

EDPS comments on a draft European Parliament Decision laying down internal rules concerning the restrictions of data subjects' data rights, in accordance with Article 25 of the Regulation (EU) 2018/1725

1. Introduction

- These comments refer to the draft European Parliament (EP) draft Bureau Decision laying down internal rules relating to Regulation (EU) 2018/1725 (hereinafter 'the Regulation')¹, including the restrictions of data subjects' data rights in accordance with Article 25 of that Regulation (hereinafter 'the draft internal rules'). Our comments refer to the document submitted on 15 April 2019, which contained the introduction of the document, Chapter V and its ten annexes.
- We give these comments in accordance with Article 41(2) of the Regulation.

2. General comments

- The EDPS takes note that the rules are written in a comprehensive way. We believe, however, that it is preferable to include the text of the annexes in the main text of the draft internal rules.
- Concerning the right to information, we take note that the EP is going to publish data protection notices on its website informing all data subjects of the potential restrictions of their rights related to personal data processing.
- The EDPS also takes note of the fact that the EP will perform a necessity and proportionality test on the need for the restriction of data subjects' rights, according to several provisions of the draft internal rules.
- The EDPS welcome that the EP is documenting the restrictions for accountability purposes, namely to make the files available to the EDPS upon request.

3. EDPS recommendations

- The EDPS would like to clarify the EP's interpretation of the right to portability mentioned in the third Recital of the draft internal rules. According to Article 22 of the Regulation, the portability of personal data refers to the right of the data subjects to receive personal data that they have provided to the controller where the processing's lawfulness is based either on consent or on necessity for fulfilling a contract and carried out by automated means. Where it does not apply (e.g. because lawfulness is based on Article 5(1)(a) of the Regulation, there can be no need to restrict it. Additionally, exercising the right to data portability does not automatically mean the erasure of that data by the initial controller (see Article 22(1) of the Regulation). The right to erasure is an autonomous right established in Article 19 of the Regulation.
- The EDPS welcomes that the Section 1 begins with 'Exceptions and Derogations' of Chapter V and that Article A(1) states that the controller shall consider whether any exceptions are applicable, before applying a restriction.

¹ OJ L 295, 21.11.2018, p. 39.

- According to Article N of the draft internal rules, the Annexes to Chapter V – Section 2 form an integral part of the Decision. We believe that a situation in which internal rules are fragmented into ten separate Annexes goes against the principles of clarity (required by Art. 25(5) of the Regulation) even if those Annexes form an integral part of the Decision. Hence, we are of the opinion that, for reasons of legal clarity, such Annexes should be **moved into the normative part of the draft internal rules**.
- The EP should specify in the body of the draft internal rules which objectives among those mentioned under Article 25(1) of the Regulation the restrictions are supposed to safeguard.
- The EDPS recommends that the **terminology** used in the draft internal rules is **aligned with the wording of the Regulation**. For example, Article H(4) of the draft internal rules mentions Articles 25(6), (7) and (8) of the Regulation, but with a different wording ('...right of access through the intermediary of the European Data Protection Supervisor ...') which may cause some misunderstandings.
- Notwithstanding being available on the EP website, the EDPS recommends that the **data protection notices** including information on potential restrictions to data subject rights are also **provided in other formats**. The most appropriate format will have to be assessed on a case-by-case basis – for example, when the EP wants to (possibly) impose restrictions on the right of access, but no restriction on the right to information, then it should still communicate the data protection notice directly to the data subject.
- As mentioned above and despite the fact that most of the points mentioned in Article 25 (2) of the Regulation are referred to in the recitals and annexes of the internal rules, the EDPS recommends that **all the following items should be clearly included in the body of the draft internal rules**:
 - a) *the purposes of the processing or categories of processing;*
 - b) *the categories of personal data;*
 - c) *the scope of the restrictions introduced;*
 - e) *the specification of the controller or categories of controllers;*
and
 - g) *the risks to the rights and freedoms of data subjects.*
- The EDPS also highlights that one of the novelties of the Regulation is the assessment performed by the controller not only regarding the risks posed to the controller itself, but also **the risks to the rights and freedoms of the persons** affected. These are related, but not necessarily identical. Therefore and as mentioned above, the internal rules should mention the risks to the rights and freedoms of data subjects whose rights may be restricted. The reference in recital six of the draft internal rules to these risks does not provide the necessary level of detail required by Article 25(2)(g) of the Regulation.
- In relation to the necessity principle, the EDPS underlines that **restrictions should be temporary and be lifted when their causes no longer apply**. Therefore, the EDPS welcomes the fact that restrictions to the right of information will be **reviewed every six months** (see Article L of the draft internal rules), to assess if its factual and legal reasons are still observable and perform a necessity/proportionality assessment.

However, in some situations, the EP will only assess the need to maintain the restriction on an annual basis, which appears to be too long. The EP should apply the six months review cycle in all situations.

- According to the Article M of the draft internal rules, the DPO will be informed without undue delay of each restriction of the data subject's rights applied pursuant to the internal rules. The EDPS recommends the EP **document the involvement of the DPO** along the procedure.
- The EP must keep in mind that the restrictions must be limited to what is strictly necessary. Restrictions to fundamental **rights should always be exceptional and only when indeed needed**. Article 17 of the Regulation concerns the right of direct access by the data subject. In that sense, granting indirect access through the intermediary of a physician is a restriction of the right of access, which may be justified as a safeguard to the patients/data subjects, due to the impact which that information may have on them. The EDPS recommends that the draft internal rules clarify that the restriction of data subjects' rights regarding medical files (see Annex IV of the draft internal rules) is limited to direct access – and not to indirect access – to the documents of a psychological or psychiatric nature. Hence, these internal rules should not imply that the indirect access will be limited. Therefore, **the intermediary physician should be given access to all the information and discretionary power to decide how and what information to provide to the data subject**.
- Following the same reasoning, **restrictions to the right of access regarding selection procedures (see Annex III of the draft internal rules) do not seem necessary**. The EP can ensure the 'secrecy of the jury' in recruitment procedures by referring to the jury in an aggregated manner when evaluating candidates, instead of having separate assessments per juror. There seems to be **no obvious use case for restricting the right of access in staff evaluation procedures** either. The EDPS, therefore, **recommends that the EP remove the possibility to restrict this right in the abovementioned situations**.
- Additionally, the EDPS would like to remind that, according to Article 25(5) of the Regulation, this decision should be signed at the highest management level.
- Finally, the part of the draft internal rules sent to the EDPS does not mention the date of its entry into force. At this regard, the EDPS would like to remind that these internal rules shall be published in the Official Journal of the European Union, as stated in Article 25(5) of the Regulation. Also for a matter of legal certainty, the EDPS recalls that **the entry into force of the act must be set at a specific date or a date determined by reference to the date of its publication in the Official Journal of the European Union**. The EDPS **therefore recommends adopting a provision on the draft internal rules accordingly**. In this regard, the EDPS recalls that entry into force on the day of publication in the Official Journal of the European Union being an exception, it must be justified by an overriding need — for example, to avoid a legal vacuum — and accompanied with a specific recital giving appropriate reasons for the urgency.