



EUROPEAN DATA PROTECTION SUPERVISOR

Opinion 10/2017

EDPS Opinion on safeguards and derogations under Article 89 GDPR in the context of a proposal for a Regulation on integrated farm statistics



20 November 2017

The European Data Protection Supervisor (EDPS) is an independent institution of the EU, responsible under Article 41(2) of Regulation 45/2001 'With respect to the processing of personal data... for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to privacy, are respected by the Community institutions and bodies', and '...for advising Community institutions and bodies and data subjects on all matters concerning the processing of personal data'. Under Article 28(2) of Regulation 45/2001, the Commission is required, 'when adopting a legislative Proposal relating to the protection of individuals' rights and freedoms with regard to the processing of personal data...', to consult the EDPS.

He was appointed in December 2014 together with the Assistant Supervisor with the specific remit of being constructive and proactive. The EDPS published in March 2015 a five-year strategy setting out how he intends to implement this remit, and to be accountable for doing so.

This Opinion responds to a formal consultation by the European Council pursuant to Articles 41(2)(2) and 46(d) of Regulation 45/2001 and provides comments and recommendations on how to better safeguard the right to privacy and the protection of personal data in the proposed Regulation on integrated farm statistics.

Executive Summary

The draft Regulation on integrated farm statistics, as proposed by the European Commission, after consultation of the European Data Protection Supervisor, raises few data protection issues in and of itself. However, the amendments proposed in the context of discussions in the Council raise new issues not initially present in the Commission proposal. Notably, if these amendments were to be included in the final text, **the draft Regulation would become the first EU legislative instrument that would provide for a derogation from the rights of access, rectification, as well as from the right of restriction and the right to object for the processing of personal data for statistical purposes pursuant to Article 89 of the General Data Protection Regulation.** The EDPS therefore welcomes that the Council consulted him on this new development, thus providing the opportunity to the EDPS to issue an Opinion at this stage of the procedure.

This Opinion focuses on the necessity test for derogations under Article 89 of the GDPR read in the light of the Charter. The EDPS emphasises, in particular, that the **rights of access and rectification are set out in Article 8(2) of the Charter itself, and are considered as essential components of the right to the protection of personal data.** Any derogation to these rights must not go beyond what is strictly necessary to achieve its objective and must meet the high standards required by Article 52(1) of the Charter of Fundamental Rights of the European Union and Article 89 of the GDPR.

In addition to highlighting the need for a thorough assessment of necessity, the Opinion also points out to **the need to minimise the scope of any restrictions**, and discusses the nature of the safeguards required. The Opinion also discusses Article 11 of the GDPR, which may potentially help address some of the concerns of national statistical institutes raised by the Council, without the need for any derogations under Article 89 of the GDPR. In particular, in accordance with Article 11, in cases **where a controller is able to demonstrate that it is not in a position to identify the data subject, the rights of the data subjects under Articles 15 to 20 would not apply.**

In light of the foregoing, the **EDPS recommends that the Council re-assess the necessity for the proposed derogations in the light of the standard established under Article 89 of the GDPR read in the light of the Charter.** Unless the EU legislator can provide further justifications for the need for such derogations, and tailor the scope of the provisions more narrowly, the **EDPS recommends instead considering to what extent Article 11 of the GDPR may help address legitimate concerns of national statistical institutes.** It may be relevant at stages of the data processing when the keys connecting the individuals to the datasets about them have already been deleted, and other technical and organisational measures have been taken to ensure that the individuals can no longer be re-identified by the statistical institutes or by any other party.

The EDPS emphasises, however, that for the initial period often necessary for the preparation of statistics during which the individuals must remain directly or indirectly identifiable, the general rules set forth in the GDPR continue to apply. **The fact that putting in place technical and organisational measures to provide access and other rights to individuals may require financial and human resources is by itself not a valid justification to derogate from the rights of individuals under the GDPR.** This is true for all data subject rights under the GDPR, and especially crucial for rights of access and rectifications explicitly required

under the Charter, which constitute essential components of the fundamental right to the protection of personal data.

