

Opinion on the notification of a prior check received from the Data Protection Officer of the Committee of the Regions relating to the file "Procedures to be applied for the consultation and updating of the central exclusion database"

Brussels, 4 June 2010 (Case 2010-248)

1. Procedure

In a letter received on 26 March 2010, notification was issued by the Data Protection Officer (DPO) of the Committee of the Regions (hereinafter "the CoR") to the European Data Protection Supervisor (EDPS) pursuant to Article 27(3) of Regulation (EC) 45/2001 regarding the "Procedures to be applied for the consultation and updating of the central exclusion database".

In an email dated 21 April 2010, questions were asked to the DPO of the CoR. Responses were provided on 23 April 2010. The DPO was given a period of 8 days to give his comments on the draft opinion of the EDPS.

2. Facts

In accordance with Article 181(2) of the Financial Regulation,¹ the central database provided for in Article 95 of said Regulation came into force on 1 January 2009. This database was created by the Commission (tasked with creating and managing it pursuant to Article 95) by the adoption of the Regulation on the central exclusion database² on 17 December 2008.³

The **purpose** of the data processing is to implement a procedure at CoR level that facilitates compliance with obligations arising from Article 95 of the Financial Regulation. It should be pointed out that the purpose of the data processing is therefore to exclude candidates and tenderers from participation in and the awarding of contracts (Articles 93 and 94 of the Financial Regulation, hereinafter referred to as "FR").

¹ Council Regulation (EC, EURATOM) No. 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248 of 16/09/2002, p. 1) amended by Council Regulation (EC, EURATOM) No. 1995/2006 of 13 December 2006 (OJ L 390 of 30/12/2006, p. 1) and Council Regulation (EC) No. 1525/2007 of 17 December 2007 (OJ L 343 of 27/12/2009, p. 9), corrected by the Corrigendum published in OJ L 25 of 30/01/2003, p. 43 (1605/2002) and the Corrigendum published in OJ L 48 of 22/02/2008, p. 88 (1995/2006).

² Commission Regulation (EC, EURATOM) No 1302/2008 of 17 December 2008 on the central exclusion database (OJ L 344 of 20/12/2008, p. 12).

³ The EDPS carries out a prior check of the central exclusion database and will adopt an opinion, which will be made available on its website (file 2009-0681). The analysis conducted and recommendations made within the context of this opinion should be taken into account when analysing this opinion.

In accordance with the Regulation on the central exclusion database (Article 6), and by decision of the Secretary-General of the CoR (No 420/2009 of 21 September 2009), the Accounting Officer of the CoR has been designated "*point of contact*" and tasked with implementing the procedures necessary in order to comply with the provisions on this database and distributing them, by memorandum, to the financial operators of the CoR (administrators and authorising officers by sub-delegation) tasked with their practical implementation.

The Accounting Officer of the CoR wrote (after internal consultation) and distributed (by email) a memorandum on 27 January 2010 for the attention of the financial operators of the CoR, entitled "*Accounting Memorandum No 1/2010: Procedures to be applied for the consultation and updating of the central exclusion database*". This memorandum had previously been presented to the financial operators verbally on 19 January 2010. On the day it was distributed, the accounting memorandum was also made available to the financial operators on the CoR intranet site.

The main points of this memorandum, as presented in the notification, are as follows:

1) Organisation of the consultation of the central exclusion database (CED).

Only the Accounting Officer of the CoR, as the official point of contact, has access to the CED managed by the Commission. However, he may authorise other people to access it, under his supervision. This authorisation has been granted to the three Accounting Officers by Delegation of the CoR (appointed by the Accounting Officer in accordance with the Financial Regulation). No other financial operator of the CoR may directly access the CED. For security reasons, the authorisation given by the Accounting Officer is automatically stopped if the CED is not consulted for a period of 90 consecutive days. Only the Accounting Officer may reinstate the authorisation.

When they have to consult the CED (the accounting memorandum states in which cases and at what time⁴), financial operators must send an email to an ad-hoc electronic mailbox service created specifically for this purpose. Only the Accounting Officer and the three Accounting Officers by Delegation have access (to read and write) to this mailbox. The mailbox is consulted several times a day, and each request for consultation is processed within 24 hours so as not to delay the procedures of budgetary or legal commitment of funds. All requests and responses are stored electronically in the mailbox. Each consultation is valid for one calendar month. Once this period of time has elapsed, any new budgetary or legal commitment of funds made with a legal entity must be the subject of a new request for consultation from financial operators.

