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Brussels, 06 October 2015  
WW/BR/sn/D(2015)1709 C 2013-1092  
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**Subject: Prior checking opinion on staff Rotation Exercise in EU Delegations - Case 2013-1092**

Dear [\*],

We refer to the prior checking notification on the above quoted processing operations by DG Development and Cooperation - Europeaid (**DEVCO**) of the Commission.

As this is an **ex-post case**, the deadline of two months for the EDPS to issue his Opinion does not apply<sup>1</sup>.

**I. Relevant facts**

***1.1. Legal basis***

The legal basis of the Annual Rotation Exercise (the "**Rotation Exercise**") is Article 7 of the Staff Regulations (transfer in the interest of the service) as well as the Commission Decision of 10 October 2012 on the Management of Commission Resources in Union Delegations (the "**Decision on Delegations**"). Rotation Guidelines<sup>2</sup> further describe the application and selection procedure.

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<sup>1</sup> The EDPS sent questions to the DPO of the Commission on 6 January 2014 and received a reply on 23 September 2014. The EDPS submitted a draft of the summary of facts to the DPO on 5 March 2015. The Commission sent a reply as well as a new version of the privacy statement on 30 June 2015. The EDPS sent the draft Opinion to the DPO for comments on 22 September 2015. No comments were made on the draft Opinion.

<sup>2</sup> These Guidelines are available on the Commission's intranet and are updated every year. See Guidelines for the 2016 exercise:

<http://myintracomm.ec.testa.eu/dg/devco/human-resources/permanent-staff-officials/Documents/Rotation%202016-2017/Guidelines%20and%20instructions.pdf>

## **1.2. Individuals concerned**

The individuals concerned are officials of the Commission.

## **1.3. Sequence of events of the Rotation Exercise**

Establishment plan posts of the External Relations DGs due to become vacant must in priority be filled by means of the Rotation Exercise<sup>3</sup>. The Rotation Exercise is different from the standard selection procedure for vacancy posts at the Commission<sup>4</sup>. Its specificities relate notably to the recurrent sequence of events and to the coordinated mobility of a significant number of officials within the Commission<sup>5</sup>.

The Rotation Exercise starts in March of year  $n-1$  and ends in September of year  $n$  and can be summarised as follows.

### *a) Adoption of the list of Delegation posts due to become vacant*

The Commission sets up a list of Delegation posts due to become vacant as well as a detailed description of the said posts.

### *b) Adoption of the list of officials eligible for rotation*

Each External Relations DG adopts the list of their officials required to serve abroad in the forthcoming Rotation Exercise<sup>6</sup>.

### *c) Publication of the vacant posts on the intranet and expression of interest by the officials*

Officials eligible for rotation are informed about all Delegation posts due to become vacant. All posts are published on the intranet at the same time and officials eligible for rotation are invited to apply online through a specific IT tool ("**IT tool**"). The IT tool is used to facilitate the registration and the treatment of applications by the candidates, as it allows online applications and uploading of CV and motivation letter by the candidates. The data are exported into excel tables and used to facilitate the selection procedure.

For the 2016 Rotation Exercise (launched on 2 July 2015), the Commission is using an updated version of the initial IT tool (called EU Survey) and as of 2017, the Commission intends using the same application tool as the EEAS<sup>7</sup>.

There is no separate vacancy notice prepared for each post but candidates can obtain information about the job profile of each post through the job descriptions published in Sysper2.

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<sup>3</sup> Article 11(1) of the Decision on Delegations. If such posts are not filled by the end of the annual rotation exercise, they shall be published under Article 29 of the Staff Regulations.

<sup>4</sup> The standard selection procedure was notified to the EDPS in 2012 (case 2012-0276) and updated in 2013 (case 2013-1278). The EDPS issued a prior checking Opinion on 22 May 2012 and a revised Opinion on 7 July 2015.

<sup>5</sup> The process is described in Article 11 of the Decision on Delegations. See also email from DPO office of 23 September 2014.

<sup>6</sup> Article 11(3) explains how the annual list of officials required to serve abroad is drawn up.

<sup>7</sup> cf. Letter from the Head of unit R4 Human Resources in Headquarters of 30 June 2015.

Candidates from other DGs of the Commission can also apply, subject to certain conditions, through a call for expressions of interest that is published at the same time. However, candidates from External Relations DGs<sup>8</sup> (DEVCO, TRADE, ELARG, ECHO, FPI<sup>9</sup>) shall be given first consideration, as a counterpart to their obligation to serve abroad, and shall have priority for the posting if their profile fits. Officials taking part in the Rotation Exercise can express their interest in a maximum of 8 posts.

#### *d) Selection*

The selection process itself involves:

- a pre-selection following pre-defined selection criteria included in the job description for each post (education and diplomas, previous experience, expertise in a specific field and language skills) by a selection panel composed of members appointed by the geographical and thematic Directors; the selection committees are generally organised not by country but according to profile (i.e. all Finance and Contract posts in one selection committee, Head of cooperation in another, operations in another, etc.);
- the pre-selected candidates are either directly offered a post matching their qualifications, or interviewed by the selection committee;
- each candidate is notified by email on the outcome of his/her application (assignment to a Delegation post or back to the Commission's headquarters if unsuccessful).

