



EUROPEAN DATA PROTECTION SUPERVISOR

EDPS SUPERVISORY OPINION ON THE DRAFT COMMISSION DECISION ON THE PREVENTION OF AND FIGHT AGAINST HARASSMENT AND ACCOMPANYING DRAFT COMMISSION DECISION CONCERNING THE RESTRICTION OF CERTAIN DATA SUBJECTS' RIGHTS (Case 2023-0965)

1. INTRODUCTION

1. This Supervisory Opinion relates to the draft Commission decision on the prevention of and fight against psychological and sexual harassment ('the draft administrative decision' or 'the draft decision'), and the draft Commission decision laying down internal rules concerning the restriction of certain data subjects' rights in the context of processing of personal data by the Chief Confidential Counsellor and the confidential counsellors in the performance of the tasks relating to the prevention of and fights against psychological and sexual harassment ('the draft internal rules'), in their respective versions as submitted to the EDPS for consultation on 13 September 2023.
2. The EDPS issues this Supervisory Opinion in accordance with Article 58(3)(c) of Regulation (EU) 2018/1725¹ ('the Regulation') as far as the draft administrative decision is concerned and as a reply to the consultation under 41(2) of the Regulation as far as the draft internal rules are concerned.

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. FACTS

3. On 13 September 2023, the Commission informed the EDPS of its draft Commission decision on the prevention of and fight against psychological and sexual harassment and formally consulted the EDPS on its draft internal rules concerning the restriction of certain data subjects' rights in the context of processing of personal data by the Chief Confidential Counsellor and the confidential counsellors in the performance of the tasks relating to the prevention of and fights against psychological and sexual harassment.

3. LEGAL ANALYSIS

3.1. Comments under Article 58(3)(c) of the Regulation regarding the draft Commission decision on the prevention of and fight against psychological and sexual harassment

4. The EDPS welcomes the fact that the draft decision includes in its Article 34 rules prescribing how personal data are processed by the Chief Confidential Counsellor and the network of confidential counsellors.
5. The draft decision mentions that “personal data obtained by the Chief Confidential Counsellor and the network of confidential counsellors as part of the informal procedure, shall be processed in accordance with Regulation (EU) No 2018/1725”. The EDPS **recommends** that the draft decision also mention that personal data obtained as part of the informal procedure are processed in line with the respective record of processing operations, maintained in accordance with Article 31(1) of the Regulation.
6. Concerning the retention of the personal data obtained during the informal procedure, the draft decision currently states that “The Chief Confidential Counsellor shall store the opening form for 5 years in a secure manner. The Chief Confidential Counsellor and the confidential counsellors shall not keep any personal data obtained during the informal procedure beyond the time necessary to fulfil their mandate” (Article 34(2)). For the sake of clarity, the EDPS **recommends** that the latter sentence refer to the personal data contained in the opening form to clarify that such personal data is kept for five years **as a maximum** starting from the moment such personal data are collected. The EDPS notes that the Commission should assess whether such retention period is necessary for the purpose(s) of the processing operation at stake, and make reference to the criteria used to define the retention period in the respective record of processing operations.²
7. Additionally, Article 34(4) of the draft decision states that “the Chief Confidential Counsellor may, where necessary, exchange information, including personal data,

² Article 4(1)(e) of the Regulation.

when such information is required for the legitimate performance of their tasks”, without specifying with which actors the Chief Confidential Counsellor may exchange personal data. The EDPS **recommends** that the Commission clarify with which recipients or categories of recipients the Chief Confidential Counsellor may exchange personal data. Additionally, the EDPS **recommends** that the Commission clarify what data is transmitted to each category of recipient. For instance, in accordance with the EDPS guidelines concerning the processing of personal data during the selection of confidential counsellors and the informal procedures for cases of harassment in European institutions and bodies, transmission of personal data to the HR Department should be limited to “hard” or “objective” data, i.e. administrative and identification data.³

8. Finally, the EDPS **recommends** that the draft decision clarify that the Commission should inform the alleged victim and witnesses about the processing of their personal data in the context of the informal procedure by means of a data protection notice that includes the information required under Articles 15 and 16 of the Regulation.

