

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

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European Data Protection Supervisor