



"EU High Level Advisers programme in Moldova"
Prior Checking Opinion
Cases 2016-0505 and 2017-0712

The EU High Level Advisers programme in Moldova aims to draw on the experience of expert senior officials in EU Member States to help Moldova meet its commitments related to agreements with the EU. The programme is run by the Commission and the EU Delegation in Moldova. A service provider helps to implement the programme in Moldova. The candidate High Level Advisers are selected by the Commission and the Delegation and after the endorsement by Moldovan authorities are recruited by the service provider. In consultation with the Moldovan authorities, the service provider annually evaluates the High Level Advisers on their performance. Following this, the Delegation decides whether to extend the High Level Advisers' contracts. All this entails the processing of personal data by the Commission, the Delegation, the service provider and Moldovan authorities.

The Commission and the Delegation are the co-controllers for the processing of personal data in the High Level Advisers programme and need to clearly define their respective obligations. They should also set up a framework for exchanging the personal data of candidate and recruited High Level Advisers with the Moldovan authorities. The Delegation needs to clarify their respective data protection obligations with the service provider. The candidate and recruited High Level Advisers need to be properly informed about how their personal data is processed in the EU High Level Advisers programme in Moldova.

Brussels, 15 December 2017

1) The Facts

1.1. General

The EU-Moldova Association Agreement¹ and the European Neighbourhood Instrument guide the cooperation between the EU and Moldova. The implementation of the EU-Moldova Association Agreement is supported by Annual Action Programmes in favour of Moldova, financed by the EU under the European Neighbourhood Instrument. One such external action is the EU High Level Advisers ('HLA') programme in Moldova. The HLA programme in Moldova aims at drawing on the experience of expert senior officials in EU Member States to help Moldova meet its commitments related to agreements with the EU. The programme is run by DG NEAR² of the European Commission ('the Commission') and the EU Delegation in Moldova ('the Delegation')³.

The legal basis for the HLA programme and the related processing of personal data is:

- Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument⁴
- Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument⁵
- Regulation (EU) No 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action⁶
- Service contract between the EU (represented by the Commission, itself represented by the Delegation) and a consortium of companies contracted to implement the HLA programme in Moldova

1.2. Selection of the EU High Level Advisers in Moldova

To establish the HLA programme in Moldova 2016-2018, the Commission launched a first call for expression of interest in 2015. The call is launched through the network of National Contact Points for Twinning and TAIEX programmes⁷ in each of 28 EU Member States. The National Contact Points circulate the job descriptions of the available positions to appropriate services and administration in their respective Member State. The National Contact Points collect the applications (Curriculum Vitae ('CV')) of the expert, accompanied by a cover note indicating the position the expert applied for and, possibly, a motivation letter. They check the applicants' credentials and verify that the CV meets the minimum criteria in the job descriptions. Applications cleared by the National Contact Points are sent to a functional mailbox established

¹ [OJ L 260, 30.8.2014, p. 4.](#)

² Specifically, the Institution Building Unit, however the task was transferred in early 2017 to the Unit Georgia, Moldova & Neighbourhood Cross-Border Cooperation.

³ Assisted by the Division Eastern partnership bilateral of EEAS.

⁴ [OJ L 310, 9.11.2006, p. 1.](#)

⁵ [OJ L 77, 15.3.2014, p. 27.](#)

⁶ [OJ L 77, 15.3.2014, p. 95.](#)

⁷ TAIEX (Technical Assistance and Information Exchange) provides short-term, peer-to-peer assistance to eligible beneficiaries (Member States and third countries) to support them in the approximation, application and enforcement of the Union *acquis* and EU standards. Twinning is an institution building instrument of the Commission for cooperation between public administrations of EU Member States and of eligible beneficiary third states.

by DG NEAR for the HLAs programme.