The presence of one of the legal entities of the CoR is theoretical. In the vast majority of cases, the consultation of the CED by the Accounting Officer or his Accounting Officers by Delegation will not produce a result. Nevertheless, if this is not the case, the memorandum sets forth the steps to be taken, in which the Accounting Officer will be involved at all times.⁵

⁴ In the case of procedures for the award of contracts, the authorising officer by sub-delegation in charge or one of his referring agents will consult the CED before the contract award decision is made at the latest. However, if an authorising officer by sub-delegation limits the number of candidates invited to submit an offer or to enter talks within a limited procedure or a negotiated procedure (after the publication of a notice of contract or otherwise), such a consultation will be carried out before the selection of the candidates has been completed. For contracts worth less than 5 000 euros requiring a simple offer, such a consultation will take place before the invitation is sent.

⁵ If a warning is recorded in the CED, the Accounting Officer of the CoR will check the accuracy of the exclusion situation, as errors can never be prevented entirely (typing errors, errors due to homonyms, incorrect

2) Recording and updating of the CED.

When financial operators observe within the context of their operational activities that one of the legal entities in to Community funds have been committed is in one of the exclusion situations provided for by the Financial Regulation (Article 93 and 94), the memorandum sets forth the steps to be taken to organise the recording of the legal entity in the CED and to update and remove this record. These steps are coordinated by the Accounting Officer of the CoR.

Memorandum 1/2010 from the Accounting Officer contains the following details:⁶

- The rules on consultation of the exclusion database and cases in which the database must not be consulted.
- It also details certain situations relating to sub-contractors and people with authorisation to represent, make decisions for or supervise a third party.
- The memorandum also gives practical explanations about how to consult the database and how evidence of the consultation is used.
- It also explains what should be done if an entity is included in the database: if a warning is recorded in the database, the Accounting Officer of the CoR will check the accuracy of the exclusion situation, as errors can never be prevented entirely (glaring errors, errors due to homonyms, incorrect classifications, etc.). If the exclusion is confirmed, the Authorising Officer by Sub-Delegation will notify the legal entity concerned in writing. A copy of this notification will be sent to the Accounting Officer of the CoR.
- It also specifies what is expected of administrators and Authorising Officers by Sub-Delegation (for example, if one of them discovers during the normal course of his activities that an entity is in an exclusion situation). Once he has begun recording an entity, he is also responsible for amending, updating and deleting the record. The memorandum also specifies the procedure to be followed when indisputable evidence is provided that a warning is incorrect, no longer current or has ended.
- Finally, the memorandum sets out the responsibility for managing contacts with the entities whose data are held in the CED.

3) Preliminary information supplied to legal entities.

The memorandum stipulates that a specific clause must be inserted into all calls for tenders organised by the financial operators (open or restricted procedure and low-value contracts). From this perspective, all standard documents in invitations to tender are made available to the financial operators by the Legal Service on the CoR intranet site were revised after the memorandum from the Accounting Officer was distributed and contain the following terms:

"The follow-up of your response to the invitation to tender will involve the recording and processing of personal data (for example, name, address, CV). These data will be processed in accordance with Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the institutions and bodies of the Community and on the free movement of such data. Except where otherwise indicated, the answers to the questions and the personal data requested are necessary to assess your offer, in accordance with the specifications of the invitation to tender, and will be processed exclusively by [entity appointed to be in charge of

classifications etc.). If the exclusion is confirmed, the Authorising Officer by Sub-Delegation will notify the legal entity concerned in writing. A copy of this notification will be sent to the Accounting Officer of the CoR.
⁶ As the memorandum is available in English only, the summary is taken from an unofficial translation.

data processing] for this purpose [and, where appropriate, for other pertinent purposes to be specified]. On request, you may receive a copy of your personal data and you may amend any personal data which are inaccurate or incomplete. If you have any questions regarding the processing of your personal data, please contact data.protection@cor.europa.eu. You have the right to contact the European Data Protection Supervisor at any time regarding the processing of your personal data.

