or financial penalty, the responsible for the relations with the person whose data are introduced into the EDES. Regarding the data stored in the database, the data subject will be informed upon its request to the Commission (article 108 (1), third subparagraph of the Financial Regulation).

9/ AUTOMATED / MANUAL PROCESSING OPERATION

The information on early detection and/or exclusion and/or financial penalty is entered by the authorising officer in question in the EDES (following the procedure described under articles 106 to 108 of the Financial Regulation). The Authorising officer creates a case on an economic operator which might be complemented by additional data from Legal Entity File in ABAC (where this is applicable). Subsequently data are made automatically available to the "Workflow" part of the EDES. When the case is validated and published in EDES, the data related to early detection and/or exclusion and/or financial penalty imposed on the economic operator are recorded in ABAC if applicable. See also ABAC related notifications (DPO-1180, DPO-1214 and DPO-1256)

10/ STORAGE MEDIA OF DATA

Personal data related to cases on early detection and/or exclusion and/or financial penalty will be stored in a local application (EDES) which is located in DIGIT. Part of personal data stored in EDES is copied in the Commission's ABAC accounting system if applicable.

11/ LEGAL BASIS AND LAWFULNESS OF THE PROCESSING OPERATION

Articles 108 (1), (2), (3), (4), and (12), 131 paragraph 4, 138 paragraph 2, third subparagraph, 139 paragraph 5a and 204 of the Financial Regulation. (attached)

Article 143 of the Commission Delegated Regulation amending Delegated Regulation No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (hereinafter Rules of Application or RAP) which entered into force on 1 January 2016. (attached)

Processing of personal data in the EDES is lawful under articles 5 (a) and 5 (b) of Regulation (EC) 45/2001: it is necessary for the performance of a task carried out in the public interest on the basis of legal instruments adopted on the basis of the Treaties. It is also necessary because the legal basis mentioned before makes it an obligation for the controller to process personal data, as it aims at making available information concerning economic operators who could represent a threat to the

European Union's financial interests and reputation, pursuant to article 106 (1) of the Financial Regulation.

This processing is subject to be prior-checked by the EDPS pursuant to article 27(a), (b) and (d) of Regulation (EC) 45/2001.

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

Recipients of the data of the EDES are the following (article 108 (2), (4) and (12) of FR and article 143 of RAP):

- Authorised persons within the Commission and of the Executive Agencies (article 108 (4), subparagraph 1 of the Financial Regulation) for information concerning early detection, exclusion and financial penalty;
- Authorised persons within all other Institutions, bodies, European offices and agencies (article 108 (4), subparagraph 1 of the Financial Regulation) for information concerning early detection, exclusion and financial penalty;
- Members of the Panel referred to in article 108 FR: a high level independent chair, 2 representatives of the Commission and a representative of the requester authorising officer;
- Authorised persons from all entities participating in the implementation of the budget in accordance with articles 59-60 of the Financial Regulation (see article 108 (12) of the Financial Regulation and article 143 of the RAP) only for exclusion decisions;
- Public for cases which are made public on the website of the EDES related to exclusion and where applicable, the financial penalty (article 106 (16) of the Financial Regulation). In this respect, it is noted that according to article 106 (16), 5th subparagraph, where personal data is concerned the authorising officer shall inform the economic operator of its rights under the applicable data protection rules and of the procedures available to exercise those rights. In addition, pursuant to article 106 (17) (c) where a natural person is concerned, personal data shall not be published, unless the publication of personal data is exceptionally justified, inter alia, by the seriousness of the act or its impact on the Union's financial interests. In such cases, the decision to publish the information shall duly take into consideration the right to privacy and other rights provided for in Regulation (EC) No 45/2001; European Court of Auditors, European Anti-Fraud office (OLAF) for all data that are in the EDES database for audit /investigation purposes.

13/ RETENTION POLICY OF (CATEGORIES OF) PERSONAL DATA

The information on early detection will have a maximum duration of 1 year (pursuant to article 108, paragraph 4, 3rd subparagraph of the Financial Regulation) from the moment that the relevant case is validated by the Commission. The information is automatically removed at the end of the period. If, during the retention period of information on early detection, the authorising officer requests the panel referred to in Article 108 to issue a recommendation in an exclusion case, the retention period may be extended until such time, when the authorising officer has taken a decision. In other cases, as soon as it is no longer justified, the information on early detection is closed by the authorising officer.