After the deadline for applications, the forwarded CVs are evaluated at the Commission by selection panels. The selection panels are composed of the programme manager and selected staff members (of DG NEAR and /or Commission, EEAS) depending on the expertise being evaluated. The shortlisted CVs, cover notes and supporting documents are then sent to the Delegation, which selects candidates to invite for interviews. The Delegation determines the composition of the Evaluation committee. The Evaluation committee conducts the interviews and selects candidates to be proposed by the Delegation to the beneficiary Moldovan authorities for final endorsement. The main beneficiary of the project (State Chancellery of the Republic of Moldova) and the specific counterpart of each EU High Level Adviser (e.g. Ministry of Finance, Ministry of Internal Affairs, Ministry of Environment, Parliament of the Republic of Moldova, etc.) will receive only the CV and motivation letter of the proposed candidate to the position by the Evaluation Committee. Following endorsement, the Delegation will officially notify the candidate HLA about the selection.

The Delegation may exceptionally launch a call for expression of interest for a limited number of vacancies (e.g. only one or two). In this case, the Delegation will and manage the reception of CVs, shortlisting and interviews. In any case, the same rules apply as for the general procedure.

1.3. Recruitment and contract/administrative management of the EU High Level Advisers in Moldova

A consortium of companies ('the service provider') was chosen through public procurement. The service provider will establish a contractual framework and logistical platform to support the deployment and work in Moldova of the designated HLAs. This is governed by the service contract between the Contracting Authority (i.e. the Delegation) and the service provider for the implementation of the HLA programme in Moldova. The Contracting Authority is responsible for managing the performance of the service contract, while a formal Steering Committee⁸ approves the work for the implementation of the project. The Contracting Authority needs to give a prior authorisation for hiring/replacing/adding HLAs. The service provider will recruit the selected individual HLAs, who will be hired as experts through individual service contracts with the service provider. Under the service contract, the Contracting Authority can ask that, before they can be recruited as HLAs, the selected individuals produce a fitness for work certificate. The selected individuals will need to declare any conflict of interest in line with the HLAs' Code of Conduct.

The service provider will also ensure that the recruited HLAs are covered by a health and accident insurance. The Contracting Authority will determine the level of the remuneration paid to each HLA by the service provider from the budget for service contract. The service provider will reimburse the HLAs' expenses based on the invoices from the HLAs. The service contract also governs how the service provider will manage and assist the work of the contracted HLAs.

⁸ The Project Steering Committee is co-chaired by representatives from the Delegation and Secretary General of the Government of Moldova (State Chancellery) as Main Beneficiary. The service provider is member of the Project Steering Committee. The beneficiaries of the HLA programme (e.g. Ministry of Finance, Ministry of Economy etc.) are observers in the Project Steering Committee at a discretion of the State Chancellery but also agreed with the Delegation.

1.4. Annual 360° evaluation of the EU High Level Advisers in Moldova

The service contract lays down that the assignment of a HLA may be renewed on a yearly basis, following a 360° evaluation to evaluate the performance of HLAs in discharging their duties within the beneficiary institutions.

The annual 360° evaluation the HLAs will be made by the Team Leader of the service provider. A questionnaire for each HLA will be produced by the Team Leader and approved by the Contracting Authority (i.e. the Delegation). The questionnaire has two parts: (i) a part that assesses the contribution of the HLA to his/her sector as defined by the job profile as well as the sector itself following the same definition and (ii) a second part that evaluates general competencies shown by the HLA. The evaluation process is included in the HLA Manual, prepared by the service provider, and HLAs are informed about the process in different information sessions.

The process starts with a self-assessment done by the HLAs according to the policy reform objectives set up in their job profiles. The Team Leader then shares questionnaires with all relevant stakeholders (the beneficiary and the Delegation) for each HLA. The Team Leader will consolidate all three documents in a final evaluation report advising the Specific Project Steering Committee. The annual 360° evaluation will be finalised before the end of the second week of November each year. The Team Leader will present the findings in a Specific Steering Committee meeting to decide on the renewal of each individual position. The Contracting Authority will take into consideration the opinion of the Steering Committee before making a final decision regarding the renewal or dismissal of each HLA.

2) Legal analysis

This joint prior checking Opinion⁹ under Article 27 of Regulation (EC) 45/2001¹⁰ (the Regulation) will focus on those aspects of the processing which raise issues of compliance with the Regulation or otherwise merit further analysis.

