

From: ZERDICK Thomas
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: New Art. 18 RoP - DEADLINE: 11 June cob
Date: 10 June 2024 12:37:00
Attachments: image014.png
image015.png
image016.png
RoP MM revised June 2024.docx
RoP MM revised June 2024-track.docx
image001.png
image003.png
image004.png
image005.png
image007.png
Importance: High

Dear [REDACTED], Dear S&E colleagues,
Please find attached the revised text, as discussed last week. I attach a clean and track changed version, FYI.
As agreed, I have taken as a starting point the text of the MM as decided.
I have also taken into account the suggestions below (thanks!).
I have also provided reasons for all changes in the recitals.

Since this is becoming quite urgent now to resubmit to WW, and to subsequently publish in the OJ, could I please ask you to double-check the attached and send me essential comments, by tomorrow (11 June 2024) cob?
Many thanks!

 **Thomas ZERDICK**
Head of Unit "Supervision and Enforcement"
[REDACTED]
[REDACTED]
European Data Protection Supervisor
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From: [REDACTED]
Sent: Wednesday, June 5, 2024 11:03 AM
To: [REDACTED]
[REDACTED]
Cc: [REDACTED]
[REDACTED]
Subject: RE: New Art. 18 RoP

This redrafting is ok for me!

[REDACTED]

From: [REDACTED]
Sent: 04 June 2024 15:19
To: ZERDICK Thomas <thomas.zerdick@edps.europa.eu>; [REDACTED]
[REDACTED]
Cc: [REDACTED]
[REDACTED]
Subject: RE: New Art. 18 RoP

Dear Thomas, dear all,

First we would like to thank you for our exchanges yesterday, including on how to address the specificities of the Europol/EPPO/ Eurojust legal frameworks by adding a reference to Article 84 (3) of the EU DPR.

[REDACTED] and I have continued to think about it and we would like to share with you some suggested wording for Article 18 (4) of the RoP (see attached), for your consideration and double check that this would work.

Of course, any comments are welcome and we are happy to discuss it should you wish so.

Wishing you a nice afternoon

Best

From: [REDACTED]
Sent: 03 June 2024 13:55
To: [REDACTED]
[REDACTED] ZERDICK Thomas <thomas.zerdick@edps.europa.eu>
Cc: [REDACTED]
[REDACTED]
Subject: RE: New Art. 18 RoP

Dear all,

Please find attached a few comments of mine as well.

Looking forward to our discussion,

[REDACTED]

From: [REDACTED]
Sent: 31 May 2024 17:24
To: [REDACTED] ZERDICK Thomas
<thomas.zerdick@edps.europa.eu>
Cc: [REDACTED]
[REDACTED]
Subject: RE: New Art. 18 RoP

Dear all,

Attached are a few comments and suggestions from my side too.

Have a good weekend!

Best,

[REDACTED]

From: [REDACTED]
Sent: 30 May 2024 19:11
To: [REDACTED] ZERDICK Thomas <thomas.zerdick@edps.europa.eu>
Cc: [REDACTED]
[REDACTED]
[REDACTED]
Subject: RE: New Art. 18 RoP

Dear colleagues,

Many thanks, I've made some suggestions and comments in the enclosed document.

Best wishes,

[REDACTED]

From: [REDACTED]
Sent: 30 May 2024 16:29
To: ZERDICK Thomas <thomas.zerdick@edps.europa.eu>
Cc: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
Subject: RE: New Art. 18 RoP
Importance: High

Thanks Thomas,

As quite some time has passed it would be useful to dig out the past exchanges. Indeed there are quite a few changes in comparison with a text rather specifically approved at MM and now rediscussed almost 6 months later... I checked the version I revised in January 2024 (which I should have forwarded you – in any event it is



attached here) as well the documents as recorded in the minutes of the MM 2023-12-20

No intent to spark controversy, it is just difficult to recall both what was agreed and also the state of thinking, also because of some issues in the way the documents have been registered in CMS: see inter alia below on the question of Article 18(8) (former 18(6) of the draft RoP.

I suggest we call quickly a meeting where we finalise this at services level before seeking again validation at MM because I am afraid that the changes you suggest are too far-reaching in relation to a text already validated by WW – this applies in particular to:

the deletion from the scope of administrative fines,
the new approach followed in para (1) of Article 18 of the RoP and
the correct identification of the paragraph (6) of the same article and of recital (12) which according to the minutes should have been deleted

See my comments directly below in the body of your e-mail as well as in the attached version.

