

GIOVANNI BUTTARELLI
SUPERVISOR

Ms Catherine DAY
Secretary-General
European Commission
Rue de la Loi, 200
B-1049 Brussels

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GB/BR/sn/D(2015)0659 C 2015-0144
Please use edps@edps.europa.eu for all
correspondence

Subject: Consultation under Article 46(d) of Regulation (EC) 45/2001 - Draft Commission Decision on managing conflicts of interest of members of expert groups in a personal capacity

Dear Ms Day,

By letter of 12 February 2015 (received on 18 February 2015), you consulted the EDPS pursuant to Article 46(d) of Regulation (EC) 45/2001 (the "**Regulation**") on the draft Commission Decision on managing conflicts of interest of individuals appointed as members of expert groups in a personal capacity (the "**DoI Decision**").

In addition to the DoI Decision, the following annexes were appended to your letter:

- the draft standard Declaration of Interests (DoI) form "**DoI form**";
- the draft guidance for filling in the DoI form (the "**DoI Guidance**");
- the Ombudsman's letter to the President of the Commission of 27 January 2015 on her own-initiative inquiry concerning the composition of Commission expert groups.

Relevant context

In 2010, the Commission issued Horizontal Rules for Commission experts groups¹, which provide in particular that:

- individuals appointed as experts in a personal capacity must act independently and in the public interest and that the selection of these experts must be carried out in such a way as to avoid any conflict of interest²;

¹ The Horizontal Rules are annexed to the Communication from the President to the Commission of 10 November 2010 (C(2010) 7649) - Framework for Commission expert groups: horizontal rules and public register.

- the names of individual experts appointed in a personal capacity ("*individual experts*") shall be published in the online Register of expert groups (the "*Register*")³.

The DoI Decision complements these rules notably by:

- specifying the meaning of a conflict of interest;
- providing for a conflict of interest assessment to be performed by all Commission services concerned on the basis of a DoI form;
- providing for the publication of the DoI forms in the Register.

Legal analysis

We note, as mentioned in your letter, that the DoI Decision was checked against the EDPS guidelines on the processing of personal data with regard to the management of conflict of interest by EU institutions and bodies (the "*EDPS Guidelines*")⁴. We will therefore only address the aspects that do not seem to be fully compliant with Regulation 45/2001 (the "*Regulation*") as further outlined by the Guidelines.

A. Lawfulness

1. Collection of DoI forms

The collection of DoI and CV⁵ of individual experts is lawfully based on Article 5(a) of the Regulation (existence of binding rules on the management of conflicts of interest and necessity to process DoI in this context). Therefore, there is no need and it may even be confusing to rely also on Article 5(d) of the Regulation by asking for the experts' consent on the data collection as provided in the DoI form and the Guidance.

Recommendations:

- the words "*and that I agree to the conditions included herein*" should be removed from the DoI form (p. 5) and the sentence "*Completing this DoI form means that you agree to these conditions*" should be removed from the Guidance (p. 2);
- a clearer reference to the legal basis of the processing (DoI Decision) should be made in the DoI form and in the Guidance.

2. Publication of personal data of family members included in the DoI form

The DoI Decision states that personal data of any individuals other than the experts mentioned in the DoI form will be masked, unless the individuals concerned have consented to the publication⁶. To this end, these individuals must (i) fill in their name in the DoI form and (ii) expressly give or deny consent to public disclosure by signing the DoI⁷.

Consent seems neither necessary, nor appropriate in this context. Indeed, the publication of information on experts' family members may contribute to the proper management of

² Horizontal Rule 9(1).

³ Horizontal Rule 18(1).

⁴ https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/14-12-08_CoI_Guidelines_EN.pdf.

⁵ We note that the European format is used for CVs (cf. Annex III to the Commission Staff Working Document SEC(2010) 1360 final accompanying document to the Communication from the President to The Commission - Framework for Commission expert groups: Horizontal Rules and Public Register).

⁶ See Section 3.6. of the draft Decision and p. 2 of the DoI Guidance.

⁷ They must tick in a box to consent/deny on the publication and sign the DoI form.

conflicts of interest by the Commission under the DoI Decision. If family members were asked to consent to the publication of their personal data, the DoI would no longer fully meet the transparency purpose pursued by the Commission. Therefore, the publication of personal data on experts' family members could be based on Article 5(a) of the Regulation (necessary for the performance of a public task) and not on Article 5(d) of the Regulation (consent).

In any event, experts' family members should nevertheless be properly informed in due time about the publication of their personal information, so that they can object to publication based on compelling legitimate grounds (see below C).

Recommendation: remove any reference to the family members' consent in the DoI Decision, Guidance and form.

B. Data retention

The DoI Decision does not provide for any retention period for the DoI form.

Recommendation: Add a retention period for the DoI form in the DoI Decision.

C. Information

The DoI Guidance is intended to help individual experts to fill in the DoI as well as informing them about the collection and publication of their personal data through DoI. However, some mandatory items (listed in Article 11 of the Regulation) are missing.

In addition, if data on family members of individual experts are also collected and published, these persons should receive the information listed in Article 12 of the Regulation, at the latest when the data are first disclosed, so that they can exercise, if need be, their right to object to the processing⁸. Individual experts must be requested to inform their family members about the collection and further publication of their personal data in due time, so that they have the opportunity to exercise their right to object under Article 18 of the Regulation⁹.

Recommendations:

- draft a privacy statement (i.e. clear identification of the controller, recipients of the data, additional legal basis¹⁰, rights of access and rectification, retention period, right to have recourse to the EDPS and referring to the right to object under Article 18 of the Regulation);
- append the privacy statement to the DoI Guidance;
- insert, in the DoI Guidance and in the DoI form, an obligation for the individual experts to (i) inform their family members about the collection and publication of information on their interests in the DoI and to (ii) provide them with the privacy statement, this at the latest when the experts file the DoI with the Commission.

⁸ The right to object must be based on compelling legitimate grounds (Article 18 of the Regulation).

⁹ See EDPS Guidelines, p. 22.

¹⁰ The DoI Guidance refers to the Horizontal Rules but it should also refer to the draft DoI Decision.

D. Data quality

1. Publication of CV

The DoI Decision only refers to the publication of DoI forms in the Register. We draw your attention to the fact that the Ombudsman's recommendations relate to the publication of DoI and CV¹¹. If CV were to be published, the same principles as for the publication of DoI would apply to the publication of CV in terms of data quality¹².

2. Conflict of interest raised at a meeting of the experts group

Section 3.6. of the DoI Decision states that at the beginning of each meeting, experts whose participation in the group's work would raise a conflict of interest shall inform the Chair and that the conflicts of interest shall be reported in writing¹³.

In this respect, we draw your attention to the fact the information registered in the minutes must be adequate, relevant and not excessive for the purpose of management of conflicts of interest¹⁴.

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We remain at your disposal for any further information.

Yours sincerely,

(signed)

Giovanni BUTTARELLI

Cc: Mr Philippe RENAUDIERE, Data Protection Officer of the Commission

¹¹ See pp.10 and 14 of the Ombudsman's letter to the President of the Commission of 27 January 2015.

¹² See EDPS Guidelines, p. 7.

¹³ Section 3.6 also requires that the expert submits immediately a newly completed DoI form describing the relevant changes, as foreseen in Section 3.1 of the DoI Decision.

¹⁴ See EDPS Guidelines, p. 18.