



Head of Control & Procurement Service
Office for Harmonisation in the Internal Market (OHIM)
Brussels, 20 December 2013
Please use edps@edps.europa.eu for all correspondence

Subject: Prior checking notification concerning public procurement

Dear Ms X,

I refer to the ex post notification for prior checking concerning public procurement submitted to the European Data Protection Supervisor (EDPS) by the Data Protection Officer (DPO) of the Office for Harmonisation in the Internal Market (OHIM) on 21 June 2013.

We note that the procurement procedure at the OHIM is in most aspects in compliance with Regulation (EC) No 45/2001¹ (the Regulation) as outlined in the EDPS Public Procurement Guidelines² and will therefore address only 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, all procurement files have an administrative retention period of ten years after the closure of the file. After that, paper documents are destroyed, whereas mandatory legal electronic documents are archived permanently in SAP.

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.

We observe that no maximum time limit has been established for the conservation of electronic files. Also, the lengthy storage of procurement files cannot be considered as necessary for the purpose of financial control and audit or all possible appeals. Therefore, we invite the OHIM to establish shorter conservation periods in due respect of Articles 48(1)(d)

¹ 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.

² 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).

and (2) of the Rules of Application to the Financial Regulation³. In similar cases, administrative retention period of seven years was considered appropriate for files of successful tenderers, whereas conservation period of five years was considered appropriate for files of unsuccessful ones.

Furthermore, we consider that the extracts from judicial records should not be kept for longer than for two years after the signature of the respective contract⁴ and thus invite the OHIM to establish such a conservation period for extracts kept in the electronic form.

2. Transfers of data. Personal data processed in this context are transferred to the responsible staff in the OHIM Finance and Procurement Service, members of the Opening and Evaluation Committees, as well as -upon request- to the OHIM legal advisor, OHIM Internal Audit or ECA and OLAF. External experts can take part in procurement procedure as members of the Evaluation Committee.

The data transfers to the responsible staff at the Office can be considered as necessary for the accomplishment of the respective task in the particular procedure, whereas the transfers to ECA and OLAF as necessary for the legitimate performance of the respective audit and supervisory tasks. In order to ensure full compliance with Article 7 of the Regulation, the EDPS recommends that all the recipients are made aware of their obligation not to process the data received for any other purposes than the ones for which they were transmitted.

The transfers to the external members of the Evaluation Committee have to be assessed in light of Articles 8 and 9 of the Regulation, depending on as to whether they are subject to national law adopted pursuant to Directive 94/56/EC⁵, i.e. whether they are established in the EU.

The transfers to external experts established in the EU can be deemed necessary for the performance of the evaluation task in the area of public procurement in terms of Article 8(a) of the Regulation; 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 any case, the tenderers should be informed about the possible processing of their data by external experts in the respective invitation for tender documents.

3. Information to data subjects. According to the information provided in the notification, information to data subject is provided in the form of data protection clauses attached to the tender specifications and contracts (point 24. of Annex I. and point 1.9. of the Annex III. respectively).

³ 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.

⁴ 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).

⁵ 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.

The EDPS observes that information about the data recipients, the legal basis of the processing as well as the data conservation period is missing in both documents and that the information provided about the rights of data subjects is rather misleading.

In order to ensure full compliance with Articles 11 and 12 of the Regulation, the EDPS recommends that the missing information is being added to the respective documents, as well as that the information about rights of access and rectification is clarified in the following manner:

- the reference to the OHIM DPO as the addressee of the access and rectification requests is replaced by the reference to the controller;
- the limitation of the rectification right after the opening of the tenders in terms of Article 112 of the Financial Regulation⁶ is clearly mentioned in the data protection clause attached to the tender specifications;
- the reference to the contractor's rights is deleted from the data protection clause for contracts as it does not relate to the processing of tenderers data by the external expert.

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

- shorten the conservation period for files of successful tenderers to maximum seven years;
- shorten the conservation period for files of unsuccessful tenderers to maximum five years;
- establish a two years conservation period for extracts from judicial records kept in the electronic form;
- ensure that all internal recipients are reminded of the purpose limitation obligation set out in Article 7(3);
- revise the information provided in the data protection clauses attached to the tender specifications and the contract in a manner outlined above.

We would like to invite the OHIM 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)

⁶ Regulation (EU, Euratom) 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 and repealing Council Regulation (EC, Euratom) 1605/2002.

Cc.: Gregor SCHNEIDER, Data Protection Officer - OHIM

Eduardo GISPERT, Assistant Data Protection Officer - OHIM