While the notified processing on the selection and contracting of HLA's does not fall directly under the scope of the EDPS Guidelines on selection and recruitment procedures¹¹ ('the Guidelines'), it is sufficiently similar for these Guidelines to be applied by analogy. The EDPS Guidelines on staff evaluation¹² are applicable by analogy to the 360° evaluation of the HLAs.

For aspects not covered in this joint Opinion, the EDPS has, based on the documentation provided, no comments. In the light of the accountability principle guiding his work, the EDPS would nonetheless like to highlight that *all* relevant recommendations made in the Guidelines apply to the processing operations put in place for the EU High Level Advisers programme in Moldova.

⁹ As these are ex-post cases, the deadline of two months for the EDPS to issue his Opinion does not apply. The case 2016-0505 was suspended from 1 July 2016 to 20 March 2017 and from 27 June 2017 to 5 July 2017. The cases 2016-0505 and 2017-0712 were suspended for comments from the DPOs of EC and EEAS from 1 to 15 December 2017. These cases have been dealt with on a best-effort basis taking into account the specific context of the EU HLA Programme in Moldova.

¹⁰ OJ L 8, 12.1.2001, p. 1.

¹¹ Available on the EDPS website: https://edps.europa.eu/data-protection/our-work/publications/guidelines/staff-recruitment_en.

¹² Available on the EDPS website: https://edps.europa.eu/data-protection/our-work/publications/guidelines/staff-evaluation_en.

a) **Relationship between the Commission, EEAS and the Delegation**

The Commission notification lists the Delegation among the processors of personal data in the HLA programme in Moldova. The EDPS was in contact with DG NEAR and the EU Delegation to obtain additional information. A meeting between DG NEAR staff and EDPS staff took place on 16 June 2017 to confirm factual information and clarify various aspects of the functioning of the programme. Following this, it became clear that for certain parts (i.e. the second stage selection of HLAs, their annual 360° evaluation, the processing done by the service provider), it is the EU Delegation in Moldova, as part of the EEAS, which is responsible for managing the processing of personal data. EEAS is therefore the co-controller with the Commission. The subsequent EEAS notification confirms the joint controllership and also indicates that in certain cases the Delegation may manage the whole selection procedure.

As regards all the processing operations, the EDPS **recommends** that the Commission, EEAS and the Delegation clearly establish their respective responsibilities for compliance with their data protection obligations. This should be done in particular as regards the exercising of the rights of the data subject and their respective duties to provide the information in accordance with Articles 11 and 12 of the Regulation, so as to ensure fairness and transparency towards the data subjects. The proposal¹³ for a new Regulation replacing Regulation (EC) No 45/2001 further specifies how this can be done (Article 28). The Commission and the Delegation would do well to already consider those future rules¹⁴.

b) **Further processing**

Under Article 4(1)(b) of the Regulation, personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. This provision is the counterpart to Article 6(1)(b) of Directive 95/46/EC, which is applicable to the Member States as transposed in their national laws.

Under Article 6 of the Regulation, personal data shall only be processed for purposes other than those for which they have been collected if the change of purpose is expressly permitted by the internal rules of the EU institution or body.

Any processing for further purposes of the personal data provided in the context of the HLA programme, be it by the Commission, the Delegation or by the Member States, would thus have to comply with the above data protection provisions.

The EDPS **considers** that keeping the CVs of candidates from one HLA call to be used in another HLA call or in other selections of experts in similar DG NEAR programmes (e.g. TAIEX or Twinning programmes) can be compatible further processing in accordance with Article 4(1)(b) of the Regulation, if the candidates have been clearly informed about this and have given their free and unambiguous consent to it.

c) **Processing of sensitive personal data in accordance with Article 10 of the Regulation (specifically data related to health)**

Under the service contract, the Contracting Authority can ask that, before they can be recruited as HLAs, the selected individuals produce a fitness for work certificate. The service provider

¹³ Proposal COM(2017)8 final, planned applicability 25 May 2018.