We wish to inform you that in order to protect the financial interests of the Community, your personal data may be passed on to services that deal with financial irregularities and/or the European Anti-Fraud Office (OLAF). Personal data (name/surname, forename in the case of an individual, address, legal form and surname and forename of persons who have power of representation, decision-making or supervision, in the case of a legal person) of financial operators which are in one of the situations mentioned in Articles 93, 94, 96(1)(b) and 96(2)(a) of the Financial Regulation may be registered in a centralised database managed by the Commission (central exclusion database) and passed on to the persons appointed within the Commission, as well as to the other institutions, agencies, authorities and bodies mentioned in Article 95(1) and (2) of the Financial Regulation. Any person registered in the database has the right to be informed of the data recorded concerning them, on request to be sent to the accounting officer of the Committee of the Regions, or directly to the Accounting Officer of the Commission.

*Before being registered in the central exclusion database, the candidate or tenderer will have the opportunity to express its opinion in writing (within 14 calendar days). However, while awaiting a possible decision as regards the duration of the exclusion and in order to protect the financial interests of the Union, it may be necessary to issue an exclusion warning, on a provisional basis, before giving the third party concerned the opportunity to express its opinion. The central exclusion database is managed by the Commission. A specific statement on privacy policy may be consulted on the website of the Commission at the following address:
http://ec.europa.eu/budget/library/sound_fin_mgt/privacy_-statement_ced_fr.pdf.*

The specific clause, therefore, stipulates that in the event of a procedure to record a legal entity in the CED on the initiative of the CoR, the persons concerned will be notified about their data and may contact the Accounting Officer of the CoR or the Accounting Officer of the Commission directly within 14 calendar days.

The **addressees** of the data include the following categories:

Addressees within the CoR to whom the data are likely to be disclosed are specified in the Financial Regulation (Article 95) and the CED Regulation. They are mentioned in the specific clause.

- 1) Accounting Officer of the CoR - official CED point of contact
- 2) Accounting Officers by Delegation (3) - CED access authorised by the Accounting Officer
- 3) Financial operators (Administrators and Authorising Officers by Sub-Delegation) - obligation of CED consultation through the Accounting Officer and Accounting Officers by Delegation
- 4) Secretary-General and Legal Service - involved in exceptional cases in which an exclusion decision is taken against a legal entity in accordance with Article 96 of the Financial Regulation.

It should be pointed out that the other end addressees referred to in the CED Regulation are OLAF, the EDPS and Ombudsman, Member States and third countries.

Data stored will only relate to cases in which one of the legal entities to which Community funds have been committed by financial operators of the CoR is in one of the exclusion situations provided for by the Financial Regulation (Articles 93 and 94).

These data will be limited to information to be passed on to the Commission within the context of the CED Regulation and, in particular, in its annexes and to any exchanges with the legal entity/ies concerned as described in the memorandum explained above.

Retention periods: According to the notification, the time data processed at CoR level can be retained corresponds to the time limits provided for in the CED Regulation. The EDPS notes that the CED Regulation provide for a fixed time limit to be placed in the database for each type of exclusion warning, which is set forth in the Financial Regulation. In such cases, exclusion warnings are automatically deactivated at the end of the warning period if, in the meantime, they have not been manually removed as a result of a duly justified request by the person concerned.

As regards **transfers**, the notification provides for third countries and international organisations to be included in the addressees provided for.

With regard to security measures, offers shall be received from bidders in paper format. These offers shall be stored in a locked cabinet.

3. Legal aspects

3.1. Prior check

The notification received on 26 March 2010 refers to the processing of personal data pursuant to Article 2(b) of Regulation (EC) No 45/2001 ("any information relating to an identified or identifiable natural person" - Article 2(a)). In fact, the exclusion system concerns data relating to individuals not only in their capacity as representatives of a legal person, but also individually as persons likely to be the subject of an assessment within the context of the central exclusion database.

The processing of data the subject of this opinion is implemented by a European institution (formerly "Community institution") for the performance of activities which fall within the scope of application of European (formerly Community) law (Article 3(1) of the Regulation).

As part of the procedure of recording the persons concerned in the exclusion database, the processing of data is at least partially automated as set out in Article 3(2) of Regulation (EC) No 45/2001. This data processing carried out at CoR level is manual, but the content is likely to appear in an automated system because when the CoR receives information concerning candidates and bidders, this information is entered in the CED application. The Regulation, therefore, applies in accordance with Article 3(2).