The duration of information on exclusion shall not exceed :

- a) Five years for cases referred to in point (d) of paragraph 1 of article 106 of the FR (in cases of fraud, corruption, participation in criminal organisation, money laundering, offences linked to terrorist activities, child labour or other forms of trafficking in human beings);

- b) Three years for the cases referred to in points (c), (e) and (f) of paragraph 1 of article 106 of the FR (grave professional misconduct, significant deficiencies in complying with main obligations in the performance of a contract and irregularity)
- c) The duration, if any, set by the final judgement or the final administrative decision of a Member State; An economic operator shall be excluded as long he is in one of the exclusion situations referred to in points (a) and (b) of paragraph 1 of article 106 of the FR (see article 106 (14) of FR) (bankruptcy, insolvency or winding-up procedures, or an analogous situation, non-payment of taxes or social security contributions). Any decision of the authorising officer or any recommendation of the panel referred to in article 108 FR on the proposed duration of the exclusion shall be made in compliance with the principle of proportionality (article 106 (3) of the FR).

The information on exclusion will be removed as soon as the exclusion has come to an end (see article 106 (16) 4th subparagraph of FR). In case of a financial penalty, if the relevant information has been published, the publication shall be removed six months after payment of that penalty (106 (16) 4th subparagraph of FR).

Removed information on early detection, exclusion and/or financial penalty shall be accessible for audit, investigation purposes and for the purposes of the preliminary classification in law due to the fact that the "recurrence" is a criterion to be taken into consideration for the recommendation of the panel referred to in article 108 (pursuant to article 106 (3) of the FR). The removed information shall not be visible for the users of the EDES database.

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

For every demand made by the data subject to block/erase data, the time to process and assess the legitimacy of it should be evaluated on a case-by-case basis.

1. As long as the legitimacy of a request is not established, the Commission commits itself to answer the request of the applicant within 15 working days in order to complete the request and make it legitimate. The request will be legitimate when the following elements are established: · The request for blocking/erasure is signed; · It contains a serious motivation; · The identity of the signatory is established (copy of an ID card). The link between the signatory and the concerned economic operator is established (given by the form of recording of the exclusion or, otherwise: copy of extract of register, status, gazette).
2. Within 15 working days of the receipt by the Authorising Officer of a legitimate request of blocking/erasure of the data, the information on the economic operator will be removed from EDES and the economic operator at stake will disappear one day after the removal (with the automatic daily update of the EDES). According to the data controller, the economic operator concerned will be informed of the removal and the subsequent decision by standard letter. Therefore, there will be no prejudice to the requestor should the examination take more than 15 working days.
3. If the examination of the request shows that the request of blocking/erasure is not justified, the information will be reinserted and the data subject concerned will be notified in writing within 10 working days about the entry. The procedure to block/erase data will not have effects on the general processing operation taking place on the EDES.

Finally, as explained above (point 13), information is entered upon registration and removed automatically at the end of the retention period of the information if, in the meanwhile, they have not been manually removed on the basis of a duly justified request by the data subject.

14/ HISTORICAL, STATISTICAL OR SCIENTIFIC PURPOSES

If you store data for longer periods than mentioned above, please specify, if applicable, why the data must be kept under a form which permits identification.

n/a

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

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

Those entities are the following:

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

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

16/ THE PROCESSING OPERATION PRESENTS SPECIFIC RISK WHICH JUSTIFIES PRIOR CHECKING

Article 27.2.(a) Processing of data relating to health and to suspected offenses, offenses, criminal convictions or security measures;

Article 27.2.(b) Processing operations intended to evaluate personal aspects relating to the data subject;

Article 27.2.(d) Processing operations for the purpose of excluding individuals from a right, benefit or contract.

17/ COMMENTS

n/a

PLACE AND DATE: BRUXELLES, 22.09.2016

DATA PROTECTION OFFICER: RENAUDIÈRE PHILIPPE

INSTITUTION OR BODY: THE EUROPEAN COMMISSION