¹⁴ See also EDPS letter of 12 October 2017, our reference D(2017)2101 C 2016-1153.

will also need to ensure that the recruited HLAs are covered by a health and accident insurance.

The EDPS was informed that the Commission and the EU Delegation will not require the selected HLAs to provide a fitness for work medical certificate before taking up their duties. The EDPS was also informed that any personal data related to the health and accident at work insurance would be exchanged directly between HLAs and the insurance company, without involvement of the Commission, the EU Delegation or the service provider. If the Commission, EEAS, the Delegation or the service provider were to collect any data related to health or medical data (e.g. fitness for work and other medical certificates, reimbursement claims, recognition of accident at work etc.), they would be processing sensitive personal data under Article 10 of the Regulation.

The EDPS **reminds** the Commission and the Delegation that if they process data related to health, the responsible data controller(s) and the processor (the service provider) must comply with the provisions of the Regulation, in particular as regards the processing of sensitive personal data, the information and rights of the data subjects, as well as the data retention and security¹⁵. The Commission, EEAS, Delegation and the service provider need to clearly define their respective roles and obligations (e.g. who collects the fitness for work and other medical certificates, how are they stored and secured etc.). This information should be included in a privacy statement to be provided to HLAs. Furthermore, the responsible data controller(s) will need to comply with the prior checking obligation under Article 27(2)(a) of the Regulation and notify the processing operation to the EDPS.

d) **Data retention**

Under Article 4(1)(e) of the Regulation, personal data should not be kept for longer than necessary for the purpose for which they were collected or further processed. Further storage of data for historical, statistical or scientific purpose is possible in anonymous form only.

According to the notifications and the privacy statements, the CVs, cover notes and any supporting documents of candidates not shortlisted will be deleted at the end of the selection process. The personal data of all shortlisted candidates will be electronically retained in DG NEAR and in the Delegation for seven years following the conclusion of the service contract, to allow for historical, statistical and reference purposes. This also applies to any photos / pictures, presentations, live web streaming and/or audio and video recording of the EU High Level Advisers Programme in Moldova. Following this period, the personal data will be encrypted by DG NEAR or mandated to be encrypted by DG NEAR. The decoding of these files will require the agreement of the controller and each request will be logged. In cases where the controller agrees the personal data will be decoded for use by the requesting person or organisation. Prior to the data being re-encrypted, a copy of the relevant part of the log will be added to the decoded file. The data will be transferred to the archives of DG NEAR for ten years after their delivery to the Document Management Office. The date of delivery to the archives depends on the date of closure (including the period of grace to conclude all outstanding transactions) of the HLA programme in Moldova as regulated by the Commission's Financial Regulations. After this period, the files containing the data will either be deleted or transferred to the Commission's Historic Archive.

The notifications and privacy statements do not contain any information on the retention

¹⁵ The EDPS has adopted Guidelines on health data at work, available on the EDPS website: https://edps.europa.eu/sites/edp/files/publication/09-09-28_guidelines_healthdata_atwork_en.pdf

periods of personal data personal data of HLAs processed in the annual 360° evaluation of HLAs.

The EDPS notes that the HLA programme is an external action falling under specific rules of the European Neighbourhood Instrument and the financing agreement (i.e. the service contract) for the implementation of the HLA programme. In particular, Articles 7.9 and 24.3 of Annex I (General conditions) to the service contract lay down the keeping of records for seven years after the final payment made under the service contract.

In line with the EDPS guidelines¹⁶, the conservation of files of successful experts for up to seven years after:

- the signature of the respective contract, grant agreement or
- the end of the particular program

can be considered as necessary for control and audit purposes in terms of Article 48(1)(d) and (2) of the Rules of Application of the Financial Regulation¹⁷. In any case, according to Article 48(3) of the Rules of Application, personal data contained in supporting documents should be deleted where possible where these data are not necessary for budgetary discharge, control and audit purposes.

