

From: [ZERDICK Thomas](#)
To: [EDPS-CABINET](#)
Cc: [REDACTED]; [COLAPS Anna](#); [REDACTED]; [CERVERA NAVAS Leonardo](#); [EDPS-SECRETARY-GENERAL](#); [REDACTED]; [SUPERVISION](#); [REDACTED]
Subject: [S&E] note MM on the review of the review procedure/ revised text of the suggested revision of our Rules of procedure
Date: 14 June 2024 13:10:00
Attachments: [SE note MM on the review of the review procedure.msg](#)
[RoP_MM_revised_June_2024.docx](#)
[image001.png](#)
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[image005.png](#)
[image008.png](#)
[RoP_MM_revised_June_2024-track.pdf](#)

Dear [REDACTED]

Please find attached, for the attention of, and approval by the Supervisor, and for the next MM, the **revised text of the suggested revision of our Rules of procedure**.

We 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)." (see also the initial MM note and proposal attached).

The proposed changes:

1. abolish the review step;
2. introduce clear rules on preliminary assessments and the right to be heard,
3. while also allowing for necessary limitations, where necessary or where prescribed by law.

I also attach a track-changes version in pdf.

Once you give the green light to this version, it should be published asap in the OJ.

My thanks go again to [REDACTED] for his involvement and suggestions provided.

Kind regards,



Thomas ZERDICK
Head of Unit "Supervision and Enforcement"

[REDACTED]

[REDACTED]

European Data Protection Supervisor

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To: [EDPS-CABINET](#)
Cc: [EDPS-SECRETARY-GENERAL](#); [REDACTED]; [CERVERA NAVAS Leonardo](#); [REDACTED]
[REDACTED] [SUPERVISION](#)
Subject: [S&E] note MM on the review of the review procedure
Date: 18 December 2023 23:41:00
Attachments: [2023-12-18-ReviewReview-note to the SupervisorMM.docx](#)
[2013-12-18-Annex Review.docx](#)
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[image004.png](#)
[image005.png](#)

Dear [REDACTED]

Please find attached, for the attention of, and approval by the Supervisor, and for the next MM, a note on the review of the review procedure.

- This **note** explains the current situation of the review procedure in relation to complaints laid down in Article 18 EDPS Rules of Procedure, as well as the need and options for changes.
- It proposes to **revise the EDPS Rules of Procedure**, by abolishing the existing review procedure and by introducing a requirement for the EDPS to issue **preliminary assessments** before adopting a final decision in cases of finding of an infringement of the Regulation or of any other applicable data protection law for which the EDPS is competent, or exercising corrective powers, or imposing an administrative fine, or where the EDPS intends to fully dismiss or partially reject a complaint in cases within the supervisory competence of the EDPS. The proposed changes include the **right to be heard** of the persons concerned, and the right to have access to the file, while respecting confidentiality and other interests.
- The note comes with an **annex** with a draft proposal for a revision of the EDPS Rules of Procedure.

With my big thanks to the colleagues involved in the discussions.

Please note that it is still subject to further considerations by [REDACTED]

Many thanks in advance to [REDACTED] for further dissemination for this week's MM.

Many thanks for your consideration,



Thomas ZERDICK
Head of Unit "Supervision and Enforcement"

[REDACTED]

European Data Protection Supervisor

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Note to the attention of the Supervisor

From: Unit 'Supervision and Enforcement'
Contact person: Thomas Zerdick

For Approval

Brussels, 18 December 2023
CMS case number: 2023-1244

1. Revision of the review procedure in relation to complaints

This note explains the current situation of the review procedure in relation to complaints laid down in Article 18 EDPS Rules of Procedure, as well as the need and options for changes.¹

It proposes to revise the EDPS Rules of Procedure, by abolishing the existing review procedure and by introducing a requirement for the EDPS to issue preliminary assessments before adopting a final decision in cases of finding of an infringement of the Regulation or of any other applicable data protection law for which the EDPS is competent, or exercising corrective powers, or imposing an administrative fine, or where the EDPS intends to fully dismiss or partially reject a complaint in cases within the supervisory competence of the EDPS. The proposed changes include the right to be heard of the persons concerned, and the right to have access to the file, while respecting confidentiality and other interests.

