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Brussels, 12 December 2014  
GB/BR/sn/ D(2014)2525 C 2014-0906  
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**Subject: Prior checking notification of Development programme for DG Mare  
"Middle Management Programme – 360° Feedback leadership Circle"  
(Case 2014-0906)**

Dear Mr Johnston,

On 25 September 2014, the Data Protection Officer (DPO) of the European Commission has submitted a notification for prior checking pursuant to Article 27 of Regulation (EC) 45/2001 (the "**Regulation**") on the "DG MARE Development programme for DG MARE middle managers. 360° Feedback Leadership Circle" (DPO-3709.1) (the "**Programme**").

Questions were raised on 10 October 2014 and 18 November 2014 to which the DPO replied respectively on 21 October 2014 and 21 November 2014. The draft Opinion was sent to the DPO for comments on 1 December 2014. The EDPS received a reply on 9 December 2014.

As indicated in the cover note attached to the notification, the processing operation is comparable to those already prior-checked in the cases referred to in the cover note of your DPO<sup>1</sup>. For this reason, this Opinion does not contain a full analysis of all data protection aspects, but focuses on pointing out those aspects that are not compliant.

## 1. Controller, processors and data subjects

The notification refers to you as controller. We would like to remind you that Article 2(d) of the Regulation defines the controller as "*the Community institution or body, the Directorate-General, the unit or any other organisational entity which alone or jointly with others determines the purposes and means of the processing of personal data*", i.e. always as an

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<sup>1</sup> Cases 2009-0215, 2012-0590 and 2013-1290.

organisational entity and not *ad personam*. As mentioned in the privacy statement, the notification should mention the European Commission, with the Human Resources Management unit of your DG as the organisational entity entrusted with the processing.

The Programme involves two processors: 1) the Commission's contractor, BICK Consortium and 2) the subcontractor, The Leadership Circle Ltd. From the information provided we understand that The Leadership Circle collects evaluations on the middle managers that participate in the Programme through its web-based tool and generates individual reports (one for each manager who participates in the Programme) and group reports (aggregated results for each Directorate with no reference to individual answers/results). BICK Consortium provides for individual coaching sessions to the managers following the communication of the individual report. However, the specific roles and tasks of the processors do not appear clearly from the notification.

**Recommendation:** The notification and the privacy statement should further clarify the respective tasks of both processors.

As regards data subjects, the notification refers to both the "assessee" (middle managers) and assessors (the staff, peers and managers of the middle managers).

**Clarification:** Since the processing operations subject to prior checking under Article 27(2)(b) of the Regulation (evaluation) are relating to the assessees, our comments and recommendations only cover the processing of the assessees' data.

### **3. Lawfulness of the processing**

The processing is based on Article 5(d) of the Regulation (unambiguous consent). The Programme is voluntary and it is clearly presented as such to the middle managers when being invited to participate. Consent may be revoked at any time, also while the exercise is underway<sup>2</sup>. This free choice should apply to the whole process, including the bilateral session between the manager and his/her director during which the manager presents his/her development plan/actions.

**Recommendation:** The notification<sup>3</sup> and the privacy statement<sup>4</sup> should make clear that consent covers the whole process including group reports (see below Section 4) and the bilateral session with the hierarchical superior.

### **4. Processing of group reports**

According to the notification, the group reports combine results of managers coming from the same Directorate and contain "*aggregated information i.e. the compiled results without any possibility to track or identify individual answers*"<sup>5</sup>, such as most voted and less voted competencies and number of participants<sup>6</sup>. Group reports are provided to the HR Unit and to the Director General of DG MARE.

We understand that the group reports do not allow for the identification of individual answers provided by the assessee and the assessors to the online questionnaire. However, the

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<sup>2</sup> See Section 11 of the notification and privacy statement.

<sup>3</sup> Section 3.

<sup>4</sup> Page 3, point 5.

<sup>5</sup> See Section 3 of the notification.

<sup>6</sup> See p. 3 of the privacy statement.

organigram of DG MARE shows that each Directorate has 3 or maximum 4 heads of unit (potential assesseees). In view of this limited number and since the participation in the Programme is done on a voluntary basis, one cannot entirely exclude that group reports contain identifiable information on managers-assesseees. Therefore, the Regulation also applies to the processing of group reports, including the ground for lawfulness chosen by DG MARE (see above Section 3). The privacy statement indicates that the purposes of the Programme are two-fold: from the management perspective, to enhance leadership competencies of middle managers, and from the organisation's perspective, to further develop common effective management culture and to analyse management learning objectives to be integrated in DG MARE HR strategy. The generation of individual reports corresponds to the first objective and the group reports to the second objective.

**Recommendation:** The notification should include the second objective and clearly delineate the respective purposes of the processing of individual and group reports, as well as the categories of data contained in both individual reports and group reports.

## **5. Information to managers**

The legal basis of the processing mentioned in the notification is the Commission decision of 7 May 2002 on staff training.

**Recommendation:** We recommend to add in the privacy statement a reference to Article 24a of the Staff Regulations with regard to the legal basis of the processing.

## **6. Recipients of individual reports**

From the notification and the privacy statement, it is not entirely clear whether The Leadership Circle transfers the individual report automatically to the coach or whether it is provided only to the manager who chooses to share it or not with the coach<sup>7</sup>.

**Recommendation:** The privacy statement should further clarify the conditions under which the external coach has access to individual reports.

## **7. Processing on behalf of controllers - Transfer to a third country**

As already mentioned, the processing operations required by the Programme are carried out by a processor (BICK Consortium) and a sub-processor (The Leadership Circle). According to the notification and additional information provided subsequently<sup>8</sup>, the sub-processor (The Leadership Circle Ltd) is located in the USA, as well as its data centres.

The contract between the Commission (represented by the European School of Administration) and BICK Consortium provides notably that the Regulation applies to any processing of personal data in relation to the contract and that, in the case of sub-contracting in cascade, the Commission must be consulted in advance so that it may verify if the subcontractors satisfy the requirements of the EU legislation on protection of personal data<sup>9</sup>.

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<sup>7</sup> The privacy statement provides that "the individual report will be accessible only to the participant and the coach for the individual session" (p. 2) and that "if the participant [manager] so wishes, a certified coach from the sub-contractor of DG MARE can also receive the anonymous, amalgamated report of the feedback" (p. 3).

<sup>8</sup> cf. E-mail from the Assistant DPO of 21 November 2014.

<sup>9</sup> Article I.9.2. in fine.

Pursuant to Article 9 of Regulation 45/2001 an adequate level of protection must be ensured within the recipient's legal framework (the Leadership Circle). In this case, The Leadership Circle is self-certified under the Safe Harbor Agreement<sup>10</sup>. Therefore the company meets the adequacy requirement of Article 9 of the Regulation<sup>11</sup>.

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In view of the above, there is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the above-mentioned recommendations are fully taken into account.

Once this condition is satisfied, please inform the EDPS of the measures taken based on the recommendations of this Opinion within three months.

Yours sincerely,

**(Signed)**

Giovanni BUTTARELLI

Cc: Mr Philippe RENAUDIÈRE, Data Protection Officer, European Commission

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<sup>10</sup> See information provided by the Commission DPO in the email sent on 9 December 2014.

<sup>11</sup> See pp.12-13 of EDPS Position paper on transfers to third countries and international organisations by EU institutions and bodies:

[https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Papers/14-07-14\\_transfer\\_third\\_countries\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Papers/14-07-14_transfer_third_countries_EN.pdf)