TABLE OF CONTENTS

I. Contents

1. INTRODUCTION AND BACKGROUND.....	6
2. MEETING THE NECESSITY TEST FOR DEROGATIONS.....	7
2.1. STANDARDS FOR DEROGATIONS UNDER THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION.....	7
2.2. DEROGATIONS RELATING TO PROCESSING FOR STATISTICAL PURPOSES UNDER ARTICLE 89 OF THE GDPR.....	7
2.3. ASSESSMENT OF THE JUSTIFICATIONS FOR THE NECESSITY OF THE DEROGATIONS PROPOSED BY THE COUNCIL	8
3. RECOMMENDATIONS ON PROVISIONS ON SAFEGUARDS IN THE PROPOSED AMENDMENTS.....	12
3.1. SAFEGUARDS RELATING TO PROCESSING FOR STATISTICAL PURPOSES UNDER ARTICLE 89 OF THE GDPR.....	12
3.2. EDPS RECOMMENDATIONS ON THE SAFEGUARDS PROPOSED.....	13
4. CONCLUSIONS	14

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Articles 7 and 8 thereof,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹, and to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)²,

Having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data³, and in particular Articles 41(2) and 46(d) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. INTRODUCTION AND BACKGROUND

On 9 December 2016, the European Commission (‘Commission’) adopted a Proposal for a Regulation of the European Parliament and of the Council on integrated farm statistics and repealing Regulations (EC) No 1166/2008 and (EU) No 1337/2011 (‘Proposal’)⁴. The aim of the Proposal is to create a more coherent, flexible, and inter-linked system of farm statistics, and provide the legislative framework for a programme of farm surveys starting with an agricultural census to run in 2020.

The draft Regulation itself, as proposed by the Commission, after consultation of the European Data Protection Supervisor (‘EDPS’), raised only few data protection issues, and these have been appropriately dealt with in the Proposal. Indeed, the EDPS welcomes that he has been consulted by the Commission prior to the adoption of the Proposal and that his informal comments have been taken into account. In particular, he supports the references, in recital 16, to the applicable data protection legislation, Directive 95/46/EC and its national implementing provisions, as well as Regulation 45/2001, as the case may be. He also welcomes the reference, in recital 26, to the fact that the EDPS has been consulted. As the Proposal, as published on 9 December 2016, raised no significant outstanding data protection concerns, the EDPS decided at that stage not to issue a formal Opinion.

However, some of the amendments discussed in the context of negotiations in the Council of the European Union (‘Council’) during the legislative process raise new issues not initially present in the Commission Proposal. If these amendments were to be included in the final text, the draft Regulation would become the first EU instrument that would explicitly provide a derogation from the rights of access and rectification, as well as from the right of restriction and the right to object pursuant to Article 89 of the General Data Protection Regulation (‘GDPR’).

This significant new element justifies an Opinion of the EDPS at this stage of the procedure. The EDPS therefore welcomes that the Council decided to consult him on this new development and - on 26 September 2017 - specifically requested the EDPS to look into these amendments proposed in the context of the negotiations in the Council.⁵

The purpose of this Opinion is to provide specific recommendations on the draft Regulation focusing on the relevant draft amendments under discussion in the Council. The focus of this Opinion, under Section 2, is to discuss and help assess whether or not the proposed derogations meet the necessity test for derogations for statistical purposes under Article 89 of the GDPR and under Article 52(1) of the Charter of Fundamental Rights of the European Union ('Charter'). Additionally, in Section 3, the EDPS provides recommendations regarding the proposed provisions on the safeguards.

2. MEETING THE NECESSITY TEST FOR DEROGATIONS

2.1. Standards for derogations under the Charter of Fundamental Rights of the European Union

The EDPS, first, emphasises that any derogations from the right to the protection of personal data must not go beyond what is strictly necessary to achieve their objectives and must meet the high standards required by Article 52(1) of the Charter. This Article provides that *'any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'* (emphasis added).

The EDPS also points out that the rights of access and rectification are set out in Article 8(2) of the Charter itself, and are generally considered as essential components of the right to the protection of personal data. Article 8(2) of the Charter specifically sets out that *'everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified'*. The right of access is of particular importance as it enables the data subjects to exercise the other rights provided for by data protection legislation⁶. Therefore, any derogation from these essential data subject rights must be subject to a particularly high level of scrutiny.

2.2. Derogations relating to processing for statistical purposes under Article 89 of the GDPR

Article 89(2) of the GDPR outlines the - more specific - conditions under which Union or Member State law may derogate from certain provisions of the GDPR.

First, Article 89(2) limits the possibility to provide for derogations to four specific Articles in the GDPR:

- Article 15 on the right of access by the data subject;
- Article 16 on the right to rectification;
- Article 18 on the right to restriction of the processing; and
- Article 21 on the right to object.

Second, Article 89(2) makes any derogations only possible if the conditions and safeguards which we will describe below in Section 3 are in place.

Third, Article 89(2) allows any derogations only *'in so far as'* the rights to be derogated from are *'likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes'* (emphasis added). This sets a high bar, in line with Article 52(1) of the Charter, discussed above in Section 2.1.