The EDPS does not consider proportionate keeping personal data of shortlisted and selected candidates, processed in selection and recruitment, as well as in annual evaluation of EU High-Level Advisers, for longer than strictly necessary and potentially, if transferred to the Commission's Historic Archive, retaining these personal data indefinitely and opening them to the public. The EDPS welcomes the Commission's proposal to delete the documentation at the end of the retention period instead of transferring it to the Historical Archives.

The EDPS **recommends** that the Commission and the Delegation review the retention period for the personal data of not shortlisted candidates to take into account the two-year period following the recruitment procedure during which a complaint may be brought to the European Ombudsman. The applicable retention periods for the personal data of shortlisted and selected/recruited candidates should be clarified. The Commission should delete the documentation at the end of the retention period instead of transferring it to the Historical Archives. The EEAS and Delegation should define the retention periods for the personal data of HLAs processed in the annual 360° evaluation in line with their needs. The privacy statements should be updated accordingly.

e) **Transfers of data to third countries or international organisations**

Under Article 9(1) of the Regulation, personal data shall only be transferred to recipients, other than EU institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, if an adequate level of protection is ensured in the country of the recipient or within the recipient international organisation and the data are transferred solely to allow tasks covered by the competence of the controller to be carried out. The adequacy of the level of protection afforded by the third country or international organisation in question shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data

¹⁶ See EDPS Guidelines on the processing of personal data in the context of public procurement, grants as well as selection and use of external experts, available on the EDPS website: https://edps.europa.eu/data-protection/our-work/publications/guidelines/public-procurement-grants-and-external-experts_en.

¹⁷ [OJ L 362, 31.12.2012, p. 1.](#)

transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the recipient third country or recipient international organisation, the rules of law, both general and sectorial, in force in the third country or international organisation in question and the professional rules and security measures which are complied with in that third country or international organisation (paragraph 2). Paragraph 6 of Article 9 lists the derogations from paragraphs 1 and 2 of Article 9 on the basis of which an EU institution or body may transfer personal data.

Moldova is a third country for which an adequacy decision has not been established. For the transfers to the Moldovan authorities and the service provider, the Commission and the Delegation rely on exceptions under Article 9(6)(a) and (c) of the Regulation:

- the data subject has given his or her consent unambiguously to the proposed transfer and
- the transfer is necessary for the conclusion or performance of a contract entered into in the interest of the data subject between the controller and a third party.

Transfers of personal data to the Moldovan authorities

The EU is clearly under a legal obligation and commitment arising from international agreements and contracts with Moldova to run the HLA programme. With the HLA programme, the EU is assisting the Moldovan authorities in developing a strong democratic society respecting human and fundamental rights and so the HLA programme is clearly in the important public interest. The transfer of personal data of selected candidate for HLA to the Moldovan authority which the HLA will be advising, so that they can endorse the selected candidate, is necessary for the implementation of the HLA programme.

The EDPS therefore **considers** that relying on the exception under Article 9(6)(d) of the Regulation (the transfer is necessary or legally required on important public interest grounds) would be more appropriate for the transfers of personal data to Moldovan authorities in the context of the HLA programme.

Nevertheless, the EDPS **recommends** that the Commission and the Delegation formalise with Moldova the data protection framework for transfers/exchanges of personal data under the HLA programme to/with the Moldovan authorities, similarly to what has been done for the different areas of the EU-Moldova Association Agreement¹⁸, as an additional safeguard for protecting the privacy and fundamental rights and freedoms of individuals. For example, a specific Memorandum of Understanding could be signed with the beneficiary country, which would detail the functioning of HLA programme, the processing of personal data and the data

¹⁸ The EU-Moldova Association Agreement sets out the framework under which personal data are to be transferred and exchanged with the Moldovan authorities for the different areas of the association (e.g. in area of freedom, security and justice, in area of customs cooperation, in area of electronic commerce/information society). The approximation of Moldovan institutional and legal framework to the EU norms and standards (including steps to comply with EU data protection principles) is part of the EU- Moldova Association Agreement. Title IV of the EU- Moldova Association Agreement provides a framework for the economic and other sectorial cooperation, including for the cooperation on public administration reform. However, the provisions of the EU- Moldova Association Agreement on the cooperation framework on public administration reform (under which the HLA programme in Moldova would fall) do not cover the transfers/exchanges of personal data. According to the documents and information provided by the Commission, a Memorandum of Understanding was signed between the EU and Moldova in 2009. This Memorandum of Understanding however does not contain any data protection provisions.

protection framework.

