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Subject: Prior-checking Opinion regarding 360° feedback exercise at the European Agency of Fundamental Rights (Case 2016-1007)

On 4 November 2016, the European Data Protection Supervisor (EDPS) received a notification for prior checking under Article 27 of Regulation (EC) No 45/2001¹ ("the Regulation") on 360° feedback exercise from the Data Protection Officer (DPO) of the European Agency of Fundamental Rights (FRA).²

This processing operation is similar to other notified cases of feedback tools for managers already prior checked by the EDPS.³ For this reason, this Opinion does not contain a full analysis of all data protection aspects, but focuses on pointing out those that diverge from other cases or otherwise require improvement.

¹ OJ L 8, 12.1.2001, p. 1.

² According to Article 27(4) of the Regulation, the EDPS has to provide his Opinion within two months of receiving the notification, not counting suspensions. The notification was suspended from 11 November 2016 to 17 November 2016, from 22 November 2016 to 23 November 2016 and from 15 December 2016 to 4 January 2017. The EDPS shall thus render his Opinion by 31 January 2017.

³ Cases 2009-0215, 2013-1290, 2014-0906, 2014-1146, 2015-0733 and 2015-0772.

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1. Facts and analysis

1.1. Lawfulness of the processing

As grounds for lawfulness, FRA has stated that the processing of personal information is based on Article 5(a)⁴ and (d)⁵ of the Regulation.

The legal basis for the processing operation assessed is Article 24a of the Staff Regulations, according to which "*The Union shall facilitate such further training and instruction for officials as is compatible with the proper functioning of the service and is in accordance with its own interests*".

Regarding FRA's reference to Article 5(d) as a ground for lawfulness, the data subject's consent is defined in Article 2(h) of the Regulation as "*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 processed*". In this regard, the EDPS underlines that consent should be used with caution in the employment context. Such consent is valid only in exceptional circumstances where the employee has a genuine free choice and is subsequently able to withdraw the consent without negative consequences.⁶

The notification and the privacy notice clearly state that participation in the 360° feedback exercise is voluntary for the reviewers/raters. According to further information provided by FRA, participation is voluntary also for the reviewees (i.e. Director, Heads of Department, Heads of Sector and other staff with management responsibility). However, the notification and the privacy notice do not reflect that participation for reviewees is also based on consent. Furthermore, it should be made clear that such consent may be revoked at any time, also while the exercise is underway. The procedure should expressly provide that reviewees' participation is based on consent, which may be withdrawn at any time.

The EDPS **recommends** that the notification and privacy notice clearly state that participation is voluntary also for the reviewees and that their consent may be revoked at any time before or during the 360° feedback exercise.

1.2. Processing of group reports

According to the notification and the privacy notice, no confidential individual reports will be communicated to FRA. The latter will only receive the consolidated anonymised group feedback reports, which will provide input for learning and development plans. However, in the light of the optional character of the 360° feedback exercise, one cannot entirely exclude that group reports contain identifiable information on reviewees, since they could potentially constitute a very limited number.

⁴ Personal data may be processed only if the processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body or in a third party to whom the data are disclosed.

⁵ Personal data may be processed only if the data subject has unambiguously given his or her consent.

⁶ Article 29 Data Protection Working Party Opinion 8/2001 of 13 September 2001 on processing of personal data in the employment context.

The EDPS **recommends** that reviewees are properly informed of the fact that it cannot be entirely excluded that the consolidated anonymised group feedback reports communicated to the HRL Department could potentially contain identifiable information related to them.

2. Conclusion

Provided that the above recommendations are implemented, the EDPS sees no reason to believe that there is a breach of the Regulation.

In light of the accountability principle, the EDPS expects FRA to implement the above recommendations accordingly and has therefore decided to **close the case**.

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

cc.: Data Protection Officer, FRA