2.3. Assessment of the justifications for the necessity of the derogations proposed by the Council

In the new Article 12a, the Council proposes a broad derogation to the fullest extent potentially possible under Article 89 of the GDPR. In particular, the proposed Article 12a provides that

'where personal data are processed by national statistical institutes and/or other national authorities in the public interest for the statistical purposes falling within the scope of [the Farm Statistics Regulation] and are kept in a form which permits identification of data subjects for no longer than is necessary for the sole purpose of creating Union statistics, the rights referred to in Articles 15, 16, 18 and 21 of [the GDPR] shall not apply in accordance with Article 89(2) of [the GDPR].' (emphasis added).

In order to justify the need for the derogations, the Council, in a new recital 16a proposes the following arguments:

- *'application of certain rights set out [in the GDPR] would render the production of Union statistics impossible or would seriously impair the production of such statistics in line with applicable statistical principles'* (emphasis added);
- these principles include, in relevant part, the principles of *'objectivity, reliability, cost-effectiveness and statistical quality, including timeliness'* (emphasis added);
- *'granting an access to personal data in all circumstances would be technically extremely difficult given that personal data relating to a particular data subject are dissociated from the identification of the data subject'* (emphasis added);
- *'re-linking of data to a particular national identification number would in most cases require a linking of a large number of statistical files into which those data have been previously dissociated'*; it would also require *'keeping track of the original format in which data records have been received'* (emphasis added);
- *'the exercise of [the right to object and right of restriction], especially when exercised by a large number of subjects, would defeat the purpose of the production of Union statistics, more particularly as regards their representativeness and reliability'* (emphasis added).

Each of these arguments will be discussed below.

Cost-effectiveness

Providing rights of access, rectification, restriction and objection to the individuals concerned undeniably requires a number of technical and organisational measures to be put in place by the controller. Some of these measures may take significant investment of human and financial resources. This is, however, not unique to statistical organisations.

The fact that putting in place technical and organisational measures to provide access and other rights to individuals may require financial and human resources in and of itself is not a valid justification for derogating from the rights of individuals under Article 89 of the GDPR. Indeed, Article 89 allows derogations only in so far as the data subject's rights would be likely to *'render impossible or seriously impair the achievement of the [statistical] purposes'*.

Upholding this high standard is especially crucial for rights of access and rectifications explicitly provided under the Charter, which constitute essential components of the fundamental right of the protection of personal data.

Technical difficulties in re-linking statistical files and keeping track of original format

In order to assess the validity of this argument, it is useful to distinguish between two different phases of statistical data processing:

- the initial phase while re-linking the data is still possible, and indeed, desired in order to enrich statistical data by linking various datasets;
- a later phase when statistical data has been prepared, and the keys allowing linking the various datasets can be destroyed.

Re-linking files during the initial phase

As a first step when creating statistics under the proposed Regulation of Farm Statistics, the respondents (e.g. individual farmers) typically complete a detailed set of survey questions. These survey questions cover items such as geographical location of a farm, details of the owner and manager of the farm, size of the area used for growing wheat, potatoes, grapes or other types of agricultural products, area used for organic farming, number of dairy cows and chickens and the like, set forth in annexes 1 to 5 of the draft Regulation. Other data sources, such as administrative data sources may also be used to complement the data (see Article 4(2)-(4) of the draft Regulation).

While preparing official statistics, and in order to ensure statistical confidentiality, statistical institutions, as the proposed recital 16a suggests, ‘*dissociate*’ the input data gathered from surveys and other sources. In other words, they pseudonymise the input data and also ensure that other technical and organisational measures are in place to minimise the risk that the individuals can be re-identified. This process usually includes key-coding the data and ensuring that the keys, that is, information to link the datasets to the individuals whom they relate to, are kept separately.

Once no longer necessary, the keys will be destroyed. For a time, however, typically while the statistical institutes are still in the process of enriching the survey data with data from other sources, the keys are instrumental in relinking the survey data to additional datasets that are necessary for the production of official statistics. During this time, ‘*re-linking the data*’ routinely occurs. Indeed, the very reason why the keys are not destroyed is often to enable this possibility. If re-linking the data can routinely occur to combine and enrich datasets, it should also be possible to put in place technical and organisational measures to ensure that the same ‘*dissociated*’ data can also be re-linked on a case by case basis when an individual submits a request for access, rectification, restriction or objection. While the EDPS acknowledges that this requires effort and an innovative mind-set, he considers that in accordance with the principle of data protection by design (now a legal requirement under Article 25 of the GDPR), organisations that invest a lot of effort into finding innovative ways to make use of personal data should use the same innovative mind-set when designing new, innovative ways to provide information, access and control to individuals⁷.

For this phase of data processing, the fact that putting in place technical and organisational measures to provide access and other rights to individuals may raise ‘*technical difficulties*’ in and of itself does not provide an adequate justification for derogating from the rights of individuals under Article 89 of the GDPR.