Article 27(1) of Regulation (EC) No 45/2001 subjects data processing likely to present particular risks to the rights and freedoms of the persons concerned to a prior check by the EDPS. Article 27(2) contains a list of instances of data processing likely to present such risks, which includes in particular in Article 27(2)(d) " processing operations for the purpose of

excluding persons from a right, service or contract". The recording of an individual⁷ in the CED results in their exclusion from a contract, receipt of a subsidy or a refusal of funds; thus, it falls within the scope of Article 27(2)(d) and, as such, is subject to a prior check by the EDPS.

Furthermore, the Regulation also subjects to a prior check "... the processing of data relating to suspected offences, offences, criminal convictions or security measures" (Article 27(2)(a)). Insofar as the exclusions set forth in Article 93 of the FR may contain this type of data, any procedure that aims to introduce the information into the CED must also, in this respect, be subject to a prior check.

Finally, the Regulation also subjects to a prior check " processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct" (Article 27(2)(b)). Any procedure that aims to introduce and update the exclusion database is indisputably linked to an evaluation procedure carried out by the CoR, in particular of the financial conduct of a person, and must, in this respect, also be subject to a prior check.

However, contrary to what the CoR presents as a basis for a prior check, the EDPS does not consider Article 27(2)(c) relevant in the aforementioned context. Article 27(2)(c) provides for such a check in the event of "processing operations allowing linkages not provided for pursuant to national or Community legislation between data processed for different purposes". According to the EDPS, the linkages provided for within the context of the envisaged processing are clearly defined, as stated in Point 2 above (the facts).

The EDPS has already issued an opinion on the exclusion database managed by the Commission (file 2009-0681). According to the Financial Regulation, the CED is managed by the Commission and its data are supplied *inter alia* by the other European institutions and bodies. Current processing is therefore supplementary to general data processing applicable within the context of the CED.

This instance involves a genuine prior check of procedures to be applied for the consultation and updating of the central exclusion database implemented by the CoR, which will be finalised once the recommendations of the EDPS have been issued.

Official notification was received on 26 March 2010. Additional information was requested by email on 21 April 2010. In accordance with Article 27(4) of Regulation No 45/2001, the period of two months granted to the EDPS to issue its opinion has been suspended. Its responses were provided on 23 April 2010. The DPO was given a period of 7 days to give his comments on the draft opinion of the EDPS. Thus, the EDPS should issue its opinion no later than 8 June 2010.

3.2 Legality of processing

The legality of processing must be examined in light of Article 5(a) of Regulation No 45/2001, which stipulates that personal data may only be processed if it 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 or in the legitimate exercise of official authority vested in the Community institution*". Article 5(b) stipulates that the processing of personal data may be carried out only if it is

⁷ As well as legal persons (not falling within the scope of Regulation (EC) No 45/2001).

"*necessary for compliance with a legal obligation to which the controller is subject*". Moreover, data relating to offences, criminal convictions or security measures are classed as "special categories of data" in accordance with Article 10(5) of the Regulation and it is advisable to search under Article 10 for grounds permitting the processing of data by Community institutions (see Point 3.3 below regarding special categories of data).

The legal basis of the system put in place by the Committee of the Regions is Articles 93, 94, 95 and 96 of the Financial Regulation adopted in 2002 (see note 1 above, at the bottom of page 1 for references) and the related methods of application in Articles 133 and 134.

It is also in Commission Regulation (EC, Euratom) No 1302/2008 of 17 December 2008 on the central exclusion database.⁸

Finally, it is also advisable to mention Decision No 420/2009 of the Secretary-General of the Committee of the Regions of 21 September 2009 regarding the designation of a point of contact for the Committee of the Regions for questions relating to the central exclusion database (central exclusion database point of contact).

The EDPS notes that the system put in place is considered necessary by the Committee of the Regions in order to fulfil its legal obligations and to perform its task in the public interest, which is to safeguard the financial and economic interests of European institutions.

The processing of personal data within the context of the central exclusion database falls within the legitimate exercise of official authority vested in the institutions, inasmuch as it aims to ensure the circulation of restricted information concerning third parties who could represent a threat to the Communities' financial interests and reputation, should the Commission enter into, or if it has already entered into, a contractual or conventional relationship with them.

