



EDPS's Opinion in reply to the consultation from the Commission DPO concerning recommendations on reconciling the legitimate interests of EU institutions' Trade Unions with the staff data protection rights (Case 2021-0127)

1. INTRODUCTION

On 2 February 2021, the Data Protection Officer (the 'DPO') of the European Commission consulted the EDPS under Article 57(1)(g) of Regulation (EU) 2018/1725 (the 'EUDPR')¹ on the recommendations he was considering to make to ensure that Commission staff are able to unsubscribe from unsolicited e-mails from representative trade unions and staff associations (the 'trade unions').

In his consultation, the DPO emphasised that the trade unions are usually established under national law and that they are also referred to specifically in the Staff Regulations². He provided a copy of the Framework Agreement on relations between the European Commission and the trade unions in force since 18 December 2008 (the 'Framework Agreement') and clarified that the code of good practice, mentioned in Article 24 of that Framework Agreement, has not been adopted to date.

The DPO also underlined that the trade unions send e-mails, both to their members and non-members and without any previous subscription, some of which could be considered as "*promotion... and an indirect way to gain more supporters/members*". In this respect, the DPO emphasised that, with the exception of one, the trade unions do not offer the possibility to unsubscribe from their mailing lists. The DPO expressed the view that Commission staff should be able to unsubscribe from all e-mails from the

¹ Regulation (EU) 2018/1725 of the European Parliament and of 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, OJ 2018 L 295, p. 39: <https://eurlex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1725>

² Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01962R0031-20210101>

trade unions and that the Commission should ensure that possibility, namely in a code of conduct.

The DPO asked for the EDPS guidance on this matter.

2. LEGAL ANALYSIS

2.1. The difference between staff committees and trade unions

Every EU institution ('EUI') has a staff committee that represents the interests of their staff³. Typically, staff committees engage in activities such as, for example, contributing to decisions on the working hours of certain groups of officials engaged in particular duties⁴ and/or appointing a member to the selection board examining prospective staff⁵. In this context, a staff committee processes personal data of the EUI's staff to represent, promote and defend the interests of the staff vis-à-vis that EUI⁶, in accordance with the rules set out in the EUDPR. The mandate of a staff committee is between one and three years and its members are elected in a secret ballot⁷.

More generally, staff of EUIs enjoy the right of association. They may be members of trade unions⁸. Trade unions are usually associations established under national law⁹, which process personal data in accordance with the rules set out in the GDPR¹⁰. They act in the general interest of the staff, without prejudice to the statutory powers of the staff committee. Commission proposals, for example, to revise the Staff Regulations, may be the subject of consultations by representative trade unions¹¹. Trade unions process personal data to register memberships, send their members newsletters and information, and, more generally, to easily communicate with their members¹². Each

³ Article 9(1) and (3) of the Staff Regulations.

⁴ Article 55(2) of the Staff Regulations.

⁵ Article 3 of Annex III to the Staff Regulations.

⁶ See, for example, Point 7 of the EDPS record of processing activity on EDPS Staff Committee activities:
https://edps.europa.eu/sites/default/files/publication/43_staff_committee_en.pdf

⁷ Article 1 of Annex II to the Staff Regulations.

⁸ Article 24b of the Staff Regulations. See also Article 26 of the Staff Regulations in this respect: "*An official's personal file shall contain no reference to his political, trade union, philosophical or religious activities and views, or to his racial or ethnic origin or sexual orientation. The preceding paragraph shall not however prohibit the insertion in the file of administrative acts and documents known to the official which are necessary for the application of these Staff Regulations.*"

⁹ See, for example, 'Union for Unity', an international non-profit association, established in Belgium:
<https://u4unity.eu/statutu4U.htm>

¹⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ 2016 L 119, p.1: <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

¹¹ Articles 10 and 10b of the Staff Regulations.

¹² See, for example, point 3 of the Privacy Policy of the European Civil Service Federation:
<https://www.ffpebxl.eu/?q=privacy-policy>

EUI may conclude agreements concerning its staff with its representative trade unions¹³.

