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Please use [edps@edps.europa.eu](mailto:edps@edps.europa.eu)  
for all correspondence

**Subject: Prior checking notification concerning public procurement**

Dear Mr Ricotta,

I refer to the notification for prior checking concerning public procurement submitted to the European Data Protection Supervisor (EDPS) by the Data Protection Officer (DPO) of the European Railway Agency (ERA) on 6 September 2013.

We note that the procurement procedure at the ERA is in most aspects in compliance with Regulation (EC) No 45/2001<sup>1</sup> (the Regulation) as outlined in the EDPS Public Procurement Guidelines<sup>2</sup> and will therefore only address the existing practices which do not seem to be fully compliant in this respect.

**1. Data conservation.** According to the information provided in the notification, files of successful tenderers are kept for seven years after the signature of the related contract or the last payment by the ERA. The files of unsuccessful tenderers are kept for five years after the signature of the related contract.

Article 4(1)(e) of the Regulation 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 for up to seven years can be considered necessary for control and audit purposes in terms of Articles 48(1)(d) and

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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).

(2) of the Rules of Application to the Financial Regulation<sup>3</sup>, whereas the storage of files of the unsuccessful tenderers for up to five years can be considered necessary in order to allow for all possible appeals.

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 ERA to establish a conservation period of two years for extracts from judicial reports kept in the electronic form.

**2. Information to data subjects.** The EDPS notes that most information about the data processing in the context of public procurement required in terms of Articles 11 and 12 of the Regulation is provided in the specific privacy statement.

Nevertheless, the information about identity of the data controller seems to be rather confusing as it refers to three different entities, namely "the Head of Resources and Support, acting as Data Controller", "the Head of the Finance and Procurement Unit publishing the particular call for tenders responsible for the collection and processing of personal data" as well as the entity whose "contact information are mentioned in the call for tenders". The EDPS considers that these entities can only be considered as contact points or "controllers in practice" since the ERA is to be considered as the "controller". We recommend that it is clarified as it is crucial for the exercise of the rights of the data subjects.

In conclusion, the EDPS considers that there is no reason to believe that there is a breach of any provisions of the Regulation on condition that the consideration contained in this Opinion are fully taken into account. In particular, the ERA should:

- establish a two years conservation period for extracts from judicial records kept in the electronic form;
- clarify the information about identity of the controller in the existing privacy statement.

He would like to invite the ERA to inform him about the implementation of these recommendations within three months after receipt of this letter.

**(signed)**

Giovanni BUTTARELLI

(signed)

Cc: Zografia PYLORIDOU, DPO

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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).