Transfers of personal data to the service provider

The Commission and the Delegation have concluded a service contract with the service provider for the recruitment and contract/administrative management of HLAs. The service provider is the processor as regards the processing of personal data in this context. The service provider is a consortium of companies based in different EU Member States and in Moldova. The EDPS reminds the Commission and the Delegation that the transfers of personal data to the processor based in Moldova must comply with Article 9 of the Regulation. In the absence of an adequacy decision, the controllers can introduce additional safeguards to ensure the adequate level of protection of personal data in the destination country, for example by adopting the Commission's standard contractual clauses for processors¹⁹.

f) Rights of the individuals (access, rectification, blocking, erasure)

Under Articles 13 and 14 of the Regulation, data subjects have the right of access to their personal data within 3 months from the receipt of the request and the right to have their personal data corrected without delay if inaccurate or incomplete. Granting a data subject the right to access, check and rectify inaccurate data and to provide comments contributes to ensuring the accuracy of the data in line with Article 4(1)(d) of the Regulation. Under Article 15 of the Regulation, data subjects have the right to have their personal data blocked under certain circumstances. Under Article 16 of the Regulation, data subjects have the right to obtain the erasure of their personal data if their use is unlawful. The rights of blocking and erasure may be complementary to the right of rectification.

The EDPS has always recommended that data subjects should be given access to the widest extent possible to their aggregated results regarding all stages of the selection procedure (pre-selection, interview and written tests), unless the exception in Article 20(1)(c) of the Regulation is applied (the protection of the rights and freedoms of others)²⁰. The same is valid for granting access to personal data in the staff evaluation and appraisal procedures. Furthermore, individuals should be granted access to all their personal data kept by the data controllers and processors, even after the end of their contracts.

The EDPS **recommends** that the Commission and the Delegation clearly explain in the privacy statements the procedures for granting individuals' rights for the different processing operations (see also recommendations in the next section). It is good practice to include also information on within which time limit a reaction can be expected from the data controller to the requests of the individuals (e.g. 3 months for access to personal data request, without delay for rectification, etc.).

g) Information to be given to the individuals

Articles 11 and 12 of the Regulation provide a minimum list of information on the processing of personal data that need to be provided to the concerned individuals. In order to ensure

¹⁹ More information on standard contractual clauses for the transfer of personal data to non-EEA countries is available at: http://ec.europa.eu/justice/data-protection/international-transfers/transfer/index_en.htm.

²⁰ More guidance on data subjects' rights and restrictions of these rights can be also found in the EDPS Guidelines on the Rights of Individuals with regard to the Processing of Personal Data, available on the EDPS website: https://edps.europa.eu/sites/edp/files/publication/14-02-25_gl_ds_rights_en.pdf

transparency and fairness of the processing, the following information should be provided:

- identity of the controller;
- purpose of the processing;
- data categories;
- whether replies to the questions are obligatory or voluntary, as well as possible consequences of failure to reply;
- possible data recipients;
- existence of rights of access, rectification and recourse to the EDPS;
- legal basis of the processing;
- applicable data retention periods.

The Commission and the Delegation have prepared privacy statements information in accordance with Articles 11 and 12 of the Regulation to the candidates on the processing of their personal data during the selection of HLAs. However, it is not clear to the EDPS how the privacy statements are provided to the (potential) candidates.

Both notifications and privacy statements list a number of internal and external recipients to whom data might be disclosed during the selection of HLAs. They however do not mention all the recipients to whom data might be disclosed during the selection of HLAs (e.g. for certain posts other DG NEAR and Commission services or EEAS might be involved in the selection process).

The EDPS therefore **recommends** that the Commission and the Delegation amend the privacy statements to include all recipients of personal data in selection of HLAs. The Commission and the Delegation should provide to the (potential) candidates the information on the processing of their personal data in selection of HLAs before the start of the processing (at least) and during all stages of the processing (best practice), so as to ensure fairness and transparency towards the data subjects.