3.2. Reply to the consultation submitted under Article 41(2) of the Regulation regarding the draft internal rules concerning the restriction of certain data subjects’ rights

9. The EDPS welcomes the fact that the Commission has made partial use of the EDPS model of internal rules provided as Annex II to the EDPS Guidance on Article 25 of the Regulation 2018/1725 and internal rules restricting data subjects’ rights.⁴

Definition of special categories of personal data

10. Recital 7 of the draft internal rules prescribes that “the confidential counsellors collect and process several categories of personal data, including (...) special categories of personal data within the meaning of Articles 10(1) and 11 of Regulation (EU) 2018/1725. At the same time, Article 1(3) of the draft internal rules provides that “the categories of personal data covered by this Decision include (...) special categories of personal data within the meaning of Article 10(1) of Regulation (EU) 2018/1725.” The EDPS **deems necessary** that the Commission ensure consistency between the above Recital and the Article concerning the definition of special categories of personal data and clarify whether the above processing operation encompasses processing of personal data relating to criminal convictions and offences.⁵

³ Guidelines concerning the processing of personal data during the selection of confidential counsellors and the informal procedures for cases of harassment in European institutions and bodies, p.9, available at https://edps.europa.eu/sites/default/files/publication/11-02-18_harassment_guidelines_en.pdf.

⁴ EDPS Guidance on Article 25 of the Regulation 2018/1725 and internal rules restricting data subjects’ rights, available at : https://edps.europa.eu/sites/edp/files/publication/20-06-24_edps_guidance_on_article_25_of_the_new_regulation_and_internal_rules_en.pdf

⁵ Article 11 of the Regulation.

Provision of information to data subjects

11. The EDPS welcomes the fact that Article 3 of the draft internal rules safeguards the right to the provision of information to data subjects via the publication of a data protection notice that includes a section providing general information on the potential restriction of data subjects' rights. Nonetheless, the EDPS notes that once the circumstances justifying the restriction are no longer valid, the data subject has the right to know that a restriction was in place. Such information should be communicated to data subjects, irrespective of whether they have submitted a data subject request.⁶ Therefore, the EDPS **deems necessary** that data subjects (i.e. the alleged harassers) also receive a specific data protection notice individually, in writing and are informed of the restrictions of their rights, once the circumstances that justify the restriction are no longer valid.⁷ Such data protection notice could be communicated at a later stage (e.g. when the informal procedure has been finalised). It is still possible at this stage that certain rights will continue to be restricted, such as the documents containing the allegations of potential victims of harassment. This fact should be indicated in the data protection notice along with an indication of a period in which the rights will be fully restored, if possible.⁸
12. To this end, the EDPS also **deems necessary** that Article 4 of the draft internal rules be modified to clarify that the provision of information to data subjects is not limited in cases where data subjects have exercised their data subject rights. In that respect, the Commission should delete the following sentence included in Article 4(1) of the draft internal rules: "in its reply to the request for access, erasure or restriction of processing".
13. Furthermore, Article 4(2) of the draft internal rules mentions "the provision of information concerning the reasons for the restriction (...) may be deferred, omitted or denied for as long as this would cancel the effect of the restriction". The EDPS **recommends** that the draft internal rules further specify that an assessment of whether this would be justified take place on a case-by-case basis.⁹

Right of access

14. Article 4(4) of the draft internal rules mentions that "where the right of access is wholly or partly restricted, the data subject may exercise his or her right of access

⁶ Article 4 of the draft internal rules limits the provision of information to cases where the data subjects have filed a request for access, erasure or restriction of processing.

⁷ Article 6(2) of the Model internal rules, provided as Annex II to the EDPS Guidance on Article 25 of the Regulation 2018/1725 and internal rules restricting data subjects' rights.