Will send an invite to keep the ball rolling and not lose momentum again on this.

[REDACTED]

From: ZERDICK Thomas <thomas.zerdick@edps.europa.eu>

Sent: 29 May 2024 23:01

To: [REDACTED]

Cc: [REDACTED]

[REDACTED]

[REDACTED]

Subject: New Art. 18 RoP

Dear [REDACTED]

dear fellow S&E colleagues,

As previously discussed, as regards the discussions on the review and the right to be heard, please find attached a revised draft decision (in clean and in track changes).

I have used as a starting point for the draft decision the text of the Annex as adopted in the MM of 20/12/2023 (Quote from the minutes: "The Supervisor approved the proposed change of the Rules of Procedure without the text parts in square brackets (i.e. without recital 12 and without paragraph 6 of the new Article 18). A [revised draft](#) as adopted is linked to these minutes.")

Here is what I have changed:

1. Following our discussions, I have [taken over the welcome suggestions](#) by [REDACTED], but with some modification/adaptations where necessary.

I am afraid too much time has passed now for me to remember all e-mail exchanges with said suggestions (which I have not saved) but I retrieved the last version I worked post-MM, in January this year, which essentially introduced the limitations to the disclosure of information in the preliminary assessment. That is where perhaps the discussion stopped?

2. I have [removed](#) the references to imposing [administrative fines](#), since the EUDPR itself contains already detailed rules for that, so no need to address them in here (at least for now).

I am not convinced by this deletion which would change the scope of the of a text approved already by WW and discussed at MM. I might have forgotten sthg of our previous discussions (I feel justified...). I see no reasons not to be comprehensive on this and include a [prel assessment for the fines](#): as long as we do not contradict anything in Article 66 EUDPR we are fully entitled to regroup all provisions on the administration of the right to be heard in one provision of our RoP. After all Article 66 does not require per se issuance of a preliminary assessment, so this explicit provision would not merely repeat the content of Article 66. If the issue is more fundamental, i.e. that there is no will to issue a preliminary assessment in case of imposition of fines, this should be (i) explicitly explained and (ii) re-discussed with WW at MM.

3. The main real issue was the extent of possible [limitations](#), [both to the preliminary assessment as well as to the access to the file](#), taking in particular account of some specifics from the ASFJ sector. These should now be [fully addressed](#) in Art. 18(4) and (7). (Please also note the far reaching limitations contained in Art. 84(3) EUDPR and Art. 43(2) Eurojust Reg.)

Ok in principle but as you will read in the comments of the attached revised text I believe we are clearly departing from the approach explicitly approved which was to distinguish the situation of the complainant to that of the controller.

The distinction can be made because disclosure of certain info to the complainant may more easily jeopardise other persons' rights or legitimate objectives in the public interest.

In case of complainants, the threat to such rights or interests may, when balanced against the right of defence, prevail over them, also taking into account the fact that the preliminary assessment is.... preliminary,

and we might change idea in the final decision, and we cannot afford to endanger such interests or right.

By way of contrast, I do not see immediately how we can limit the information provided to the controller in the preliminary assessment, i.e. limiting its rights of defence. Controllers normally have the information. Maybe out of prudence we want simply not to exclude that such situation may arise? I could understand this but given the higher risks in term of administering the right of defence I would be prudent.

4. I have tried to simplify as much as possible and to structure it more clearly, by steps of procedure (inspired by the latest GDPR Procedural Reg texts by EP, Council):

OK on the overall idea of restructuring rationally, this does not affect the substance of what already agreed.

