



EDPS SUPERVISORY OPINION ON THE DRAFT IMPLEMENTING RULES CONCERNING THE DPO OF THE EUROPEAN LABOUR AUTHORITY (Case 2023-0188)

1. INTRODUCTION

- 1.1. This Supervisory Opinion relates to the draft decision of the Management Board of the European Labour Authority (ELA) on implementing rules concerning the Data Protection Officer (DPO) pursuant to Article 45(3) of Regulation (EU) 2018/1725¹. ELA submitted the request for consultation to the EDPS on 13 February 2023.
- 1.2. The EDPS issues this Supervisory Opinion in accordance with Articles 41(1) and 57(1)(g) of the Regulation, as outlined by the [EDPS Position Paper on the role of DPOs of EUIs \(30 September 2018\)](#).

2. EDPS RECOMMENDATIONS

- 2.1. The draft decision provides a definition of ‘**(data) controller**’, ‘**(data) operational controller**’ and ‘**staff responsible**’. The distinction between controller and operational controller seems to follow the approach of the European Commission², but smaller EU institutions, bodies and offices (EUIs) usually do not need to make such distinction. Indeed, Article 3 (8) of the Regulation sets out that controller means the Union institution or body or the directorate-general **or any other organisational entity** which alone or jointly with other determines the means and the purposes of the processing of personal data. Therefore, according to the Regulation, the entities identified in the draft as operational controllers are actually controllers, even though the legal responsibility lies ultimately with the institution.

¹ Regulation (EU) 2018/1725 of the European Parliament and the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ, L 295, 21.11.2018, pp. 39-98.

² [Commission Decision \(EU\) 2020/969 of 3 July 2020 laying down implementing rules concerning the Data Protection Officer, restrictions of data subjects’ rights and the application of Regulation \(EU\) 2018/1725 of the European Parliament and of the Council, and repealing Commission Decision 2008/597/EC](#) C/2020/4183 OJ L 213, 6.7.2020, p. 12–22

- 2.2. The definition and use throughout the text of the term of staff representative seems to follow the approach used in the implementing rules of the EDPS³. It should however be noted that the EDPS implementing rules has no definition of controller. In fact, the draft ELA implementing rules attribute rights and obligations of a controller to the 'staff responsible' as it is provided in the Regulation for controllers.
- 2.3. The EDPS understands the need to reflect the hierarchical structure by designating the Executive Director as the controller and at the same time to allocate clearly roles and responsibilities for the specific processing operations by referring to operational controllers or staff representatives. However, this approach seems to create some confusion, therefore the EDPS recommends harmonizing the terminology (*Recommendation No 1*) by:
- deleting the definition of operational controller and staff responsible;
 - completing the definition of controller in line with Article 3(8) of the Regulation and adding that the Executive Director may delegate his tasks to reflect the operational responsibilities to ensure compliance with the Regulation in relation to specific processing operations carried out by ELA;
 - replacing in the text all references to 'staff responsible' and 'responsible staff' with 'controller';
 - modify Article 5(13) to reflect the above changes, for example to read: '*For processing operations on personal data under his or her responsibility, the DPO shall be considered to be an 'operational' controller as delegated by the Executive Director*'.
 - modify Article 6(1)(c) to reflect the above changes by adding '*'operational' controller as delegated by the Executive Director*'.
- 2.4. The draft decision provides a **definition of 'internal arrangement'** as any arrangement between ELA and any other EUI to coordinate processing activities carried out jointly as controller or processor. There are no further references to internal arrangements in the text. This definition appears to refer to two different types of instruments, i.e. to joint controllership arrangements based on Article 28 of the Regulation and to contracts or other legal acts concluded between controllers and processors based on Article 29 of the Regulation. Such arrangements and legal acts concluded with other EUIs cannot be considered internal, since each EUIs has its own legal personality. Therefore, considering that there is no further reference in the text to such acts, the EDPS recommends deleting this definition (*Recommendation No 2*).
- 2.5. Article 4 provides for designation, status and independence of the DPO. The EDPS recommends (*Recommendation No 3*):
- clarifying that the DPO ensure the internal application of the Regulation in an **independent** manner and shall not be instructed in the exercise of their duties;
 - including that ELA ensures that the DPO tasks do not result in a **conflict of interest** with any other tasks and duties of the DPO.

³ [EDPS DPO Implementing Rules under Regulation 2018/1725](#) adopted on 11 December 2018.

- 2.6. Article 4(3) provides that the DPO shall report directly to the Executive Director in the performance of their duties as a DPO. The EDPS recommends that this reporting obligation be taken into account for the **annual performance appraisal** of the DPO for the specific DPO duties, for which the Executive Director shall ensure an equal and fair treatment. It also appears that there is a word missing at the beginning of Article 4(3), so we recommend adding ‘prejudice’ after the word ‘Without’ (*Recommendation No 4*).
- 2.7. Article 4(6) provides for the conditions for the dismissal of the DPO. The EDPS recommends setting the same **conditions for the dismissal of the Deputy DPO** by adding a reference to the Deputy DPO in this paragraph (*Recommendation No 5*).
- 2.8. Article 5(3) provides for keeping ‘records of processing’. The EDPS recommends clarifying the paragraph in line with Article 31(5) of the Regulation, so that ELA keeps the **register of ELA’s records** of processing operations while those records are provided by the staff/entity responsible for the processing operations in question (i.e. the controller of the said operations) (*Recommendation No 6*).
- 2.9. Article 5(14) provides for the obligation of the DPO to cooperate with DPOs of other EUIs. The EDPS welcomes the specific reinforced cooperation with some EUIs, but recommends adding that the DPO shall also participate in the dedicated **network of EUI DPOs** (*Recommendation No 7*).
- 2.10. Article 5 specifies the tasks and duties of the DPO. We recommend adding that the DPO shall ensure that the controller (staff/entity responsible for the processing operations in question) informs data subjects of their rights and obligations pursuant to the Regulation in the context of ELA processing activities. The DPO shall support the controller in ensuring that the rights and freedoms of the data subjects are not adversely affected by the activities requiring the processing of personal data (Recommendation No 8).
- 2.11. Article 6 provides for the powers of the DPO. The EDPS recommends clarifying that the DPO can access data forming subject matter of the processing operation, offices, data processing installations and carriers of the **processors** as well. Therefore the EDPS recommends adding at the end of Article 5(1)(a) ‘including also those of processors’ (*Recommendation No 9*).
- 2.12. Article 6(e) provides that the DPO may **bring to the attention of the Executive Director any failure** of staff members to comply with the Regulation. The EDPS recommends clarifying further the procedure by adding that the Executive Director may be notified after the DPO informed the concerned staff members and their manager and suggested them safeguards to prevent similar future incidents (*Recommendation No 10*).

3. CONCLUSION

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

Brussels, 20 March 2023

[e-signed]

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