2.2. The Framework Agreement and the Code of good practice

The Framework Agreement appears to be one such agreement. According to the copy provided by the DPO, the Framework Agreement governs the relations between the Commission and the trade unions¹⁴. It confirms that Commission officials may be members of a trade union, and so can their retired officials and other servants¹⁵. It underlines that the trade unions shall act in the general interest of the staff without prejudice to the powers conferred on the staff committees by the Staff Regulations¹⁶. It also emphasises that the trade unions shall be fully independent in their actions¹⁷.

Among the different Commission commitments set out in the Framework Agreement vis-à-vis the trade unions, one concerns the availability of Commission premises for the members of the trade union for activities directly involving Commission staff¹⁸. Another one concerns the Commission mail departments distributing trade union documents to staff offices in the Commission buildings¹⁹. It can be concluded, therefore, that the Commission is required to facilitate the work of the trade unions in its buildings. However, when trade unions reach out to the Commission staff by e-mail, the Framework Agreement clearly states that the Commission may authorise trade unions send e-mails from their functional mailbox to all Commission staff, subject to the good practice set out in a code drafted specifically for that purpose²⁰.

According to the DPO, the trade unions are sending such e-mails. I therefore assume that the Commission has given the necessary authorisation for the trade unions to use the Commission's directory with a view to reach out the entire staff²¹.

In this respect, however, I note that no code of good practice has been adopted to date to regulate the sending of e-mails by trade unions. Moreover, I understand that in most cases, recipient Commission staff is not given any real possibility of unsubscribing from the majority of the trade unions' mailing lists.

¹³ Article 10c of the Staff Regulations.

¹⁴ Article 1 of the Framework Agreement. The EDPS notes that the copy of the Framework Agreement provided is neither signed nor dated.

¹⁵ Article 2 of the Framework Agreement.

¹⁶ Article 3 of the Framework Agreement.

¹⁷ Article 5 of the Framework Agreement.

¹⁸ Article 22 of the Framework Agreement.

¹⁹ Article 25 of the Framework Agreement: "*Trade union documents shall be distributed to staff offices in the administrative buildings by the central and DG internal mail departments. Recognised organisations may use the internal mail service to distribute this mail to staff.*"

²⁰ Article 24 of the Framework Agreement: "*The Administration may authorise the representative organisations (and their member elements) to send e-mails from their functional inbox [sic] to all staff. A specific code of good practice shall apply to the sending of these e-mails.*" (emphasis added) ²¹ The EDPS did not receive any copies of the authorisation.

2.3. The trade unions' e-mails to the Commission staff

As the Framework Agreement does not offer sufficient detail on the purpose for which the trade unions may send e-mails to all Commission staff²¹ and in the absence of a code of good practice, my analysis will rely on the EUDPR/GDPR provisions.

It is my understanding that the trade unions use the Commission's internal staff directory as e-mailing list.

In this respect, I note that Article 38(1) of the EUDPR provides that personal data contained in directories of users and access to such directories shall be limited to what is strictly necessary for the specific purposes of the directory. Article 38(2) provides that EUIs shall take all necessary measures to prevent personal data contained in those directories from being used for direct marketing purposes regardless of whether they are accessible to the public or not.

My analysis will focus on the two categories of e-mails mentioned in the consultation: those (i) "*falling under the role of the trade unions (i.e. to defend the interest of the staff)*"; and those (ii) "*identified as promotion of the trade unions and an indirect way to gain more supporters/members.*"

(i) e-mails sent by the trade unions in the general interest of the staff²²

The Commission authorising trade unions to make use of the staff directory with a view to sending e-mails to defend the interest of the staff, can be considered as a transmission of personal data to recipients established in the Union other than Union institutions and bodies, for the performance of a task carried out in the public interest under Article 9(1)(a) of the EUDPR²³. Indeed, this use can be considered as an access "*limited to what is strictly necessary for the specific purpose of the directory*" (cf. Article 38(1) of the EUDPR).