- Art. 18 (1) scope, and preliminary assessment drafting obligation
See on this specific comments on the attached text. We need to discuss the approach to be followed: why did we depart from the exhaustive list of cases where a preliminary assessment is required to what seems a much more flexible but also ambiguous formulation?
- Art. 18 (2) preliminary assessment content
- Art. 18 (3) communication of the preliminary assessment
- Art. 18 (4) limitations to preliminary assessment (applicable to both institutions and complainants)
- Art. 18 (5) time-limit to reply
- Art. 18 (6) Access to file
- Art. 18 (7) limitations to access to file (applicable to both institutions and complainants)
- Art. 18 (8) Decision content and judicial review information.
The agreement in the minutes as also quoted by Thomas seems to have been to delete the reference to a judicial review in the RoP, as the reference contained in the minutes also quoted in Thomas' message shows.
I vaguely remember making this point because there is no real obligation for us to remind in the decision that a challenge under Article 263 of our decision is possible. This simply stems from recital (73) EUDPR which has no normative value and I have already advised that at most such a reminder should go in cover letters, and not in the main body of our decisions. This 'reminder' might be against our interests and has created problems in the past (the GC used it as a supporting argument to establish challengeability of simple finding of infringements by the EDPS in the SRB ruling).
It would seem that the document registered in CMS as 'revised draft' post-MM does not include the required changes and is identical to the one originally submitted to MM. See the documents in [redacted] 2023-12-20. Nevertheless, I can only interpret the reference in the minutes as the intention to get rid of that provision which would compel us to do what the EUDPR does not.
- *The recitals reflect all of the above.*

I hope with this we can now move swiftly forward toward publication of amended rules of procedure as regards Art. 18 (new)!

Many thanks for your input,

Thomas ZERDICK

Head of Unit "Supervision and Enforcement"

[redacted] [redacted] [redacted]

European Data Protection Supervisor

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DECISION OF THE EUROPEAN DATA PROTECTION SUPERVISOR (EDPS)

of XX June 2024

amending the Rules of Procedure of the EDPS of 15 May 2020

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to 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 data¹ (the ‘Regulation’), and in particular, Articles 54(4) and 57(1)(q) thereof,

Whereas:

- (1) The EDPS Rules of Procedure of 15 May 2020² adopted in accordance with Article 57(1)(q) of the Regulation provide in Article 18 for a review procedure in complaint cases limited to new factual evidence and legal arguments.
- (2) However, the application of the review procedure has presented practical and legal difficulties for EU institutions, offices bodies and agencies as well as for complainants. The review procedure should therefore be abolished.
- (3) Article 58(5) of the Regulation requires that the exercise of the powers conferred on the EDPS pursuant to that article should be subject to appropriate safeguards, including effective judicial remedies and due process, set out in Union law. In the same vein, Article 66(5) and (6) of the Regulation provide that before taking decisions imposing an administrative fine, the EDPS should give the Union institution or body which is the subject of the proceedings conducted by the EDPS the opportunity of being heard on the matters to which the EDPS has taken objection. In order to effectively safeguard the right to good administration and the rights of defence as enshrined in the Charter of Fundamental Rights of the European Union (‘the Charter’), including the right of every person to be heard before any individual measure which would affect him or her adversely is taken, it is therefore important to provide for clear rules in the EDPS Rules of Procedure on the exercise of these rights.
- (4) Controllers or processors should have the opportunity to express their views before a decision adversely affecting them is taken by the EDPS. Therefore, the EDPS Rules of Procedure should provide for the EDPS to draft a preliminary assessment and communicate it to the controller or processor which is the subject of the proceedings conducted by the EDPS before adopting a decision containing finding of an infringement of the Regulation or of any other Union act relating to the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data by a Union institution or body, or when exercising corrective powers pursuant to the Regulation, or imposing an administrative fine, or exercising powers

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 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, p. 39.

² Decision of the European Data Protection Supervisor of 15 May 2020 adopting the Rules of Procedure of the EDPS, OJ L 204, 26.6.2020, p. 49.

against the European Union Agency for Law Enforcement Cooperation (Europol), the European Union Agency for Criminal Justice Cooperation (Eurojust), or the European Public Prosecutor's Office (EPPO).