Assignment of Commission staff to Delegation postings is subject to the agreement of the Commission's Medical Service. Officials must communicate any medical constraints concerning themselves or their family which may have an effect on their assignment<sup>10</sup>.

On 1 September of year *n*, officials move to their new assignment (either to a Delegation or to the Headquarters if their application is unsuccessful). They are transferred to their new assignment in the interest of the service on the basis of Article 7 of the Staff Regulations (and not under Article 29 of the Staff Regulations).

#### *e) Officials in delegation due to be reinstated to the Headquarters*

Once the above selection procedure is closed, the Commission compiles the list of officials due to be reinstated into Headquarters ("**HQ**") within the same year, with a detailed description of the profile of each official. To this end, the officials currently posted in Delegation and in rotation in 2016 must indicate their wish to return to HQ using the IT tool. Their applications are then examined by each DG and a matching of officials with vacant posts is carried out. Delegation posts due to become vacant may not be filled until the new posting of the jobholder returning to Headquarters has been fixed precisely.

Posts that are not filled by the end of the Rotation Exercise are published under Article 29 of the Staff Regulations.

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<sup>8</sup> Plus candidates from the EEAS, but only until the 2015 Rotation Exercise (cf. email from the DPO office of 23 September 2014).

<sup>9</sup> FPI = Service for Foreign Policy Instruments.

<sup>10</sup> Article 10(8) of the Decision on Delegations.

#### **I.4. Categories of data**

The categories of data processed in the context of the Rotation Exercise are mainly<sup>11</sup>: administrative data<sup>12</sup> and preferred countries, individual evaluation reports established in the framework of the selection for a Delegation post and in the framework of a reintegration to Headquarters, CV, motivation letters, training maps. On a voluntary basis, the candidate may add other personal information that could be of interest for the selection committee, such as interest for a double posting, family status or health condition (e.g. possible problems if confronted to difficult climate conditions).

#### **I.5. Information**

A privacy statement on the IT tool used for the Rotation Exercise<sup>13</sup> is made available through a hyperlink included in the Rotation Guidelines, as well as on my DEVCO (Intracomm), below the link to the It tool<sup>14</sup>.

### **II. Legal analysis**

The EDPS issued Guidelines concerning the processing of personal data in the field of staff recruitment (the "**Guidelines**")<sup>15</sup>, the principles of which can be applied to staff selection in the framework of the Rotation Exercise. Therefore, this Opinion will focus on those areas of the processing which differ from existing guidance.

#### **II.1. Grounds for prior checking**

Although referring to the "staff rotation exercise in EU Delegations", the notification focuses on the IT tool used to support the Rotation Exercise. However, the prior checking by the EDPS covers *procedures* entailing the processing of personal data in certain situations (see Article 27 of Regulation 45/2001<sup>16</sup> - the "**Regulation**"), and *not only the supporting tool* of the processing (whether in paper format or through an electronic device). Thus, the use of an IT supporting tool is not subject, as such, to prior checking by the EDPS, whereas the selection process in the framework of the Rotation Exercise is subject to prior checking under Article 27(2)(b) of the Regulation. Indeed, such selection entails processing operations intended to evaluate personal aspects relating to the individuals concerned, including his/her ability, efficiency and conduct.

Therefore, the sections of the notification concerning the description and purposes of the processing should be adapted in order to cover the processing of personal data for the whole

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<sup>11</sup> cf. Sections 3 and 5 of the notification.

<sup>12</sup> i.e.: first name, surname, personal number, category and grade, administrative address, professional and private telephone number, professional and private email, current and previous assignments, citizenship, date of birth.

<sup>13</sup> A first version of the specific privacy statement was appended to the notification. A revised version of the privacy statement was provided by the Commission by email of 30 June 2015.

<sup>14</sup> <http://myintracomm.ec.testa.eu/dg/devco/human-resources/permanent-staff-officials/Pages/rotation.aspx>

<sup>15</sup> [https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/08-10-10\\_Guidelines\\_staff\\_recruitment\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/08-10-10_Guidelines_staff_recruitment_EN.pdf)

<sup>16</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.

Rotation Exercise (including for the reinstatement to HQ) and not only the use of the IT tool to support the Rotation Exercise.

**Recommendation:**

1) Modify the sections of the notification on the description of the processing (Section 3) and the purposes of the processing (Section 4) in order to cover the whole data processing entailed by the Rotation Exercise.

**II.2. Legal basis and lawfulness**

Personal data may only be processed if grounds can be found in Article 5 of the Regulation. In this case, the Rotation exercise is based on Article 5(a), as it is necessary for performance of a task carried out in the public interest on the basis of the EU Treaties or other legal instruments adopted on the basis thereof (being the Decision on Delegations as well as Article 7 of the Staff Regulations). Indeed, as further highlighted in Recital 27 of the Regulation, processing of personal data for performance of tasks carried out in the public interest includes the processing necessary for the management and functioning of those institutions and bodies.