The EDPS believes that the legal basis backs up the legality of processing.

3.3 Processing of special categories of data

Among other data, the central exclusion database processes special categories of data referred to in Article 10(5) of Regulation No 45/2001: "*The processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards*".

Processing activities, as regards the reporting used by the Committee of the Regions, are carried out on the basis of the legal instruments referred to (the Financial Regulation and the methods of implementation, the decision of the Commission regarding the exclusion database) and thus comply with Article 10(5) of Regulation (EC) No 45/2001 and justify the processing of these sensitive data.

3.4 Quality of data

Article 4 of Regulation (EC) No 45/2001 sets out a number of obligations regarding the quality of personal data.

⁸ See supra note 2

Data must be “*processed fairly and lawfully*” (Article 4(1)(a)). The legality of processing has already been examined (see Point 3.2 above), while fairness relates to information provided to the persons concerned (see Point 3.9 below).

Personal data must be collected “*for specified, explicit and legitimate purposes*” (Article 4(1)(b)), i.e. the processing of personal data may be carried out only for a specified purpose. It also implies that it is advisable to find a balance between the need to process personal data on the one hand and the consequences that this can have in terms of intrusion into the private life of the data subjects on the other. The benefits of data processing must be weighed up against its possible negative effects. If the implementation of this system, intended to protect the financial interests and the reputation of the Institutions, serves the legitimate interests of the institutions and bodies, the introduction of reporting of the exclusion of a person can have serious negative consequences for the data subject. These data are necessary with regard to the purpose of processing. As regards the serious consequences for the data subject, it is advisable to put in place certain guarantees to safeguard the legitimate interests of the data subject. In particular, these guarantees should result in the right of the data subject to information and to have access to data concerning him or her (see Points 3.9 and 3.8 below). The EDPS points out that the memorandum from the Accounting Officer of the Committee of the Regions contains a specific reference to risks linked to the disclosure of personal data.

Nevertheless, the EDPS also points out that the memorandum from the Accounting Officer stipulates that the clause to be inserted in all invitations to tender organised by financial operators must contain, among other things, the following text: “*Unless otherwise stated, responses to the questions and the personal data requested are necessary for the evaluation of your tender, in accordance with the specifications of the invitation to tender, and will be processed solely by [entity appointed as controller] for this purpose [and, if applicable, for other relevant purposes to be specified].*”

In the context of “*relevant purposes to be specified*”, the EDPS cannot agree to the purpose not being specified or explicit. Consequently, the EDPS invites the Committee of the Regions to stipulate all purposes for which processing is envisaged. These purposes must be only those for which processing is envisaged and must therefore not be left to the judgment of the entity appointed as controller. It would therefore be advisable to amend this text in order to comply with Article 4(1)(b).

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)). The processed data described at the start of this notice must be considered to comply with these conditions. The data required are administrative in nature, and considered necessary for the correct development of the different phases of the procedure planned for the central exclusion database. The EDPS is of the view that Article 4(1)(c) of Regulation No 45/2001 has been complied with.

In accordance with Article 4(1)(d) of the regulation, the data must also be “*accurate and, where necessary, kept up to date*”.

The specific clause as described in the facts stipulates that the data subjects shall have the right to be informed with regard to their data and be able to contact the Accounting Officer of the Committee of the Regions or the Commission Accounting Officer directly (as a reminder, the Commission manages the central exclusion database). It is also stipulated that it must be possible to have personal data disclosed on demand and to amend any inaccurate or incomplete personal data.

In the event of the process of recording a legal entity in the central exclusion database on the initiative of the Committee of the Regions, data subjects will be notified and have 14 calendar days to express their viewpoint before said entity is recorded in the central exclusion database.

The right of access and rectification provided for in Article 13 of Regulation No 45/2001 should also make it possible to guarantee the quality of the data. This aspect will be developed below (see Point 3.8).

3.5. Storage of data

Article 4(1)(e) of Regulation (EC) No 45/2001 sets out the principle according to which 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 storage period for data processed at the level of the Committee of the Regions corresponds to the period provided for in the Regulation on the central exclusion database.