⁸ EDPS Guidance on Article 25 of the Regulation 2018/1725 and internal rules restricting data subjects' rights, p.17

⁹ Article 6(3) of the Model internal rules, provided as Annex II to the EDPS Guidance on Article 25 of the Regulation 2018/1725 and internal rules restricting data subjects' rights.

through the intermediary of the European Data Protection Supervisor, in accordance with Article 25(6), (7) and (8) of Regulation (EU) 2018/1725”. Article 25(6) of the Regulation provides that data subjects shall be informed of the principal reasons on which the application of the restriction is based and of their right to lodge a complaint with the EDPS when a restriction is imposed. This provision is already reflected on Article 4(1) of the draft internal rules. Article 25(7) of the Regulation provides that if a restriction imposed is relied upon to deny access to the data subject, the EDPS shall, when investigating the complaint, only inform the data subject of whether the data have been processed correctly, and if not, whether any necessary corrections have been made. Finally, Article 25(8) provides that the provision of information referred to in Article 25(6) and (7) of the Regulation may be deferred, omitted or denied if it would cancel the effect of the restriction. In other words, Article 25(6), (7), and (8) of the Regulation concerns the right of information vis-a-vis the data subject, the right of the data subject to lodge a complaint with the EDPS, and what information the EDPS shall provide to the data subjects if a restriction imposed is relied upon to deny access to the data subject. The EDPS notes that Article 25(6), (7) and (8) of the Regulation does not establish the right for data subjects to exercise their right of access through the EDPS. Therefore, the EDPS **deems necessary** that the Commission delete Article 4(4) of the draft internal rules.

Communication of personal data breaches

15. Concerning the restriction of the communication of personal data breaches to data subject under Article 35(1) of the Regulation, the EDPS **deems necessary** that Article 5 of the draft internal rules also provide that the Commission register the assessment of the necessity and proportionality of the restriction, as well as the legal ground for it.¹⁰ Furthermore, the EDPS **deems necessary** that the draft internal rules clarify that the Commission communicate the personal data breach to the data subject concerned and inform him or her of the principal reasons for the restriction and of his or her right to lodge a complaint with the EDPS, where the reasons for the restriction no longer apply.¹¹

Recording and registering of restrictions

16. The EDPS welcomes the fact the Article 6 of the draft internal rules provide that the Commission shall record the reasons for any restrictions applied, including an assessment of the rights and freedoms of data subjects and the necessity and proportionality of the restriction. The EDPS **recommends** that the Commission add a provision in the draft internal rules to further stipulate that “Assessments of the risks to the rights and freedoms of data subjects of imposing restrictions and details of the period of application of those restrictions shall be registered in the record of

¹⁰ Article 7 of the Model internal rules, provided as Annex II to the EDPS Guidance on Article 25 of the Regulation 2018/1725 and internal rules restricting data subjects’ rights.

¹¹ Article 7 of the Model internal rules, provided as Annex II to the EDPS Guidance on Article 25 of the Regulation 2018/1725 and internal rules restricting data subjects’ rights.

processing activities maintained by the Commission under Article 31 of the Regulation.”¹² The EDPS notes that this additional provision would not concern the individual assessment concerning each restriction imposed, but it would establish an obligation to include the information mentioned above in the record of processing operations under Article 31 of the Regulation. Furthermore, the EDPS **recommends** that the draft internal rules also stipulate that the Commission shall prepare periodic reports on the application of Article 25 of the Regulation.¹³

Safeguards and storage periods

17. Article 8 of the draft internal rules details the safeguards and storage periods that should be implemented to prevent abuse and unlawful access to or transfer of personal data in respect of which restrictions apply or could be applied. In accordance with the current draft, the *Chief Confidential Counsellor and the confidential counsellors* shall implement such safeguards. Taking into consideration that the Commission is the controller of the processing operation at stake¹⁴, the EDPS **deems necessary** that the draft internal rules refer to the *Commission* as responsible for implementing such safeguards, instead of the *Chief Confidential Counsellor and the confidential counsellors*.

Involvement of the DPO

18. Concerning the involvement of the DPO in accordance with Article 44(1) of the Regulation, the EDPS highlights that such involvement is necessary *before* and *during* the restriction.¹⁵ The EDPS welcomes the fact that Article 9 of the draft internal rules provide for an ex-post review of the application of a restriction. However, the EDPS **deems necessary** that the draft internal rules clarify that the DPO provides his/her input before any decision to restrict data subjects’ rights is taken, e.g. when assessing the necessity and proportionality of the measure and to ensure consistency with precedents.