- (5) Controllers or processors should have the opportunity to express their views before a decision adversely affecting them is taken by the EDPS. Therefore, the EDPS Rules of Procedure should specify the situations in which the EDPS should draft a preliminary assessment and then communicate it to the controller or processor which is the subject of the proceedings conducted by the EDPS.
- (6) Likewise, complainants should have the opportunity to express their views before a decision adversely affecting them is taken by the EDPS. Therefore, the EDPS Rules of Procedure should specify the situations in which the EDPS should draft a preliminary assessment and then communicate it to the complainant.
- (7) The preliminary assessment constitutes an essential procedural safeguard which ensures that the right to be heard is observed. The EDPS Rules of Procedure should consequently lay down the elements to be contained in such a preliminary assessment. Given that these elements differ in cases where the EDPS intends to impose an administrative fine, the EDPS Rules of Procedure should also lay down the elements to be contained in a preliminary assessment in these cases.
- (8) A limitation of the information contained in the preliminary assessment may be necessary to protect interests referred to in Union or Member State law. These interests include the national security, public security or defence of the Member States; the prevention, investigation, detection and prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security; other important objectives of general public interest of the Union or of a Member State, in particular the objectives of the common foreign and security policy of the Union or an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters, public health and social security; the internal security of Union institutions and bodies, including of their electronic communications networks; the protection of judicial independence and judicial proceedings; the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions; a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority; the protection of the data subject or the rights and freedoms of others; the enforcement of civil law claims; avoidance of obstructing official or legal inquiries, investigations or procedures; avoidance of prejudicing the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. Other interests include legitimate interests of confidentiality or of professional and business secrecy. The EDPS Rules of Procedure should therefore include specific references to these interests and specify the information to the complaint.
- (9) After the communication of its preliminary assessment, the controller or processor and the complainant should be given the opportunity of submitting their observations. The EDPS should therefore lay down rules on when to give to the controller or processor, or the complainant, the opportunity of being heard, and within which time frame.
- (10) Access to the file forms part of the rights of defence and the right to good administration enshrined in the Charter. However, a limitation to access to the file of the EDPS may be necessary to protect interests referred to in Union or Member State law and should thus be reflected in the EDPS Rules of Procedure.

- (11) For maintaining a fair decision-making process, the EDPS Rule of Procedure should clarify that any EDPS decisions should only be based on findings and measures on which the controller or processor or the complainant have been able to comment, except in cases of application of limitations necessary for the protection of interests referred to in Union or Member State law.
- (12) In order to guarantee in a consistent manner that each legally binding measure of the EDPS refers to the right to an effective remedy, the EDPS Rule of Procedure should provide for the EDPS to inform, in the text of its decision, the controller or processor, and the complainant, of their right to challenge the decision before the Court of Justice of the European Union in accordance with Article 263 of the Treaty on the Functioning of the European Union,

HAS ADOPTED THIS DECISION:

Article 1

The Rules of Procedure of the EDPS of 15 May 2020 are amended as follows:

- (1) Article 18 is replaced by the following:

‘Article 18

Preliminary assessment and right to be heard

1. Before adopting a decision
 - (a) containing finding of an infringement of the Regulation or of any other Union act relating to the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data by a Union institution or body; or
 - (b) exercising corrective powers pursuant to Article 58(2) of the Regulation; or
 - (c) imposing an administrative fine pursuant to Articles 58(2)(i) and 66 of the Regulation, or pursuant to point (l) of Article 43(3) of Regulation (EU) 2016/794³; or
 - (d) exercising powers against the European Union Agency for Law Enforcement Cooperation (Europol) pursuant to points (b), (c), (d) (e), (f), (g), (j), and (k) of Article 43(3) of Regulation (EU) 2016/794; or
 - (e) exercising powers against the European Public Prosecutor’s Office (EPPO) pursuant to points (b), (d) and (e) of Article 85(3)(b) of Council Regulation (EU) 2017/1939⁴, or

³ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, p. 53–114.

⁴ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), OJ L 283, 31.10.2017, p. 1.

(f) exercising powers against the European Union Agency for Criminal Justice Cooperation (Eurojust) pursuant to points (b), (d) and (e) of Article 40(3) of Regulation (EU) 2018/1727⁵;

the EDPS shall draft a preliminary assessment and communicate it to the controller or processor which is the subject of the proceedings conducted by the EDPS ('the controller or processor').

2. Before adopting a decision in cases where the EDPS intends to partially or wholly dismiss a complaint lodged pursuant to

(a) Articles 63 and 68 of the Regulation; or

(b) Article 47 of Regulation (EU) 2016/794; or

(c) Article 88 of Council Regulation (EU) 2017/1939,

(d) Article 43 of Regulation (EU) 2018/1727; or

the EDPS shall draft a preliminary assessment and communicate it to the complainant.