When there is a ground for lawfulness under Article 5(a) of the Regulation, there is no need to obtain the official's consent to process his/her data<sup>17</sup> in the employment context where consent cannot be considered as "freely given"<sup>18</sup>. Therefore, any reference to consent on the processing should be removed from the Rotation Guidelines as well as from any other document submitted to the officials in the context of the Rotation Exercise.

**Recommendation:**

2) Add a reference to Article 5(a) of the Regulation in the notification (Section 11);  
3) Remove from the next Rotation Guidelines the sentence "*By submitting the application, candidates grant permission to the concerned HR and geographical departments to use and circulate these documents*".

**II.3. Special categories of data**

According to the notification<sup>19</sup>, candidates may spontaneously communicate data on their family status and health condition that may be useful for the selection committee. The online application contains a field with the following text: "*Would you like to mention any other useful information concerning your application (example: family constraints, medical constraints ...)*". On the other hand, Article 10(8) of the Decision on Delegations provides that assignment to Delegation postings is subject to the agreement of the Commission's medical service and that officials shall communicate any medical constraints concerning themselves or their family which may have an effect on their assignment<sup>20</sup>. This communication to the medical service can be considered as necessary for the purposes of complying with the Commission's specific obligations in the field of employment law in conformity with Article 10(2)(b) of the Regulation. By contrast, the communication of health related data to the selection committee seems not only redundant and confusing but also irrelevant. Therefore, the notification and the online application should be amended in order to make clear that health related data must be communicated directly to the medical service.

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<sup>17</sup> Consent is mentioned in Article 5(d) as a ground for lawfulness.

<sup>18</sup> See definition of consent in Article 2(h) of the Regulation.

<sup>19</sup> See Section 6 of the notification.

<sup>20</sup> This is also mentioned in the 2016 Rotation Guidelines (p.3).

The officials could, however, fill in other categories of information (such as family constraints, etc.) in the application form for the selection committee's consideration. This kind of information may also involve special categories of data (for ex. data concerning sexual orientation). As such communication would be purely voluntary; one can consider that candidates give their consent to the processing of special categories of data concerning them in accordance with Article 10(2)(a) of the Regulation<sup>21</sup>.

Since officials may communicate data on their family members (health related information to the medical service and other information in the online application), this should be mentioned in the notification and in the privacy statement. Officials should also be requested to inform directly their family members about such communication.

**Recommendations:**

- 4) Add in the notification (Section 5 - categories of data subjects) that data on family members of the officials may be processed incidentally;
- 5) Amend the online application form (more specifically, the field where officials can provide additional information if they wish so) as follows:
  - delete the words "medical constraints";
  - add a sentence clarifying that any medical constraints concerning the officials or their family members must be communicated to the medical service in accordance with Article 10(8) of the Decision on Delegations;
  - add a sentence to request the officials who may wish to communicate personal data relating to their family members to the medical service or to the selection committee, to inform directly their family members about such communication;
  - adapt the notification (Section 6 - categories of data) accordingly.

**II.4. Right of access and rectification**

The EDPS reminds DEVCO that the right of access covers not only the data provided by the candidates but also evaluation data, unless the exception of Article 20(1)(c) of the Regulation in line with Article 6 of Annex III to the staff Regulations are applied. This exception implies that access should be granted neither to comparative data concerning other applicants (comparative results), nor to the individual opinions of the members of the selection committee<sup>22</sup> if such disclosure would undermine the rights of other applicants or the freedom of members of the Selection Committee.

**II.5. Information**

The notification (see recommendation above under II.1.1)) and the privacy statement provided by DEVCO, focus on the IT tool used to support the Rotation Exercise (facilitation of the registration and treatment of applications before the selection phase). The officials concerned should however be informed about the processing of their data during the whole process (including selection).

Furthermore, the notification should mention how the privacy statement is made available to the persons concerned<sup>23</sup>.

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<sup>21</sup> See Section 2 of the Guidelines (Processing of special categories of data).

<sup>22</sup> See also Section 6 of the Guidelines (Right of access and rectification) for further details.

<sup>23</sup> See above I.5.

**Recommendations:**

- 6) Redraft the privacy statement so as to provide the information required by Articles 11 and 12 of the Regulation regarding the processing of personal data in the framework of the whole Rotation Exercise;
- 7) Indicate in the notification (Section 7 - information to be given to data subjects) how the privacy statement is made available to the officials concerned.

**II.6. Security**

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In conclusion, the EDPS considers that there is no reason to believe that there is a breach of the provisions of the Regulation provided that the above-mentioned recommendations are fully taken into account.

The EDPS invites the Commission to inform him about the implementation of these recommendations within **three months** after receipt of this letter.

Yours sincerely,

**(signed)**

Wojciech RAFAŁ WIEWIÓROWSKI

Cc : Mr [\*], Data Protection Officer, European Commission