The EDPS notes that a registration period is established in the exclusion database (see Article 10 of the Regulation on the central exclusion database) for each type of exclusion. In these cases, warnings are automatically deactivated at the end of the warning period unless, during the same period, they have not been removed manually as a result of a justified request by the data subject. In the event of a justified request or obvious error, the EDPS emphasises the need to ensure that the exclusion be no longer visible on the central exclusion database (Article 11 of the Regulation on the central exclusion database) and that the Committee of the Regions take all necessary measures to ensure that the exclusion is no longer present on the central exclusion database.

3.6. Data transfer

Article 7(1) of the Regulation stipulates: *“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”*.

Article 8 of Regulation No 45/2001 specifies that *“Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC, a) 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 (...)”*.

As explained in the facts, the notification stipulates that the recipients to whom data are likely to be disclosed shall be specified in the Financial Regulation (Article 95) and the Regulation relating to the exclusion database. The EDPS nevertheless believes that, in the procedure to which this notification refers, only the Commission may be considered to be the recipient of the data. It is true that ultimately, the recipients to whom the Financial Regulation and the Regulation on the exclusion database apply are the end recipients, but these transfers are analysed by means of the procedure relating to the exclusion database at the Commission (file 2009-0681).

In the context of this prior check, the EDPS believes that transfers are carried out at the Commission and that they can be considered “*necessary for the legitimate performance of the tasks covered by the competence of the recipient*”.

It would, however, be advisable to modify the procedure as currently described and to modify the note of the Committee of the Regions to stipulate that transfers shall initially be made to the central exclusion database managed by the Commission.

With regard to transfers to recipients other than Community institutions and bodies and which are not covered by Directive 95/46/EC, to which Article 9 of Regulation (EC) No 45/2001 applies, the EDPS emphasised in Notice 2009-0681 that discussions with the European Commission will be necessary to ensure that adequate protection is being provided with regard to the processing of data by international organisations/third countries. The EDPS therefore reiterates that the analysis of adequacy in this processing will be dealt with separately from these notices.

3.7. Right of access and rectification

In accordance with the right of access, the data subject has the right to be informed of the fact that personal data concerning him or her are processed by the controller and to have these data communicated to him or her in an intelligible form. On principle, it is advisable to interpret this right in the light of the concept of personal data. In fact, the Regulation has chosen a broad definition of the concept of personal data, based on the need to respect the rights of defence generally; in the specific area of the protection of personal data, compliance with rights of access and rectification is directly linked to the principle of the quality of data described above (Point 3.4). Although in most cases that result in exclusion data subjects are aware of the facts that led to the reporting of said exclusion, this does not mean they should be denied access to information concerning them in the system.

In accordance with Article 13 of Regulation No 45/2001, “*The data subject shall have the right to obtain, without constraint, at any time within three months from the receipt of the request and free of charge from the controller [...] information at least as to the purposes of the processing operation, the categories of data concerned and the recipients [...] to whom the data are disclosed [and] communication in an intelligible form of the data undergoing processing and of any available information as to their source*”. Article 14 stipulates that “*The data subject shall have the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data*”.

Article 13 of the Regulation on the central exclusion database provides for the right of access and rectification. In addition, the memorandum from the Accounting Officer, as presented in the facts, stipulates that “*On request, you can obtain access to your personal data and can rectify any personal data that are inaccurate or incomplete*”.

The right of access in question concerns the information managed by the Committee of the Regions, which is then sent to the Commission and the central exclusion database. It is advisable to ensure that amendments are passed on as quickly as possible, so that the changes can be made in the database.

In addition, this right of access must be open to all data subjects with regard to data relating to them, apart from the exceptions listed under Article 20 of Regulation No 45/2001. The rule relating to the right of access also applies when a data subject requests access to the files of other individuals that contain information relating to him or her (for example, employees of a

bidder). Access should not be refused, subject to possible limitations provided for under Article 20(1)(c) (“*necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others*”).

The limitations that apply to the rights of the data subject, referred to in Article 20 of Regulation No 45/2001 must not be established as a rule: they must remain the exception.

If one of the restrictions set out under Article 20 is called upon, the Committee of the Regions must take into account and comply with Article 20(3), which is worded as follows: “*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 or her right to have recourse to the European Data Protection Supervisor*” and Article 20(5), which is worded as follows: “*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*”. With regard to the right to information, this provision must be read in conjunction with Articles 11 and 12 of the Regulation (see Point 3.9 below).