3. The preliminary assessment shall contain:

(a) the relevant established facts and references to supporting evidence on which the EDPS intends to rely on to reach its decision;

(b) **the EDPS' initial legal assessment of the facts, and any alleged infringement of the applicable data protection rules; and**

(c) any corrective powers envisaged by the EDPS, having considered aggravating or mitigating factors.

4. By way of derogation from paragraph 3, in cases of application of Article 18(1)(c), the preliminary assessment shall only contain the relevant elements on which the EDPS intends to rely in deciding whether to impose an administrative fine and in deciding on the amount of the administrative fine, having regard to the elements listed in Article 66(1) of the Regulation.

5. The EDPS may restrict the information provided to the complainant in the preliminary assessment referred to in paragraphs 2 and 3, to protect any of the interests referred to in:

(a) Article 25(1) of the Regulation, or

(b) Articles 79(3), 81(1) or 84(2) of the Regulation, or

(c) Articles 58(3), 60(1) and 61(5) of Regulation (EU) 2017/1939, or

(d) any other legitimate interests of confidentiality or of professional and business secrecy.

In such cases, the EDPS shall inform the complainant at least about the part(s) of the complaint that it intends to dismiss, and of the justification for applying any of the restrictions referred to in the first subparagraph. In cases of restriction of information for interests referred to in points (b) and (c) of the first subparagraph, the EDPS may omit information regarding the justification for applying any of the restrictions where the provision thereof would undermine these interests. In such cases, the EDPS shall

⁵ Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, OJ L 295, 21.11.2018, p. 138.

inform the complainant in accordance with Article 84(3) of the Regulation and Article 62(3) of Regulation (EU) 2017/1939.

6. The EDPS shall give to the controller or processor and the complainant the opportunity of being heard on the finding of an infringement of the Regulation or of any other Union act relating to the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data by a Union institution or body, and/or the exercise of corrective powers, or the imposition of an administrative fine, or where the EDPS intends to partially or wholly dismiss a complaint, as the case may be. The EDPS shall set a time-limit within which the controller or processor and the complainant may make known their views in writing, taking into account the urgency of the matter.
7. The EDPS may limit access to the file where this is necessary to protect any of the interests referred to in paragraph 5 above.
8. The EDPS shall base his or her decisions only on findings and measures on which the controller or processor or the complainant have been able to comment, except in cases of application of paragraphs 5 and 7.
9. The EDPS shall, in the text of its decision, inform the controller or processor and the complainant of their right to challenge the decision before the Court of Justice of the European Union in accordance with Article 263 of the Treaty on the Functioning of the European Union.

Article 2

This Decision shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

Done at Brussels, XX June 2024.

For the EDPS

Wojciech Rafał WIEWIÓROWSKI
European Data Protection Supervisor

Annex

DECISION OF THE EUROPEAN DATA PROTECTION SUPERVISOR (EDPS)

of XX ~~December~~ June 20232024

amending the Rules of Procedure of the EDPS of 15 May 2020

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to 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 data¹ (the 'Regulation'), and in particular, Articles 54(4) and 57(1)(q) thereof,

Whereas:

- (1) The EDPS Rules of Procedure of 15 May 2020² adopted in accordance with Article 57(1)(q) of the Regulation provide in Article 18 for a review procedure in complaint cases limited to new factual evidence and legal arguments.
- (2) However, the application of the review procedure has presented practical and legal difficulties for EU institutions, offices bodies and agencies as well as for complainants. The review procedure and should therefore be ~~removed from the Rules of Procedure~~abolished.
- ~~(3)~~ Article 58(5) of the Regulation requires that the exercise of the powers conferred on the EDPS pursuant to that article should be subject to appropriate safeguards, including effective judicial remedies and due process, set out in Union law. In the same vein, Article 66(5) and (6) of the Regulation provide that before taking decisions imposing an administrative fine, the EDPS should give the Union institution or body which is the subject of the proceedings conducted by the EDPS the opportunity of being heard on the matters to which the EDPS has taken objection.
- ~~(4)~~(3) In order to effectively safeguard the right to good administration and the rights of defence as enshrined in the Charter of Fundamental Rights of the European Union ('the Charter'), including the right of every person to be heard before any individual measure which would affect him or her adversely is taken, it is therefore important to provide for clear rules in the EDPS Rules of Procedure on the exercise of ~~this~~ these rights.
- (4) Controllers or processors should have the opportunity to express their views before a decision adversely affecting them is taken by the EDPS. Therefore, the EDPS Rules of Procedure should provide for the EDPS should to draft communicate its preliminary assessment and communicate it to the controller or processor which is the subject of the proceedings conducted by the EDPS before adopting a decision containing finding of an infringement of the Regulation or of any other Union act relating to 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 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, p. 39.

