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**Subject: Your consultation on the "*who is who project*" on the intranet of the Committee of Regions**

Dear Mr SPÁČ,

Thank you for your consultation under Article 28(1) of Regulation (EC) 45/2001 (hereinafter "the Regulation") in which you request the EDPS position concerning the "*who is who project*" which the Committee of Regions (CoR) intends to set up.

**Facts**

In your e-mail you stated that the CoR is currently preparing a new "*who is who*" on its new intranet page which will be only accessible from inside the institution. One of the features of the project is to display a photo of the persons who are currently employed in the Committee of the Regions alongside their functions and responsibilities. For this purpose, a message (outlook message or internet survey tool) from the Secretary General will be sent to the staff informing them about the new "*who is who*" project and about the fact that their photo will be published unless they click on a specific tab "*No, I don't want my picture to be published*".

**Analysis**

The intended processing operation (publication of photos), as described in your e-mail, involves the processing of personal data by a European Union's institution in the exercise of activities within the scope of European Union law, and therefore results in the applicability of the Regulation (Article 3 and corresponding definitions of Article 2).

The display of the name, functions and responsibilities of the staff member on the intranet of the CoR is a processing activity that can be considered to be in conformity with the Regulation in light of the data quality and lawfulness of processing principles (Articles 4 and 5 of the Regulation respectively, for further analysis, see below). However, although the

display of a staff member's picture will be accessible within the institution, it is still a sensitive issue that deserves closer analysis.

The lawfulness of the processing should be first established in light of Article 5. The processing of personal data (functions and responsibilities) carried out in the context of the "who is who project" can be considered as a basic information on staff members which is necessary in view of allowing an efficient cooperation among the CoR's staff members. However, it is difficult to see how the display of photos of the staff members could be considered as "necessary" for the performance of the task of the CoR, as required in Article 5.a. Furthermore, according to Article 38<sup>1</sup> of the Regulation, the term "necessary" under Article 5.a should be strictly interpreted. It follows that according to available situation, Article 5.a does not seem to be the appropriate legal basis to justify the processing of photos in the context of a "who is who project". The most suitable provision would be Article 5.d of the Regulation, which states that "the data subject has unambiguously given his/her consent".

In terms of Article 2(h) of the Regulation, the data subject's consent is *"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"*. In the present case, the staff members seem to be given the possibility to click on *"No, I don't want my picture to be published"*. This is an opt-out system. The requirement of **"unambiguous consent"** under Article 5.d implies that in every individual case, the data subject should give his/her consent freely without any doubt. The proposed system leaves room for certain uncertainty as to whether by not clicking on the "No" button, the staff member gives an "unambiguous consent", in other words, whether by taking no action he/she really intended to have his/her picture uploaded.

In the present case, it is hence important to take into account that for consent to be valid whatever the circumstances in which it is given, it must be freely given, specific and constitute an informed indication of the data subject's wishes<sup>2</sup>. Consent must be obtained before the personal data are collected, as a necessary measure to ensure that data subjects can fully appreciate that they are consenting and what they are consenting to. Consequently the system which is the most appropriate to be used to obtain consent is an opt-in mechanism requiring an affirmative action to indicate the staff member's consent before publishing his/her photo. The EDPS therefore recommends that the staff member is given the possibility to express his consent by clicking on a box stating for example, *"Yes, I want my picture to be published"*.

Moreover, the CoR should clarify to the staff members that they are completely free to give their consent, which has to be specific and informed (Article 2.h of the Regulation). It should be clear that in case they decide not to give their consent, this will not be detrimental to them or prejudice any of their rights or interests at their work. In addition, in case they do decide to give their consent, they should have the right of withdrawal at any time. Finally, the controller should provide all staff members with a privacy statement which should explain clearly all

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<sup>1</sup> This provision relates to the Directories of users and it provides that *"personal data contained in printed or electronic directories of users and access to such directories shall be limited to what is strictly necessary for the specific purposes of the directory ..."*

<sup>2</sup> It is interesting to draw your attention to the Article 29 Working Party's Opinion 2/2010 on behavioural advertising that *"... Giving the data subjects a stronger voice 'ex ante', prior to the processing of their personal data by others, however requires explicit consent (and therefore an opt-in) for all processing that is based on consent ..."*. An opt-out approach therefore is questionable because not opting out is not the same as positively consenting. See point 4.1.3 of the Opinion, page 16.

appropriate information in conformity with Articles 11 and/or 12 of the Regulation.

### **Conclusion**

In the light of these observations, the EDPS recommends that the CoR, similarly to what happens in other EU institutions and bodies, may carry out the "*who is who project*" publishing photos of its staff members on intranet as long as it

- sets up an opt-in mechanism requiring the explicit consent of each staff member and
- provides complete and adequate information to all its staff members as to the scope and consequences of the applicable rules and policies regarding the "*who is who project*" taking into consideration and implementing the above recommendations.

We appreciate to be informed of the follow-up to this issue in due course.

Yours sincerely,

**(signed)**

Giovanni BUTTARELLI