According to the supporting documents received with the notifications from the Commission and the Delegation, in particular the service contract with the service provider, personal data of HLAs are also processed in the context of recruitment, contract/administrative management and 360° evaluation of HLAs. However, the notifications and the privacy statements provided by the Commission and the Delegation to the EDPS do not contain information on this processing.

The EDPS **strongly recommends** that the Delegation inform to the HLAs in line with Articles 11 and 12 of the Regulation about the processing of personal data in the context of the recruitment, contract/administrative management and 360° evaluation of HLAs. This information should be provided before the start of the processing (at least) and during all stages of the processing (best practice).

The HLAs' Code of conduct sets out that HLAs shall disclose promptly any existing or potential conflict of interest. It can be helpful to mention this in the call for application or in the first letters to selected HLA candidates. The EDPS reminds the Delegation that the HLAs as well as any other individuals (e.g. family members of HLAs), whose personal data is also processed in the context of preventing any conflict of interest, should be informed by the controller of

such processing²¹ in line with Articles 11 and 12 of the Regulation.

The EDPS therefore **strongly recommends** that the Delegation provide both the HLAs with a specific privacy statement concerning the processing of personal data in the management of conflicts of interest. Such privacy statement should be accessible when filling in the declaration form, attached to the HLAs' Code of conduct and on the website of the Delegation. The HLAs should also be instructed to inform their family members that the EU institution concerned will be processing data about them, and that further information is available in the specific privacy statement on the website of the Delegation.

h) Use of processors and security of the processing

Under Article 22 of the Regulation, the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks presented by the processing and the nature of the personal data protected. Article 22(2) provides a minimum list of the objectives the measures need to address. In line with Article 23, when choosing a processor, the controller has to make sure that the processor provides sufficient technical and organisational measures to ensure confidentiality and security as set out in Articles 21 and 22 of the Regulation and that these measures are complied with. Steps taken to receive this assurance from the processor have to be documented. Accordingly, the controller and the processor need to establish a contract concerning the processing of personal data on behalf of the controller by the processor and the security of the personal data processed. All these legal documents should include an explicit reference to the applicable national data protection legislation as well as Regulation (EC) No 45/2001.

Use of processors

The Commission and the Delegation have chosen a consortium of companies as processor to provide the contractual framework for the implementation of the HLA programme in Moldova. The service contract sets out the applicable data protection framework. However, the wording of the data protection clause needs improvement and clarification in some points, e.g. in the distribution of data protection obligations and granting of data subject rights. There is confusion between:

- (i) obligations of the Commission and the Contracting Authority (i.e. the Delegation) for processing the personal data relating to the service provider and
- (ii) the obligations of the service provider for processing the personal data of HLAs in implementation of the HLA programme in Moldova.

In line with the previous EDPS recommendations²², the service contract is not the appropriate time and place to provide the information on the processing of personal data relating to the service provider about which the service provider must be informed in line with Articles 11 and 12 of the Regulation. The privacy statement on the processing of personal data relating to the service provider during the awarding of the service contract would have been the most appropriate channel to do so.

²¹ See EDPS Guidelines on conflict of interest, available at https://edps.europa.eu/sites/edp/files/publication/14-12-08_coi_guidelines_en.pdf

²² See chapter 3.5 of the General Report on Measuring compliance with Regulation (EC) 45/2001 in EU institutions (“Survey 2013”) available at https://edps.europa.eu/sites/edp/files/publication/14-01-24_survey_report_en.pdf

The EDPS therefore **recommends** that the Delegation clarify with the service provider the obligations of the service provider for processing the personal data of HLAs in implementing the HLA programme in Moldova. This can be done e.g. by amending the service contract, concluding another agreement or issuing binding general standing instructions to the service provider. When relying on third parties to carry out on behalf of the controller (parts of) the processing, the controller remains accountable for the processing carried out on its behalf by processors. The proposal²³ for a new Regulation replacing Regulation (EC) No 45/2001 sets out more detailed rules on controller-processor relationships (Article 29). The Commission and the Delegation would do well to review the agreements with the service provider in the light of upcoming obligations.

