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SUPERVISOR

Mr Udo HELMBRECHT
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GB/TS/sn/D(2015)0025 C 2011-1150
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Subject: Prior checking notification concerning public procurement

Dear Mr Helmbrecht,

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 Network and Information Security Agency (ENISA) on 10 December 2011.

We also take note of the revised notification submitted together with the related privacy statement on 3 September 2014¹.

We note that the procurement procedure is in most aspects in compliance with Regulation (EC) No 45/2001² (the Regulation) as outlined in the EDPS Public Procurement Guidelines³, we will therefore only address the existing practices which do not seem to be fully compliant in this regard.

¹ Upon request of the EDPS of 23 March 2012.

² 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.

³ 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 2012-0501).

1. Data conservation. According to the information provided in the notification, data of successful tenderers are kept for five years after the budgetary discharge, whereas data of unsuccessful ones 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 and further processed.

We note that the existing time limits can - in principle - be considered necessary for control and audit purposes and/or to allow for all possible legal remedies. However, we note that the extracts from judicial records should not be kept longer than for two years in order to allow for the audit by the European Court of Auditors⁴. Consequently, we invite the ENISA to establish such time limit for extracts from judicial records kept in the electronic form.

2. Information to data subjects. The information to the tenderers is provided in a specific privacy statement that will be posted on the ENISA website upon the approval of the EDPS.

We note that the privacy statement contains all information as listed in Articles 11 and 12 of the Regulation. Nevertheless, the information about legal basis and data conservation seems to be misleading as it refers to the general Financial Regulation⁵ (FR) and Rules of Application⁶ (ROA), as well as seven years after the end of procurement contract as the applicable time limit for conservation of data of the successful tenderers.

Therefore, we invite the ENISA to modify the existing privacy statement in the following manner:

- replace the reference to the general FR and RAP by a reference to the ENISA Financial Regulation⁷,
- revise the information about the conservation of data of successful tenderers in a light of information provided in the notification and referred above, i.e. five years after budgetary discharge and two years for the extracts of judicial records kept in the electronic form.

The revised privacy statement should then be posted on the ENISA website as announced.

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 ENISA should:

- establish a maximum conservation time limit of two years for extracts from judicial records kept in the electronic form;
- revise the specific privacy statement as indicated above;
- post the revised privacy statement on the ENISA website.

⁴ cf. to this respect our letter sent to the management of all EU institutions and bodies on 12 March 2013 (EDPS 2011-0482).

⁵ Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002.

⁶ 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 of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union.

⁷ Decision of the Management Board of 7 February 2014 on ENISA Financial Regulation.

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

(signed)

Giovanni BUTTARELLI

Cc: Mr Konstantinos MOULINOS, DPO