

## Note

**From:** IALN Troika (EFSA, EUIPO)  
**To:** **Agencies' representatives of the Standing Working Party on Implementing Rules for the SR (SWP)**  
**CC.:** All IALN members  
**Re:** IALN advice to the Standing Working Party – EC Decision on managerial appraisal

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### 1. Background

The SWP has approached IALN for its advice on the following case:

- EC decision on managerial appraisal for which meanwhile the Commission has notified its decision to the agencies.

### 2. Analysis of the case

#### 2.1 Presentation

In December 2016, agencies have been notified on EC Decision (2016)7270 laying down an amendment to the EC Decision C(2013)8985 of 2013 concerning appraisal. The amendment concerns the insertion of a provision on the appraisal of middle management staff. Most agencies have opted out of the 2013 EC Decision, adopting instead the relevant model decisions on staff appraisal on which the EC provided *ex ante* agreement.

The respective positions of DG HR and of the SWP are as follows:

- The EC (DG HR) takes the view that the Decision (2016)7270 of December 2016 should be applied by analogy, regardless of whether the agency adopted the EC Decision C(2013)8985 by analogy or adopted implementing rules based on the model decisions. The EC holds that the decision of December 2016 lays down a new rule with autonomous legal value.
- The SWP expressed the view that agencies cannot adopt by analogy an amendment to the 2013 EC Decision they never have implemented. Consequently the SWP is of the view that agencies should timely opt out from the EC Decision (2016)7270, before the expiry of the 9 months period (13/09/2017). The SWP also requested the Commission to draft and grant an *ex ante* agreement to a model decision which content-wise is identical to EC Decision (2016)7270, covering agencies' temporary staff and referring to the model decision on appraisal adopted by most EU agencies.

The SWP asks for the advice of IALN, taking account of the position of DG HR and their proper views already expressed in joint meetings with DG HR.

## 2.2 Analysis on legal risks

- The explanatory note circulated on 16/03/2017 reiterates the Commission point of view that the amendment concerning the managerial appraisal can be applied by analogy to the agencies. It is added that the amendment decision has an autonomous legal value meaning that the introduction by analogy can be arranged even if agencies initially have adopted their staff appraisal rules following the model decision approach.
- On the other hand, the SWP expressed a doubt whether the amendment by analogy as proposed by DG HR is fully lawful, referring to the risk for challenges against the validity of the revised rules, especially in the context of contentious cases of unsatisfactory managerial performance.
- The IALN confirms that the risk highlighted by the SWP is manifest, in particular if challenges to individual decisions pointing to unsatisfactory managerial performance are at issue. The application by analogy of the concerned EC amending Decision may not ensure legal certainty. The IALN holds that compliance with the Article 110 procedure will only be fully established in the way the SWP has indicated. This implies that agencies should opt out from Decision (2016)7270. The Commission, in turn, should provide *ex ante* agreement on a model decision incorporating the said amendment that, once notified to agencies, would be adopted by the latter to amend their decisions on the appraisal of statutory staff.
- At the same time, each agency is left with its discretion whether to incorporate the proposed amendment identically content-wise in order to allow to take into account any peculiarities of its organisation and operations.

## 3. IALN advice to the SWP

The IALN thanks the SWP and welcomes that on the occasion of their discussion with DG HR they referred to the fact that many agencies have adopted staff appraisal rules according to the model decision approach and that they have voiced the preference for the same adoption method with regard to the amendment on the managerial appraisal. As a risk mitigation and in the common interest of the agencies, IALN takes the view that lawfulness and compliance with Article 110 procedure shall be fully established. To that end, the IALN supports the view that agencies which have adopted the relevant model decisions on staff appraisal on which the Commission gave its *ex ante* agreement should opt out from Decision (2016)7270 and the Commission should be urged to undertake the formalities linked to the adoption of an *ex ante* agreement on a model decision incorporating the said amendment. The IALN would appreciate to be kept informed on the matter.

### Document history

Date	
25/04/2017	