Security of processing

The service contract states that the service provider undertakes to adopt technical and organisational security measures to address the risks inherent in processing and in the nature of the personal data concerned. However, the service contract does not specify what those measures are and that information has not been provided to the Commission or the Delegation.

The Commission and the Delegation should obtain from the service provider reasonable assurance that the appropriate measures in line with Articles 21, 22 and 23 of the Regulation have been put in place, including information on what those measures are, and that the measures are being complied with.

The EDPS **recommends** that the Delegation obtain from the service provider written assurance that the appropriate measures have been put in place, including information on what those measures are, and that they are complied with. The Delegation should also continuously monitor and evaluate the measures put in place, e.g. by including this point in the audits of the service provider already foreseen in the service contract.

3) Recommendations and suggestions for improvement

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

The EDPS expects implementation and documentary evidence thereof within three months of the date of this joint Opinion for the recommendations made in it:

1. As regards all the processing of personal data in the HLA programme in Moldova, the Commission, EEAS and the Delegation should clearly establish their respective responsibilities for compliance with their data protection obligations. This should be done in particular as regards the exercising of the rights of the data subject and their respective duties to provide the information in accordance with Articles 11 and 12 of

²³ Proposal COM(2017)8 final, planned applicability 25 May 2018.

the Regulation.

2. The Commission and the Delegation should review the retention period for the personal data of not shortlisted candidates to take into account the two-year period following the recruitment procedure during which a complaint may be brought to the European Ombudsman. The applicable retention periods for the personal data of shortlisted and selected/recruited candidates should be clarified. The reference to the transfer of data to the Historical Archives should be removed and replaced with reference to the deletion of all of the documentation previously retained. The EEAS and Delegation should define the retention periods for the personal data of HLAs processed in the annual 360° evaluation in line with their needs. The privacy statements should be updated accordingly.
3. The Commission and the Delegation should formalise with Moldova the data protection framework for transfers/exchanges of personal data under the HLA programme to/with the Moldovan authorities.
4. The Commission and the Delegation should clearly set out in privacy statements the procedures for granting individuals' rights for the different processing operations. It is good practice to include also information on within which time limit a reaction can be expected from the data controller to the requests of the individuals (e.g. 3 months for access to personal data request, without delay for rectification, etc.).
5. The Commission and the Delegation should amend the privacy statements to include all recipients of personal data in selection of HLAs. The Commission and the Delegation should provide to the (potential) candidates the information on the processing of their personal data in selection of HLAs before the start of the processing (at least) and during all stages of the processing (best practice), so as to ensure fairness and transparency towards the data subjects.
6. The Delegation should provide to the HLAs information in line with Articles 11 and 12 of the Regulation on the processing of personal data in the context of the recruitment, contract/administrative management and 360° evaluation of HLAs. This information should be provided before the start of the processing (at least) and during all stages of the processing (best practice).
7. The Delegation should provide both the HLAs and the other individuals with a specific privacy statement concerning the processing of personal data in the management of conflicts of interest. Such privacy statement should be accessible when filling in the declaration form, attached to the HLAs' Code of conduct and on the website of the Delegation. The HLAs should also be instructed to inform their family members that the EU institution concerned will be processing data about them, and that further information is available in the specific privacy statement on the website of the Delegation.
8. The Delegation should clarify with the service provider the obligations of the service provider for processing the personal data of HLAs in implementation of the HLA programme in Moldova, e.g. by amending the service contract, concluding another agreement or issuing binding general standing instruction to the service provider.
9. The Delegation should request from the service provider written assurance that the

appropriate measures have been put in place, including information on what those measures are, and that they are complied with. The Delegation should also continuously monitor and evaluate the measures put in place, e.g. by including this point in the audits of the service provider already foreseen in the service contract.

Done at Brussels, 15 December 2017

Wojciech Rafał WIEWIÓROWSKI