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ASSISTANT SUPERVISOR

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**Subject: Prior-checking Opinion regarding multi-source feedback reviews for managers (360° evaluation) at Directorate for Human Resources and Personnel Administration (EDPS case 2018-0170)**

Dear Ms D'Aniello,

On 23 February 2018, the European Data Protection Supervisor (EDPS) received a notification for prior checking under Article 27 of Regulation (EC) No 45/2001<sup>1</sup> ('the Regulation') on biennial multi-source feedback reviews for managers from the Data Protection Officer (DPO) of the Council of the European Union (the Council).<sup>2</sup>

This processing operation is similar to other notified cases of feedback tools for managers already prior checked by the EDPS<sup>3</sup>. For this reason, this Opinion does not contain a full analysis of all data protection aspects, but focuses on pointing out those that diverge from other cases or otherwise require improvement.

## **1. Facts and analysis**

### **1.1. Lawfulness of the processing**

The Council stated in the notification that the multi-source feedback reviews is mandatory for officials in management function for professional development purposes.

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<sup>1</sup> OJ L 8, 12.1.2001, p. 1.

<sup>2</sup> According to Article 27(4) of the Regulation, the EDPS has to provide his Opinion within two months of receiving the notification, not counting suspensions. The EDPS shall thus render his Opinion by 23.04.2018.

<sup>3</sup> Cases 2009-0215, 2013-1290, 2014-0906, 2014-1146, 2015-0733, 2015-0772 and 2016-1007.

As grounds for lawfulness, the Council has stated that the processing of personal information is based on Article 5 (a)<sup>4</sup> and (d)<sup>5</sup> of the Regulation – the latter being only applicable to the reviewers, according to the Council’s notification –, as well as on the draft Decision XX/2018 on multi-source feedback reviews for managers of the General Secretariat of the Council.

The legal basis for the processing operation assessed is Article 24(a) of the Staff Regulations, according to which *‘[t]he Union shall facilitate such further training and instruction for officials as is compatible with the proper functioning of the service and is in accordance with its own interests’*.

Contrary to other similar feedback tools prior-checked by the EDPS, which are based on consent, this one is at the Council is mandatory for all managers. The notification states that the 360° evaluation is an important development tool for managers and as such necessary for the efficient management and functioning of the institution. The purpose as described above is to support the individual development and enhance the performance of managers. Therefore, it should not be used for other purposes, such as for the appraisal of managers.

Regarding the Council's reference to Article 5(d) as a ground for lawfulness, it is mentioned in the notification that the *‘... reviewers participating in the multi-source feedback reviews give their consent to the processing of personal data. The consent given within the exercise covers the whole process. This consent can be revoked by a reviewer while the exercise is underway i.e. until the feedback report has been produced. If this happens, the feedback collected from this specific reviewer will be deleted’*. The data subject's consent is defined in Article 2(h) of the Regulation as *‘... any freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed’*. In this regard, the EDPS underlines that consent should be used with caution in the employment context. Such consent is valid only in exceptional circumstances where the employee has a genuine free choice and is subsequently able to withdraw the consent without negative consequences<sup>6</sup>.

The EDPS **recommends** that the Council explicitly indicates in the Decision XX/2018 on multi-source feedback reviews for managers to be adopted that the reviewers have the power to withdraw their consent at any moment without any consequences.

## **1.2. Information to data subjects**

Despite the information provided by the Council state that participation in the multi-source feedback reviews for managers exercise is voluntary for the reviewers, the ‘information to data subjects’ does not clearly state that. Since the reviewers’ participation is based on consent, the data protection notice should reflect that fact.

Furthermore, the Council should make clear that such consent may be revoked at any time, also while the exercise is underway. The procedure should expressly provide that reviewers’ participation is based on consent, which may be withdrawn at any time.

The EDPS **recommends** that the Council clearly state in the ‘information to data subjects’ that the participation is mandatory for the reviewees and voluntary for the reviewers, also declaring

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<sup>4</sup> Personal data may be processed only if the processing is necessary for the 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 or body or in a third party to whom the data are disclosed.

<sup>5</sup> Personal data may be processed only if the data subject has unambiguously given his or her consent.