2. The review procedure

2.1. The current situation

In accordance with Article 18 of the EDPS Rules of Procedure, both the complainant and the institution can request that the EDPS review a complaint decision within one month of its adoption. Such a request for review should be limited to 'new factual evidence and legal arguments' so far not known or taken into account by the EDPS. EDPS decisions on complaints (or cover letters/email with the EDPS decision) inform both parties of the possibility of requesting a review, and of the right to bring an action for annulment against the EDPS decision before the Court of Justice (CJEU).²

¹ This note is intended for its addressees only and may contain legal advice protected against disclosure under Article 4(2) second indent of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

² Article 18 - Review of complaints and judicial remedies

1. Where the EDPS issues a decision on a complaint, the complainant or institution concerned may request that the EDPS review its decision. Such a request shall be made within one month of the decision. The EDPS shall review its decision where the complainant or institution advances new factual evidence or legal arguments.
2. Upon issuing its decision on a complaint, the EDPS shall inform the complainant and the institution concerned that they have the right both to request a review of its decision and to challenge the decision before

2.2. Why are changes needed?

Article 18 in its current wording has presented several practical and legal problems in the EDPS' supervisory practice:

1. Overlap between the EDPS review and an action for annulment

The entity negatively affected by that decision (i.e. the EUI or the complainant) has the possibility to ask the EDPS for a review, within one month. However, depending on the complexity of the case, it is not always possible for the EDPS to assess the review request and, in case the review is admissible, finalise the review before the lapsing of the two month deadline for challenging the EDPS decision before the CJEU.

This can be problematic since in order to safeguard their rights, and without knowing the possible outcome of its request for review with the EDPS, the EUI or the complainant is then obliged to **launch the action before the CJEU in parallel**. This double work is not only an extra burden for the EUI or the complainant, but also puts the EDPS under considerable pressure first to assess the review request, and then finalise the review within a reasonable period.

By way of **example**:

- On 24 June 2020, the EDPS adopted his decision against the SRB in the SRB (*Deloitte*) case.³
- On 23 July 2020, the SRB requested a review of the Decision.
- On 24 July 2020, the EDPS asked the complainants to comment on the SRB's request for review of the Decision. The complainants submitted their comments on 25 and 27 July 2020, as well as on 25, 27 and 28 August 2020.
- By letter of 5 August 2020, following the assessment of the new substantial elements brought to his attention, the EDPS informed the complainants and the SRB, that he had decided to re-examine the Decision in the light of these elements, and that he would issue a revised decision that would replace the former.
- On 1 September 2020, however, the SRB lodged its application with the Court for annulment of the EDPS Decision.
- The EDPS requested additional information from the SRB on 18 September 2020. After having requested an extension of the deadline, the SRB replied to the EDPS on 2 October 2020.
- Since the SRB's reply did not cover the whole of the EDPS' request for information deemed necessary to finalise his revision, the EDPS sent an additional information request on 15 October 2020. The SRB replied to the EDPS additional request for information on 28 October 2020.

the Court of Justice of the European Union in accordance with Article 263 of the Treaty on the Functioning of the European Union.

3. Where following a request that it review its decision on a complaint, the EDPS issues a new, revised decision, the EDPS shall inform the complainant and the institution concerned that they may challenge this new 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.

³ In the Decision, the EDPS concluded that there had been a violation of Article 15 of the Regulation, since the SRB did not inform the complainants about the possibility of their personal data being transmitted to an external consultant, Deloitte. The EDPS consequently reprimanded the SRB for this violation under Article 58(2)(b) of the Regulation.

- On 24 November 2020, the EDPS adopted its Revised Decision, i.e. four months after the request for review.⁴

2. Lack of prior right to be heard:

In addition, when receiving the EDPS decision on a complaint, under traditional practice, this would be the first time that an EUI would be informed of any findings by the EDPS of a violation of the EUDPR or any other applicable rules, plus the exercise by the EDPS of any corrective powers.⁵ Also, the admissibility of an EDPS review depends on the fulfilment of certain criteria, since in accordance with Article 18 (1) EDPS Rules of Procedure the complainant or institution must advance new factual evidence or legal arguments. At the same time, it has not been uncommon in the recent review cases that the EDPS indeed was made aware of new factual evidence or new legal arguments which then led to a reconsideration of the EDPS position.

This can be problematic in view of Article 41 of the Charter, as interpreted by the CJEU: **Article 41 of the Charter, entitled ‘Right to good administration’, states, in paragraph 1,** that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the European Union. Furthermore, the second paragraph of that article provides that the right to good administration includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file, while respecting legitimate expectations as regards confidentiality and professional and business secrecy, and the obligation on the part of the administration to give reasons for its decisions. This means that the right to be heard guarantees every person the opportunity to make known their views effectively *during an administrative procedure and before the adoption* of any decision liable to affect their interests adversely.⁶ Moreover, the consideration of new factual evidence or new legal arguments (despite late introduction of facts at the stage of the review request) puts the EDPS under considerable pressure first to assess the review request, and then to finalise the review within a reasonable period.

