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Brussels, 1 July 2014  
GB/TS/sn/D(2014)1419 **C2013-1165**  
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for all correspondence

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

Dear Ms Ross,

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 Securities and Markets Authority (ESMA) on 18 October 2013.

We note that the already existing procedures at the ESMA are in most aspects in compliance with Regulation (EC) No 45/2001 (the Regulation)<sup>1</sup> as outlined in the related EDPS Guidelines<sup>2</sup> and will therefore only address the existing data conservation practices which do not seem to be fully compliant in this respect.

According to the information provided in the notification, personal data processed in the context of public procurement procedures are kept for at least five years after the annual budgetary discharge which is deemed as necessary for the management of contract and for the finalisation of all relevant payments including recovery where relevant, all pursuant to Article 90 of the Financial Regulation<sup>3</sup>. This provision on revenue recovery states that the entitlements of the Union in respect of third parties and the entitlements of third parties in respect of the Union shall be subject to the limitation period of five years.

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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 (2012-501).

<sup>3</sup> 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.

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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 and further processed.

We note that no maximum time limits were established for the conservation of data processed in this context and would like to recall that the further storage of files of successful tenderers for control and audit purposes should correspond to the time limits set out in Articles 48(1)(d) and (2) of the Rules of Application to the Financial Regulation<sup>4</sup>, whereas the further storage of files of unsuccessful tenderers should be necessary to allow for all possible legal remedies. Consequently, we invite the ESMA to establish a maximum conservation period of seven years for files of successful tenderers and a maximum conservation period of five years for the files of the unsuccessful ones.

Moreover, we are of the opinion that the extracts from judicial records should not be kept for longer than two years after the signature of the contract<sup>5</sup> and thus invite the ESMA to establish such a maximum conservation period for extracts kept in the electronic form.

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 ESMA should:

- establish a maximum time limit of seven years for the conservation of files of successful tenderers;
- establish a maximum time limit of five years for the conservation of files of unsuccessful tenderers;
- establish a maximum time limit of two years for the extracts from the judicial records kept in electronic form.

The EDPS expects the ESMA to implement the recommendations accordingly and will close the case.

Thank you for your cooperation.

**(signed)**

Giovanni BUTTARELLI

Cc: Stephan KARAS, DPO

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<sup>4</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>5</sup> See to this respect the letter on conservation of the extracts from judicial records sent by the EDPS to the management of all EU institutions and bodies on 12 March 2013 (EDPS 2011-0482).