² Decision of the European Data Protection Supervisor of 15 May 2020 adopting the Rules of Procedure of the EDPS, OJ L 204, 26.6.2020, p. 49–59.

protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data by a Union institution or body applicable data protection law for which the EDPS is competent, or when exercising corrective powers pursuant to Article 58 (2) of the Regulation, or imposing an administrative fine pursuant to Article 66 of the Regulation, or exercising powers against the European Union Agency for Law Enforcement Cooperation (Europol), the European Union Agency for Criminal Justice Cooperation (Eurojust), or exercising powers against the European Union Agency for Law Enforcement Cooperation (Europol), or exercising powers against the European Public Prosecutor's Office (EPPO).

- (5) Controllers or processors should have the opportunity to express their views before a decision adversely affecting them is taken by the EDPS. Therefore, the EDPS Rules of Procedure should specify the situations in which the EDPS should draft a preliminary assessment and then communicate it to the controller or processor which is the subject of the proceedings conducted by the EDPS.

- (5)(6) Likewise, complainants should have the opportunity to express their views before a decision adversely affecting them is taken by the EDPS. Therefore, the EDPS Rules of Procedure should specify the situations in which the EDPS should draft a preliminary assessment and then communicate it to the complainant in cases within the supervisory competence of the EDPS and where the EDPS intends to fully dismiss or partially reject a complaint.

- (7) The preliminary assessment sets out the initial position of the EDPS on alleged infringements of the applicable data protection rules and potential corrective measures. It thus constitutes an essential procedural safeguard which ensures that the right to be heard is observed. The EDPS Rules of Procedure should consequently lay down the elements to be contained in such a preliminary assessment. Given that these elements differ in cases where the EDPS intends to impose an administrative fine, the EDPS Rules of Procedure should also lay down the elements to be contained in a preliminary assessment in these cases.

- (8) A limitation of the information contained in the preliminary assessment may be necessary to protect interests referred to in Union or Member State law. These interests include the national security, public security or defence of the Member States; the prevention, investigation, detection and prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security; other important objectives of general public interest of the Union or of a Member State, in particular the objectives of the common foreign and security policy of the Union or an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters, public health and social security; the internal security of Union institutions and bodies, including of their electronic communications networks; the protection of judicial independence and judicial proceedings; the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions; a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority; the protection of the data subject or the rights and freedoms of others; the enforcement of civil law claims; avoidance of obstructing official or legal inquiries, investigations or procedures; avoidance of prejudicing the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. Other interests include legitimate interests of confidentiality or of professional and business secrecy. The EDPS Rules of Procedure should therefore include specific references to these interests and specify the information to the complaint.

~~(6) should consequently contain all the established facts and supporting evidence on which the EDPS intends to rely on to reach its final decision, the EDPS' initial legal assessment of the facts, and any alleged infringement of the applicable data protection rules, the corrective powers envisaged by the EDPS, and the relevant elements on which the EDPS intends to rely in deciding whether to impose an administrative fine and in deciding on the amount of the administrative fine, having regard to the elements listed in Article 66(1) of the Regulation.~~

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~~(7)(9) After the communication of its preliminary assessment, the controller or processor and the complainant should be given the opportunity of submitting their observations to the EDPS. The EDPS Rule of Procedure should therefore lay down rules on when to give to the controller or processor, and/or the complainant, the opportunity of being heard, and within which time frame, on the finding of an infringement of the Regulation or of any other applicable data protection law for which the EDPS is competent, and/or the exercise of corrective powers, or the imposition of an administrative fine, or where the EDPS intends to fully or partially reject a complaint, as the case may be. The EDPS should set a time limit within which the controller or processor and the complainant may make known their views in writing, taking into account the urgency of the matter. The EDPS should base his or her decisions only on findings and measures on which the controller or processor or the complainant have been able to comment.~~