By way of example:

- On 8 September 2022, the EDPS adopted its Decision in a complaint case against the European Union Agency for Law Enforcement Cooperation (Europol).⁷
- On 7 October 2022, the EDPS decision was subject of two requests for review, one by the complainant and one by Europol. Remarkably, Europol expressed that a “hearing of Europol *prior to issuing the decision* could have helped to alleviate the

⁴ In the Revised Decision, the EDPS upheld the finding of an infringement by the SRB of Article 15 of the Regulation, but no longer issued a reprimand.

⁵ Differently from the rules in EDPS (own-initiative based) investigations which prescribe the sending of a preliminary assessment. The preliminary assessment informs the parties of: 1) all the established facts and documents that the EDPS will rely on to reach its final decision; 2) the EDPS’ initial legal assessment of the facts, and any alleged infringements of the EUDPR; and 3) the corrective measures envisaged by the EDPS, in light of aggravating or mitigating factors. See “How the EDPS conducts investigations, Version: 2/2023”, https://edps.europa.eu/system/files/2023-02/2023-01-30-edps_investigation-public_policy_en.pdf

⁶ CJEU, judgment of 4 April 2019, OZ v EIB, C-558/17 P, ECLI:EU:C:2019:289, para. 53.

⁷ In the Decision, the EDPS found violations of the Europol Regulation, and ordered Europol, in accordance with Article 43(3)(c) of the Europol Regulation, to comply with the complainant’s request to exercise his right to access his personal data, by providing the complainant with the full set of information which he is entitled to receive under Article 36(2) of the Europol Regulation, and admonished Europol, in accordance with Article 43(3)(d) of the Europol Regulation.

handling” of the case, and pointed out that “in light of the remaining time for potential Court action by Europol”, EDPS feedback on the review request “at your earliest convenience” would be welcome.

- The belated introduction of facts by Europol at the stage of a review request, having been provided ample time and opportunity to transmit those elements to the EDPS during the course of its investigation, would not be sufficient to classify a request for a review as admissible. However, due to the legitimate interests of public order and public security at stake in this matter, and in light of information indicating that the same facts are currently pending before a Dutch court, the EDPS accepted to re-examine its Decision, without this decision in any way constituting a precedent.
- On 4 November 2022, the complainant transmitted to the EDPS, in the context of providing comments on Europol’s review request, an interim judgment from the Amsterdam District Court relating to an ongoing case before that court in which he stands as plaintiff.
- On 8 November 2022, the complainant brought an action against the EDPS before the CJEU.
- Having examined the interim judgment, and after having consulted the Dutch DPA, the EDPS determined that the scope of that case dealt partially with the same matter now under consideration by the EDPS as part of the review procedure. Further, the EDPS noted that the judgment was only an interim ruling and the case appeared to be pending a final decision from the court.
- On 30 January 2023, the EDPS decided to suspend as *sub iudice* its review of the EDPS Decision of 8 September 2022 in the light of the pending Dutch case, i.e. three months after the requests for review.

The EDPS AMP 2023 therefore solicited an assessment and review of the complaints review procedure, in the light of recent experience and court cases.

2.3. What are the options?

During 2023, several discussions with S&E unit members and the EDPS Legal Service Function were held in this respect.⁸ The possibility to request a review of the decision on complaints were assessed as to their operational utility both for the complainant and the EUI concerned (as well as for the EDPS). Also, the need for clearer procedures ensuring that the right to be heard of persons negatively affected by the EDPS decision to be ensured before the EDPS takes that final decision were discussed.

Two options have been identified during the discussions:

- **Option 1: abolish the existing review procedure**, and introduce a **requirement for the EDPS to issue preliminary assessments** before adopting a final decision in cases of **finding of an infringement** of the Regulation or of any other applicable data protection law for which the EDPS is competent, or **exercising corrective powers**, or **imposing an administrative fine**, or where the EDPS intends to **fully dismiss or partially reject a complaint** in cases within the supervisory competence of the EDPS.

⁸ Discussions of 11 September, 25 September and 13 October 2023.

- Option 2: keep the existing review procedure, but slightly modify it by adding an internal suspensory effect to a review: an EDPS decision on a complaint should not apply (alternative: take effect) before the expiry of the time limit of one month for a request of a review. Such a request for review shall suspend the application (alternative: effect) of the EDPS decision on a complaint. This suspension aims to avoid triggering the two-month deadline for challenging the EDPS decision in the CJEU.