In turn, trade unions, while sending emails to the Commission staff in the framework of their core business activities to defend the interests of the staff vis-à-vis the Commission, are performing a lawful task under Article 6(1)(e) of the GDPR²⁴. Recipients retain, nevertheless, the right to object to that processing on grounds relating to their personal situation at any time, under Article 21(1) of the GDPR²⁵. In order to properly inform recipients of that right, the trade unions should ideally include

²¹ The Framework Agreement refers only to: "*Article 24: Sending e-mails to staff - **The Administration may authorise the representative organisations (and their member elements) to send e-mails** from their functional inbox to all staff. A specific code of good practice shall apply to the sending of these e-mails.*" (emphasis added) Considering, however, that the Framework Agreement provides also that: "*Article 25: Distribution of trade union documents - **Trade union documents shall be distributed** to staff offices in the administrative buildings **by the central and DG internal mail departments.** Recognised organisations may use the internal mail service to distribute **this mail** to staff*" (emphasis added), I understand that the e-mails which the trade unions may be authorised to send are necessarily not limited to "*trade union documents*".

²² Article 10b of the Staff Regulations: "*The trade unions... shall act in the general interest of the staff, without prejudice to the statutory powers of the staff committees.*"

²³ "*1. [P]ersonal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if: (a) the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the recipient...*"

²⁴ "*Processing shall be lawful only if and to the extent that at least one of the following applies:... processing is necessary for the performance of a task carried out in the public interest...*"

²⁵ "*The data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e)... of Article 6(1), including profiling based on those provisions. The controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.*" ²⁷ See recital 47 of the GDPR.

a (link to a) data protection statement in each and every e-mail sent to the Commission staff, including an easy way to unsubscribe from the trade union's mailing list.

(ii) *e-mails identified as a promotion of the trade unions and an indirect way to gain more supporters/members*

These e-mails can be considered as sent by the trade unions for direct marketing purposes. Whilst the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest²⁷, trade unions are obliged to no longer process that data for that purpose should a data subject object, in accordance with Article 21(2) and (3) of the GDPR²⁶. As mentioned above, the data subjects should be clearly informed of this right and be provided with an easy way to unsubscribe.

I recall that the Commission has an obligation, under Article 38(2) of the EUDPR, to take all measures necessary to prevent personal data contained in the directory of staff from being used for those purposes²⁷. A specific code of conduct, regulating trade unions' sending of e-mails to all Commission staff in general and forbidding direct marketing in particular, could be one such measure and should have been therefore already adopted. In the circumstances where the Commission fails to abide by this obligation, namely by adopting such a code of conduct, individual staff members receiving marketing e-mails are left only with the possibility of objecting to the processing of their personal data, followed by a request that their data be erased if they so wish, under the GDPR²⁸, directly to the trade union.

3. CONCLUSION

The above demonstrates that the Commission does not seem to have taken "*all measures necessary*" to comply with Article 38(2) of the EUDPR.

Therefore, I agree with the DPO's envisaged recommendation that the Commission adopt the code of good practice mentioned in Article 24 of the Framework Agreement without further delay. In that code, the Commission should clearly set out notably that its authorisation does not cover direct marketing. The code should also provide that trade unions must offer a clear possibility to the recipient Commission staff to unsubscribe from trade union's mailing lists (whatever the type of e-mail) as well as an obligation on the trade unions to ensure that any request in that sense is dealt with without delay. Additionally, the code should remind the trade unions of their obligation to properly inform recipient Commission staff about their rights as data subjects, namely to object to processing of their personal data, by means of a transparent and easy to understand privacy statement, including means for unsubscribing easily in every e-mail.

Done at Brussels, 15 April 2021

²⁶ "Where personal data are processed for direct marketing purposes, the data subject shall have the right to object at any time to processing of personal data concerning him or her for such marketing, which includes profiling to the extent that it is related to such direct marketing. Where the data subject objects to processing for direct marketing purposes, the personal data shall no longer be processed for such purposes."

²⁷ Article 38 of the EUDPR: "1. Personal data contained in directories of users and access to such directories shall be limited to what is strictly necessary for the specific purposes of the directory. 2. Union institutions and bodies shall take all the necessary measures to prevent personal data contained in those directories from being used for direct marketing purposes regardless of whether they are accessible to the public or not."

²⁸ Article 21 of the GDPR. See also Article 17(1)(c).

[e-signed]

Wojciech Rafał WIEWIORÓWSKI