<sup>6</sup> Article 29 Data Protection Working Party Opinion 8/2001 of 13 September 2001 on processing of personal data in the employment context.

that the latter are able to revoke their consent at any time before or during the multi-source feedback reviews for managers exercise, without adverse consequences.

### **1.3. Processing of individual and aggregate reports**

The notification mentions that *'[t]he multi-source feedback assessment tool will take the form of tailor-made, online questionnaires, one for middle management and one for senior management. The questionnaires are designed to collect the perceptions of various colleagues who work with the participating manager and who are in a position to offer feedback with regard to the manager's managerial competencies, skills and behaviours'*.

Additionally, the *'... members of the team responsible for the multi-source feedback policy within the Staff Development Unit will have access to paper versions of the aggregate reports. They will be kept in locked cupboards in offices protected by KABA keys. Electronic versions of the reports will be stored on the computers of the Staff Development Unit and secured by a password only known to the members of the multi-source feedback policy team within the Staff Development Unit'*.

The EDPS appreciates the fact that a restricted number of people has access to the reviews. Additionally, the EDPS recognises that the promotion of a digital multi-source feedback review procedure may offer more data security, as long as adequate technical and organisational security measures are adopted by the Council.

According to the notification, the *'... senior management receives an oral and written debriefing of the aggregate results after each multi-source feedback exercise. Subsequently, tailor made management training and development initiatives may be offered to managers with a view to addressing issues uncovered in the aggregate reports'*.

The EDPS understands that the group reports do not allow the identification of individual answers provided by the participants and the contributors. However, in view of the optional character of the exercise, one cannot entirely exclude that the group report will contain identifiable information on participating managers. The participants should therefore be properly informed that the group report communicated to the Council management could potentially contain identifiable information related to them.

The EDPS **suggests** that the Council add in the data protection notice that it cannot be entirely excluded that the group report communicated to senior management could potentially contain identifiable information related to the participants.

Therefore, technical and organisational measures to mitigate the risk should be adopted.

### **1.4. Processor**

The Council does not mention the name of the external contractor who is responsible for designing, planning and implementing the whole 360° evaluation process.

Since sensitive information may be processed, the Council should therefore remind its processor about its responsibilities for this processing activity and for future contracts explicitly include the obligations to be imposed on the processor under Article 23 of the Regulation. In this regard, and having in mind the different data protection legal frameworks in the world, choosing an EU processor might make it easier for the controller to ensure full compliance with the EU data protection regime. It is worth noting that controllers have a duty to assess the compliance of their contractual arrangements, namely regarding the processors, with EU data protection requirements.

The EDPS **recommends** that the Council explicitly require the processor(s) to only act upon instructions from the Council and to have proper security measures in place (as mentioned respectively in Article 23(2)(a) and 23(2)(b) of the Regulation).

The processor(s) should be reminded in writing of their obligations within the multi-source feedback reviews exercise in relation to Article 23(2) and include explicit obligations for the processor in future contracts.

## **2. Conclusion**

In this Opinion, the EDPS has made some recommendations to ensure compliance with the Regulation, as well as several suggestions for improvement. Provided that they are implemented, the EDPS sees no reason to believe that there is a breach of the Regulation.

The EDPS expects **implementation**, but does not require documentary evidence for the recommendations made in this Opinion:

1. Indicate in the Decision XX/2018 on multi-source feedback reviews for manager, as well as in data protection statement' that the participation is mandatory for the reviewees and voluntary for the reviewers, also declaring that the latter are able to revoke their consent at any time before or during the multi-source feedback reviews for managers exercise without adverse consequences;
2. explicitly require the processor(s) to only act upon instructions from the Council and to have proper security measures in place;
3. Remind the processor(s) in writing of their obligations within the multi-source feedback reviews exercise in relation to Article 23(2) and include an explicit obligation for the processor in future contracts.

The EDPS also suggests:

4. Add the contact details of the data protection officer to the data protection notice;
5. Add to the data protection notice information about the fact that it cannot be entirely excluded that the group report communicated to senior management would not potentially contain identifiable information related to the participants;

In light of the accountability principle, the EDPS expects the Council to implement the above recommendations accordingly and has therefore decided to **close the case**.

Yours sincerely,

**(signed)**

Wojciech Rafał WIEWIÓROWSKI

Cc.: Ms Reyes OTERO ZAPATA, DPO, Council of the European Union