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**Subject: Prior checking notification concerning public procurement and grant procedures at the ECDC**

Dear Ms Masoliver,

I refer to the notification for prior checking concerning public procurement and grant procedures submitted to the European Data Protection Supervisor (EDPS) by the Data Protection Officer (DPO) of the European Centre for Disease Prevention and Control (ECDC) on 21 December 2012, together with the respective privacy clauses for invitations to tender, tender specifications and contracts.

We note that the procurement and grant procedures at the ECDC are in most aspects in compliance with the Data Protection Regulation 45/2001<sup>1</sup> as outlined in the EDPS Public Procurement Guidelines<sup>2</sup> and would therefore only address the existing practices which do not seem to be fully compliant in this respect.

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<sup>1</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

<sup>2</sup> EDPS Guidelines on the processing of personal data in the context of public procurement, grants as well as selection and use of external experts of 25 June 2013 (EDPS 2012-501).

**1. Data conservation.** According to the information provided in the notification, personal data processed in the context of procurement and grant procedures are kept for up to five years after the date on which the European Parliament has granted discharge for the budgetary year to which the data relate.

Article 4(1)(e) of Regulation 45/2001 states that personal data can be kept in a form permitting identification of data subjects for no longer than necessary for the purpose for which they were collected or further processed.

The EDPS observes that the conservation of files of successful tenderers and applicants for up to seven years after signature of the respective contract or agreement can be considered as necessary for control and audit purposes in terms of Articles 48(1)(d) and (2) of the Rules of Application to the Financial Regulation<sup>3</sup>.

At the same time, we note that the extracts from judicial records should not be kept for longer than two years after the signature of the related contract<sup>4</sup> and thus invite the ECDC to establish such a conservation period for extracts kept in the electronic form.

Furthermore, we would like to question the necessity of the storage of files of unsuccessful tenderers and applicants for up to seven years after the signature of the related contract or agreement. Therefore, we invite the ECDC to reconsider the existing conservation period in relation to the time limits for the applicable legal remedies. In similar cases, five years were considered appropriate.

**2. Transfers of data.** Personal data processed in this context are transferred to the responsible staff in the Finance and Procurement Support Section, Legal and Procurement Sections, as well as to the members of the opening and evaluation committees. External experts can be involved as members of the evaluation committee.

The data transfers to the responsible staff at the Centre can be considered as necessary for the accomplishment of the respective task in the procurement or grant procedure and thus in compliance with Article 7(1) of Regulation 45/2001. In order to ensure full compliance with the Regulation, the EDPS recommends that all internal recipients are made aware of the purpose limitation set out in Article 7(3) of the Regulation.

The transfers to the external members of the evaluation committee have to be assessed in light of Articles 8 and 9 of Regulation 45/2001, depending on as to whether they are subject to national law adopted pursuant to Directive 94/56/EC<sup>5</sup>, i.e. whether they are established in the EU.

The transfers to the external recipients established in the EU can be deemed necessary for the performance of the evaluation task in the area of public procurement or grants in terms of Article 8(a) of Regulation 45/2001; whereas the transfers to experts established outside of the EU may be considered as necessary for the implementation of pre-contractual measures taken in response to the data subject's request within the meaning of Article 9(6)(b) of the Regulation. In

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<sup>3</sup> 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 the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union.

<sup>4</sup> See to this respect the letter on conservation of extracts from the judicial records sent by EDPS to the management of all EU institutions and bodies on 12 March 2013 (EDPS 2011-482).

<sup>5</sup> Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

any case, the tenderers and applicants should be informed about the possible processing of their data by external experts in the respective invitation or call (see below).

**3. Information to data subjects.** According to the information provided in the notification, the information to data subjects is provided in the form of "privacy clauses" listed above. The EDPS notes that the privacy clause for invitations to tender contains some information about data recipients and the right of recourse to the EDPS, as well as refers to the tender specifications. The privacy clause for tender specifications provides for information about the identity of the controller, the purpose of processing as well as the rights of data subjects (including the right of recourse to the EDPS), whereas the privacy clause for contracts contains information about the purpose of the processing and the rights of data subjects (including the right of recourse).

At the same time, there seems to be no "privacy clause" for the initial phase of the grant procedure. Furthermore, no information about the applicable legal basis or the time limits for data conservation is provided in any of the three existing clauses and the information about rights of data subjects seems to be rather misleading as the privacy clause for tender specifications states that any queries concerning processing of personal data should be addressed to the DPO and the privacy clause for contracts refers to rights of data subjects "and contractors".

In order to ensure full compliance with Articles 11 and 12 of Regulation 45/2001, the EDPS recommends that a privacy clause is established for the respective calls for proposals, as well as that the existing privacy clauses are revised in the following manner:

- information about legal basis of the processing, conservation periods and data recipients is added to the privacy clause for tender specifications;
- information about legal basis of the processing, conservation periods, identity of the controller and data recipients is added to the privacy clause for contracts;
- the information about data recipients clearly refers to external experts in case they may be involved in the processing of personal data in the context of the particular procurement or grant procedure;
- it is clarified in the privacy clause for tender specifications that the requests for access and rectification should be addressed to the controller ([ecdc.procurement@ecdc.europa.eu](mailto:ecdc.procurement@ecdc.europa.eu)) and not to the DPO;
- the reference to "contractor's" rights of access and rectification in the privacy clause for contracts is deleted as it does not refer to the processing of data of the tenderers and applicants by the external expert.

In conclusion, the EDPS considers that there is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the considerations contained in this Opinion are fully taken into account. In particular, the ECDC should:

- establish a two years conservation period for extracts from judicial records kept in electronic form;
- shorten the existing conservation period for the files of unsuccessful tenderers and applicants to five years after the signature of the related contract or agreement;
- remind all internal recipients of the purpose limitation obligation set out in Article 7(3);
- establish a privacy clause for calls for proposals;
- revise the existing privacy clauses for invitation to tender, tender specifications and contracts in a manner outlined above;
- ensure that tenderers and applicants are duly informed about any possible data transfers to the external experts.

We would like to invite the ECDC to inform us about the implementation of these recommendations within three months after receipt of this letter.

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor  
(signed)