2.4. Assessment of the options

Option 1 carries several potential advantages:

1. No overlap between the EDPS review and an action for annulment: with the abolishing of the existing review procedure, there would be no more overlap between the EDPS review and an action for annulment, since there would only be one final EDPS Decision, against which an action for annulment can be brought.
2. More clarity and granting the right to be heard: A preliminary assessment by the EDPS could provide more clarity and transparency in the decision-making process, whilst granting the right to be heard to the affected entity, and/or the complainant in line with the requirements of the Charter. This step would allow for thorough information of the affected entity of all the established facts and supporting evidence that the EDPS will rely on to reach its final decision, including the EDPS' initial legal assessment of the facts, any alleged infringements of the EUDPR and the corrective measures envisaged by the EDPS, in light of aggravating or mitigating factors. The affected entity/-ies and the complainant would then be able to make their views known to the EDPS prior to the EDPS final decision. This would also be in line with the position expressed by the EDPS and the EDPB.⁹
3. Opportunity for dialogue and correction: Preliminary assessments open a last channel for dialogue between the EDPS and the entity in question. This interaction can provide valuable feedback, including on new facts or new legal arguments, allowing EUIs to understand the nature of their compliance issues better and potentially rectify them before a final decision is made. This aspect is particularly beneficial in complex cases where the facts or the application of the law may not be straightforward.
4. Reduced resource burden in the long term: While initially, this approach might seem resource-intensive, over time, it could lead to more efficient use of resources. A clear, well-reasoned preliminary assessment – as already in place for EDPS investigations – could reduce the likelihood of lengthy review requests or legal challenges against the EDPS's decisions, ultimately saving time and resources for both the EDPS and the affected EUI and/or complainant.

However, this option likely also entails disadvantages:

- In order to implement this option, a revision of the EDPS Rules of Procedure is necessary.

⁹ EDPB-EDPS Joint Opinion 01/ 2023 on the Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679, adopted on 19 September 2023.

- The change could be (wrongly) perceived as reducing the rights of complainants, despite the specific introduction in the Rules of Procedure of their right to be heard.

Option 2 offers the following advantages:

1. **Legal stability:** By continuing to allowing a period for review requests and suspending the effect of a decision during this period, it ensures that entities have a reasonable opportunity to contest decisions they believe to be unjust or incorrect. This provision preserves the rights of the entities involved, allowing them to fully present their case and have it reconsidered, with only a minor change of the EDPS Rules of Procedure.
2. **Avoiding premature enforcement:** Moreover, it avoids the premature enforcement of decisions that might later be overturned, thus preventing unnecessary disruption or harm to the affected entities involved. This approach strikes a balance between effective enforcement and the rights of the entities to a fair review process, thereby enhancing the legitimacy and acceptance of EDPS's decisions.

However, this option likely also entails disadvantages:

- Adding an internal suspensory effect to the review process could complicate the legal landscape, making it more difficult for entities to understand and predict the consequences of non-compliance. This complexity could especially be challenging for smaller EUI with limited legal resources, or complainants. In addition, it is not entirely clear if the suspension would stop the two-month deadline for lodging an action for annulments.
- The introduction of a mandatory suspensory period could lead to delays in the enforcement of EDPS decisions. This delay might be particularly problematic in cases where immediate action is necessary to prevent ongoing or serious breaches of data protection laws. The suspension of the decision's effect could allow non-compliant practices to continue, potentially causing further harm or data breaches.
- Also, for individuals affected by a breach of data protection laws, this change could mean a longer wait for resolution and redress. The suspensory effect could create uncertainty and potentially diminish the sense of justice for those whose data protection rights have been violated, as they would have to wait an additional period before any remedial action is taken.
- The requirement for a review and the suspension of decisions place additional strain on the resources of the EDPS. Managing and reviewing both review requests as well as legal challenges to decisions would still require considerable time, effort, and possibly additional staffing, potentially diverting resources from other important functions of the unit.
- Knowing that any request for a review will automatically suspend the implementation of a decision, entities might be incentivized to file review requests as a delay tactic, even when the grounds for the review are weak or non-existent. This approach could lead to an increased number of frivolous or strategic challenges, undermining the efficiency of the review process. Also, the knowledge that decisions will not be immediately enforceable could reduce their deterrent effect. Entities might be less motivated to comply proactively with data protection regulations if they know that there will be a delay in the enforcement of any decision against them.

- The automatic suspension of decisions could be perceived as undermining the authority and credibility of the EDPS. If decisions are regularly suspended and subject to review, it might give the impression that EDPS's initial judgments are not final or reliable, potentially weakening respect for our role and decisions.