~~(10) Access to the file is provided for as forms a part of the rights of defence and the right to good administration enshrined in the Charter. Access to the file of the EDPS should be provided to the controllers or processors and the complainant when the preliminary assessment is communicated to them. However, a limitation to access to the file of the EDPS may be necessary to protect interests referred to in Union or Member State law and should thus be reflected in the EDPS Rules of Procedure.~~

~~(8)(11) For maintaining a fair decision-making process, the EDPS Rule of Procedure should clarify that any EDPS decisions should only be based on findings and measures on which the controller or processor or the complainant have been able to comment, except in cases of application of limitations necessary for the protection of interests referred to in Union or Member State law.~~

~~(9) In order to guarantee in a consistent manner that each legally binding measure of the EDPS refers to the right to an effective remedy, When granting access to the file, the EDPS should ensure the protection of individual's personal data, of business secrets and other confidential information. The category of other confidential information includes information which may be considered as confidential insofar as its disclosure would significantly harm a controller, a processor or a natural person. As a consequence, it might be necessary for the EDPS to withhold certain information in order to avoid obstructing official or legal inquiries, investigations or procedures, or to avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties, or to protect the public security or national security of Member States or otherwise protect the rights and freedoms of others.~~

Commented [A1]: See recital 73 EUDPR

~~(12) The EDPS Rule of Procedure should provide for the EDPS to inform, in the text of its decision, the controller or processor, and the complainant, of their right to challenge the final decision before the Court of Justice of the European Union in accordance with Article 263 of the Treaty on the Functioning of the European Union.~~

~~(10) Reason? Legal obligation~~

HAS ADOPTED THIS DECISION:

Article 1

The Rules of Procedure of the EDPS of 15 May 2020 are amended as follows:

(1) Article 18 is replaced by the following:

'Article 18

Preliminary assessment and right to be heard

1. Before adopting a decision

- (a) containing finding of an infringement of the Regulation or of any other Union act relating to the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data by a Union institution or body~~applicable data protection law for which the EDPS is competent~~; or
- (b) exercising corrective powers pursuant to Article 58(2) of the Regulation; or
- (c) imposing an administrative fine pursuant to Articles 58(2)(i) and 66 of the Regulation, or pursuant to point (l) of Article 43(3) of Regulation (EU) 2016/794³; or
- ~~(d) exercising powers against the European Union Agency for Criminal Justice Cooperation (Eurojust) pursuant to points (b), (d) and (e) of Article 40(3) of Regulation (EU) 2018/1727⁷; or~~
- ~~(e)(d)~~ exercising powers against the European Union Agency for Law Enforcement Cooperation (Europol) pursuant to points (b), (c), (d) (e), (f), (g), (j), and (k); and (l) of Article 43(3) of Regulation (EU) 2016/794⁴; or
- (e) exercising powers against the European Public Prosecutor's Office (EPPO) pursuant to points (b), (d) and (e) of Article 85(3)(b) of Council Regulation (EU) 2017/1939⁶, or
- (f) exercising powers against the European Union Agency for Criminal Justice Cooperation (Eurojust) pursuant to points (b), (d) and (e) of Article 40(3) of Regulation (EU) 2018/1727⁷.

³ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, p. 53–114.

⁴ Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, OJ L 295, 21.11.2018, p. 138.

⁵ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, p. 53–114.

⁶ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, p. 1–74.

⁷ Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, OJ L 295, 21.11.2018, p. 138.