4. CONCLUSIONS

As indicated above, in order to ensure compliance of the processing with the Regulation, the EDPS **deems necessary** that the Commission:

¹² Article 3(1) of the Model internal rules, provided as Annex II to the EDPS Guidance on Article 25 of the Regulation 2018/1725 and internal rules restricting data subjects’ rights.

¹³ Article 2(4) of the Model internal rules, provided as Annex II to the EDPS Guidance on Article 25 of the Regulation 2018/1725 and internal rules restricting data subjects’ rights.

¹⁴ Article 1 of the draft internal rules.

¹⁵ Report on the remote audit of internal rules restricting data subjects’ rights under Article 25 of the Regulation, available at https://edps.europa.eu/system/files/2021-11/21-11-30_audit_report_art_25_en.pdf, p. 11

1. Ensure consistency between Recital 7 and Article 1(3) of the draft internal rules concerning the definition of special categories of personal data and clarify whether the processing operation at stake encompasses processing of personal data relating to criminal convictions and offences;
2. Clarify in its draft internal rules that data subjects (i.e. the alleged harassers) receive a specific data protection individually, in writing and are informed of the restrictions of their rights once the circumstances that justify the restriction are no longer valid;
3. Amend Article 4 of the draft internal rules to clarify that the provision of information to data subjects is not limited in cases where data subjects have exercised their data subject rights. In that respect, the Commission should delete the following sentence included in Article 4(1) of the draft internal rules: “in its reply to the request for access, erasure or restriction of processing”;
4. Delete Article 4(4) of the draft internal rules;
5. Amend Article 5 of the draft internal rules to add that the Commission is obliged to register the assessment of the necessity and proportionality of the restriction, as well as the legal ground for it;
6. Amend Article 5 of the draft internal rules to clarify that the Commission communicates the personal data breach to the data subject concerned and informs him or her of the principal reasons for the restriction and of his or her right to lodge a complaint with the EDPS, where the reasons for the restriction no longer apply;
7. Amend Article 8 of the draft internal rules to refer to the Commission, as controller, as responsible for implementing safeguards, instead of the Chief Confidential Counsellor and the confidential counsellors;
8. Amend Article 9 of the draft internal rules to clarify that the DPO provides his/her input before any decision to restrict data subjects’ rights is taken.

Moreover, the EDPS **recommends** that the Commission:

1. Amend Article 34 of the draft decision to mention that personal data obtained as part of the informal procedure, are processed in line with the respective record of processing operations, maintained in accordance with Article 31(1) of the Regulation;
2. Amend Article 34(2) of the draft decision to refer to the personal data contained in the opening form to clarify that such personal is kept for 5 years as a maximum starting from the moment such personal data were collected;
3. Amend Article 34 of the draft decision to clarify with which recipients or categories of recipients the Chief Confidential Counsellor may exchange personal data and what data is transmitted to each category of recipient;
4. Amend Article 34 of the draft decision to clarify that the Commission communicates a data protection notice that includes the information of Articles 15 and 16 of the

Regulation to the alleged victim and witnesses to inform them about the processing of their personal data in the context of the informal procedure;

5. Amend Article 4 of the draft internal rules to specify that an assessment of whether the provision of information concerning the reasons for the restrictions may be deferred, omitted, or denied, takes place on a case-by-case basis;
6. Add a provision to the draft internal rules to stipulate that “Assessments of the risks to the rights and freedoms of data subjects of imposing restrictions and details of the period of application of those restrictions shall be registered in the record of processing activities maintained by the Commission under Article 31 of the Regulation”;
7. Amend Article 6 of the draft internal rules to add that the Commission shall prepare periodic reports on the application of Article 25 of the Regulation.

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

Done at Brussels on 13 October 2023

[e-signed]

Wojciech Rafał WIEWIÓROWSKI