If a restriction is imposed on the right of access, the data subject has the right to request indirect access by contacting the EDPS (Article 20(4)).

Article 14 of Regulation No 45/2001 grants the data subject the right to obtain the rectification of inaccurate or incomplete data. Given that in most situations these investigations are of a sensitive nature, this right is of crucial importance in guaranteeing the quality of the data used, which, in this specific case, is linked to the rights of defence. Any restriction provided for by Article 20 of the Regulation must be applied in light of the observations presented with regard to the right of access in the above points.

3.8. Information to be given to the data subject

Article 11 of Regulation (EC) No 45/2001 stipulates that the controller must provide information to the data subject, except where the data subject already has this information. As a minimum, this information shall relate to the identity of the controller, the purposes of the processing operation for which the data are intended, the recipients or categories of recipients of the data, whether replies to the questions are obligatory or voluntary, and the possible consequences of failure to reply and the existence of the right of access to, and the right to rectify, data concerning him or her. Additional information may have to be supplied, such as the legal basis of the processing operation, the time limits for storing the data and the right to have recourse at any time to the European Data Protection Supervisor. When personal data are collected directly from the data subject, it is advisable to provide the information at the time of collection. As the data are mainly collected directly from data subjects, Article 11 shall apply.

The provisions of Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) also apply, whereby the Committee of the Regions can collect the information itself or from the Commission. In such a case, the information must be supplied to the data subject at the time the data are recorded or, at the latest, when the data are communicated to a third party, unless the data subject has already been informed.

Article 20 of Regulation (EC) No 45/2001 provides for certain restrictions on the obligation to supply information under certain conditions (see above).

The memorandum from the Accounting Officer described in the facts stipulates that a specific clause must be inserted in all invitations to tender organised by financial operators (open or restricted procedures and low-value contracts). From this perspective, all standard documents in invitations to tender made available to financial operators by the Legal Department on the Committee of the Regions intranet site were revised after the memorandum from the Accounting Officer was distributed and contain the information provided for by Articles 11 and 12. The clause stipulates that data subjects shall have the right to be informed with regard to their data, and that they can contact the Accounting Officer of the Committee of the Regions or the Commission Accounting Officer directly.

As explained above (Point 3.4), however, the EDPS considers it advisable to specify the precise purposes of the processing operation in the clause.

3.9 Automated individual decisions

Article 19 of the Regulation stipulates that *“the data subject shall have the right not to be subject to a decision which produces legal effects concerning him or her or significantly affects him or her and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him or her, such as his or her performance at work, reliability or conduct, unless the decision is expressly authorised pursuant to national or Community legislation or, if necessary, by the European Data Protection Supervisor. In either case, measures to safeguard the data subject's legitimate interests, such as arrangements allowing him or her to put his or her point of view, must be taken”*.

As mentioned in the point dedicated to the facts, the decision to introduce reporting is the result of an evaluation that did not involve an automated decision. Moreover, no consequence arising from the introduction of reporting is automated. Therefore, the provisions of Article 19 do not apply in this instance.

3.10. Security measures

According to Article 22 of Regulation (EC) No 45/2001, *“the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. Such measures shall be taken in particular to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing”*.

The Regulation on the central exclusion database also stipulates (in Articles 6 and 7) that institutions must implement adequate security measures.

As explained in the facts, offers shall be received from bidders in paper form. These offers shall be stored in a locked cabinet.

Based on the available information, the EDPS does not see any indication that would suggest that the Committee of the Regions has not applied the security measures required under Article 22 of the Regulation.

Conclusion

There are no grounds for concluding that there has been a violation of the provisions of Regulation No 45/2001, provided that the observations below are taken into account in full. The Committee of the Regions should:

- Ensure that the purposes referred to in the clause on specific information appear clearly, so that they are specified and explicit;
- Take all necessary measures to ensure that in the event of a justified request or obvious error, the exclusion is no longer present on the central exclusion database;
- Amend the note of the Committee of the Regions to stipulate that transfers shall initially be made to the central exclusion database managed by the Commission and refer, within the context of international transfers, to the additional discussions that the EDPS is to hold on prior checks on the central exclusion database managed by the Commission.

Brussels, 4 June 2010

(Signed)

Giovanni BUTTARELLI
European Data Protection Assistant Supervisor