- the EDPS shall ~~draft communicate its~~ preliminary assessment ~~and communicate it~~ to the controller or processor which is the subject of the proceedings conducted by the EDPS (~~the controller or processor~~).
2. Before adopting a decision in cases ~~within the supervisory competence of the EDPS~~ ~~and~~ where the EDPS intends to ~~partially or wholly fully dismiss or partially reject~~ a complaint lodged pursuant to
 - (a) Articles 63 and 68 of the Regulation; or
 - ~~(b) Article 47 of Regulation (EU) 2016/794; or~~
 - ~~(c) Article 88 of Council Regulation (EU) 2017/1939,~~
 - ~~(b)(d)~~ Article 43 of Regulation (EU) 2018/1727; or
 - ~~(c)(a)~~ Article 47 of Regulation (EU) 2016/794; or
 - ~~(d) Article 88 of Council Regulation (EU) 2017/1939,~~
 the EDPS shall ~~draft a preliminary assessment and~~ communicate its ~~preliminary assessment~~ to the complainant.
 3. The preliminary assessment shall contain:
 - (a) ~~all the the relevant~~ established facts and ~~references to~~ supporting evidence on which the EDPS intends to rely on to reach its ~~final~~ decision;
 - (b) the EDPS' initial legal assessment of the facts, and any alleged infringement of the applicable data protection rules; and
 - (c) ~~the any~~ corrective powers envisaged by the EDPS, ~~having considered in light of~~ aggravating or mitigating factors, ~~and~~
 4. ~~By way of derogation from paragraph 3, in cases of application of Article 18(1)(c), the preliminary assessment shall only contain~~ the relevant elements on which the EDPS intends to rely in deciding whether to impose an administrative fine and in deciding on the amount of the administrative fine, having regard to the elements listed in Article 66(1) of the Regulation.
 5. ~~The EDPS may restrict the information provided to the complainant in the preliminary assessment referred to in p~~Paragraphs 2 and 3, to protect any of the interests referred to in:
 - ~~(a) Article 25(1) of the Regulation, or~~
 - ~~(b) Articles 79(3), 81(1) or 84(2) of the Regulation, or~~
 - ~~(c) (e) Articles 58(3), 60(1) and 61(5) Article 60 of Regulation (EU) 2017/1939, or; — Article 32 of Regulation (EU) 2018/1727, or~~
 - ~~(d) any other legitimate interests of confidentiality or of professional and business secrecy.~~

~~In such cases, the EDPS shall inform the complainant at least about the part(s) of the complaint that it intends to dismiss, and of the justification for applying any of the restrictions referred to in the first subparagraph. In cases of restriction of information for interests referred to in points (b) and (c) of the first subparagraph, the EDPS may omit information regarding the justification for applying any of the restrictions where the provision thereof would undermine these interests. In such cases, the EDPS shall inform the complainant in accordance with Article 84(3) of the Regulation and Article 62(3) of Regulation (EU) 2017/1939.~~

- ~~6. and of the justification for applying any of the restrictions referred to in the above provisions to the reasons provided for said rejection(s).~~ The EDPS shall give to the controller or processor and the complainant the opportunity of being heard on the finding of an infringement of the Regulation or of any other ~~Union act relating to the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data by a Union institution or body, applicable data protection law for which the EDPS is competent,~~ and/or the exercise of corrective powers, or the imposition of an administrative fine, or where the EDPS intends to ~~partially or wholly fully or partially reject/dismiss~~ a complaint, as the case may be. The EDPS shall set a time-limit within which the controller or processor and the complainant may make known their views in writing, taking into account the urgency of the matter. ~~The EDPS shall base his or her decisions only on findings and measures on which the controller or processor or the complainant have been able to comment.~~
7. The EDPS may limit access to the file where this is necessary to protect any of the interests referred to in paragraph 5 above.
8. ~~The EDPS shall base his or her decisions only on findings and measures on which the controller or processor or the complainant have been able to comment, except in cases of application of paragraphs 5 and 7.~~
- ~~6. the controller or processor and the complainant shall be entitled to have access to the file of the EDPS, subject to~~
- ~~7. the legitimate interest of individuals in the protection of their personal data; or~~
- ~~8. the legitimate interest of undertakings in the protection of their business secrets; or~~
- ~~9. the need to avoid obstructing official or legal inquiries, investigations or procedures;~~
- ~~10. the need to avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties; or~~
- ~~11. the need to protect the public security or national security of Member States; or~~
- ~~12.9. the need to otherwise protect the rights and freedoms of others. In the text of its final decision, t~~The EDPS shall, ~~in the text of its decision,~~ inform the controller or processor, and the complainant of their right to challenge the decision before the Court of Justice of the European Union in accordance with Article 263 of the Treaty on the Functioning of the European Union.

Article 2

This Decision shall enter into force ~~on the twentieth day 20 days~~ following its publication in the *Official Journal of the European Union*.

Done at Brussels, XX ~~December June 2023~~2024.

For the EDPS

Wojciech Rafał WIEWIÓROWSKI
European Data Protection Supervisor

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