3. Suggested way forward

In light of the arguments above, it is suggested to prefer Option 1: transitioning to a system where the EDPS issues preliminary assessments before adopting a final decision in cases of finding of an infringement of the Regulation or of any other applicable data protection law for which the EDPS is competent, or exercising corrective powers, or imposing an administrative fine, or where the EDPS intends to fully dismiss or partially reject a complaint in cases within the supervisory competence of the EDPS clearly does away with the current overlap between the EDPS review and an action for annulment and grants the right to be heard in line with the requirements of the Charter.

In order to implement this option, a revision of the EDPS Rules of Procedure is necessary. A draft for such a Decision is annexed to this note.

Such a change in the EDPS Rules of Procedure should also be openly and publicly communicated to the EUI and future complainants.

The EDPS Legal Service Function was consulted in accordance with the note on the organisation of the Legal Service function signed 13 April 2022.

4. Request to the Supervisor

It is requested that the Supervisor a) approves the suggested way forward for the issues described above and b) adopts the Decision annexed to this note.

Thomas ZERDICK
Head of Unit 'Supervision and Enforcement'

Annex: Decision of the European Data Protection Supervisor (EDPS) of XX December 2023 amending the Rules of Procedure of the EDPS of 15 May 2020

Annex

DECISION OF THE EUROPEAN DATA PROTECTION SUPERVISOR (EDPS)

of XX December 2023

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 and should therefore be removed from the Rules of Procedure.
- (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) 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 important to provide for clear rules in the EDPS Rules of Procedure on the exercise of this right.
- (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 should communicate its preliminary assessment 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 applicable data protection law for which the EDPS is competent, or 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

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.

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).

- (6) Likewise, complainants should have the opportunity to express their views before a decision adversely affecting them is taken. Therefore, the EDPS should communicate its preliminary assessment 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.
- (8) The preliminary assessment 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.**
- (9) After the communication of its preliminary assessment, the EDPS should 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 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 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.
- (11) 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.
- (12) [In any case, the right of access to the file of the EDPS should not extend to confidential information and internal documents of the EDPS, or of other supervisory authorities, and in particular not extend to correspondence between the EDPS and those supervisory authorities.]

- (13) The EDPS should inform 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.

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 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 Article 66 of the Regulation; 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) 2018/1727³; or
- (e) exercising powers against the European Union Agency for Law Enforcement Cooperation (Europol) pursuant to points (b), (c), (d) (e), (f), (g), (j), (k), and (l) of Article 43 (3) of Regulation (EU) 2016/794⁴; or
- (f) 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) 2017/1939⁵,

the EDPS shall communicate its preliminary assessment 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 fully dismiss or partially reject a complaint lodged pursuant to

- (a) Articles 63 and 68 of the Regulation; or
- (b) Article 43 of Regulation (EU) 2018/1727; or

³ 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.

⁴ 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.

⁵ 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. 1–71.

- (c) Article 47 of Regulation (EU) 2016/794; or
 - (d) Article 88 of Council Regulation (EU) 2017/1939,
- the EDPS shall communicate its preliminary assessment to the complainant.
3. The preliminary assessment shall contain:
 - (a) all the established facts and 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 corrective powers envisaged by the EDPS, in light of aggravating or mitigating factors, and
 - (d) 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.
 4. 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 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 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.
 5. The controller or processor and the complainant shall be entitled to have access to the file of the EDPS, subject to
 - (a) the legitimate interest of individuals in the protection of their personal data, or
 - (b) the legitimate interest of undertakings in the protection of their business secrets, or
 - (c) the need to avoid obstructing official or legal inquiries, investigations or procedures;
 - (d) the need to avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties; or
 - (e) the need to protect the public security or national security of Member States; or
 - (f) the need to otherwise protect the rights and freedoms of others.
 6. [The right of access to the file of the EDPS shall not extend to confidential information and internal documents of the EDPS, or of other supervisory authorities. In particular, the right of access shall not extend to correspondence between the EDPS and those supervisory authorities. Nothing in this article shall prevent the EDPS from disclosing and using information necessary to prove an infringement.]
 7. In the text of its final decision, the EDPS shall 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 20 days following its publication in the *Official Journal of the European Union*.

Done at Brussels, XX December 2023.

For the EDPS

Wojciech Rafał WIEWIÓROWSKI
European Data Protection Supervisor

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; orthe 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

DECISION OF THE EUROPEAN DATA PROTECTION SUPERVISOR (EDPS)

of XX ~~December~~ June 2023~~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 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 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

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 communicate its 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.~~
- (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^[12], 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.~~
- (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.~~
- ~~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) 2018/1727⁴; 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) 2016/794⁵; 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. 1–71.

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~~

~~(c) 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 pParagraphs 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. he 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