Re-linking files after the keys allowing re-linking are destroyed

Once re-linking of the files is no longer necessary for achieving the statistical purposes sought, the keys are typically destroyed (additional measures may often also need to be taken to ensure statistical confidentiality but eliminating possibilities to directly linking individuals to the datasets using the keys is typically a minimum requirement at the earliest possible time).

In some cases, the original input data can and should be destroyed, and only the final, aggregated statistical data is kept. If appropriate anonymisation techniques have been applied and these ensure that the aggregated statistical datasets no longer contain any personal data, the issue of derogation does not arise as the GDPR will no longer be applicable to these fully aggregated and anonymised datasets.

In some other cases, however, some raw data (including, possibly, entire datasets stripped of direct identifiers such as names and addresses but not meeting the high standards required for anonymisation) might need to be kept for statistical purposes for longer periods of time even after the keys are destroyed. Whether or not retaining any data is appropriate and compliant with the principle of data minimisation needs to be assessed case-by-case and is beyond the scope of this Opinion. However, for the cases where any such data would be retained, the EDPS acknowledges the technical difficulties of re-linking the files.

The EDPS considers, however, that Article 11 GDPR might be relevant in this situation.

Article 11 of the GDPR

Article 11(1) of the GDPR provides that *'if the purposes for which a controller processes personal data do not or do no longer require the identification of a data subject by the controller, the controller shall not be obliged to maintain, acquire or process additional information in order to identify the data subject for the sole purpose of complying with [the GDPR].'*

Article 11(2) further sets out that where, in the above cases *'the controller is able to demonstrate that it is not in a position to identify the data subject, the controller shall inform the data subject accordingly, if possible. In such cases, Articles 15 to 20 shall not apply except where the data subject, for the purpose of exercising his or her rights under those articles, provides additional information enabling his or her identification'*.

These provisions may potentially help address some of the concerns of national statistical institutes raised during the discussions in the Council, without the need for any derogations under Article 89 of the GDPR. In particular, under Article 11, in cases where a controller is able to demonstrate that it is not in a position to identify the data subject (such as when the keys are destroyed and other technical and organisational measures are taken to ensure that the individuals cannot be identified, see above), the rights of the data subjects under Articles 15 to 20 shall not apply. Consequently, there appears to be no need for specific derogations for such cases to be provided pursuant to Article 89.

Right to restriction of the processing and right to object

The draft recital 16a also suggests that the exercise of the right to restriction of the processing and the right to object under Articles 18 and 21 of the GDPR, especially when exercised by a large number of subjects, could jeopardise the representativeness and reliability of Union statistics.

As a preliminary remark, the EDPS would like to point out that, far from hindering the reliability of Union statistics, the exercise of the rights of access and rectification is, on the contrary, likely to contribute to their reliability, since the individuals may become aware of any inaccuracies in their data and would be able to rectify these.

As far as the rights to restriction and objection are concerned, the EDPS recognizes that in specific circumstances, if a large number of individuals object to all or part of a statistical data collection, this may have a negative effect on the representativeness and reliability of statistics. This argument is sometimes raised in the scientific research context as well (for example, with regard to statistics on rare diseases, where even a few individuals withdrawing their consent or objecting to a processing may have a significant effect and possibly ‘*seriously impair*’ the outcome of long-term research studies). However, this is by no means true in all cases. Indeed, there are many other cases of statistical data collection, where answer to survey questions is entirely optional, withdrawal of consent is available and the statistical institutes are nevertheless able to design their collection in such a way that reliability and representativeness could be ensured despite any bias caused by ‘*self-selection*’ of the respondents.

Indeed, Article 5(2) of the draft Regulation provides that ‘*the core data collection for the survey reference years 2023 and 2026 may be carried out as sample surveys. In that case, Member States shall ensure that the weighted survey results are statistically representative of agricultural holdings within each region*’. This suggests that also in the context of the data collection under the draft Regulation, data collection can be organised in such a way as to allow individuals to object to the collection of their data.

Any derogation in this regard thus, should be more specifically justified and/or more narrowly tailored.

Other considerations regarding the right to object and the legal grounds for processing data

Pursuant to Article 21(1) GDPR, as a general rule, the right to object only applies in case the processing is based on one of two specific legal grounds under the GDPR:

- Article 6(1)(e), which allows processing where it is necessary for the performance of a task carried out in the public interest; and
- Article 6(1)(f), the so-called legitimate interest ground.

This means that the right to object does not generally apply in cases where the legal ground is other than the two legal grounds listed above, for example, where the processing is based on the data subject’s consent (Article 6(1)(a) of the GDPR) or where the processing is necessary for compliance with a legal obligation to which the controller is subject (Article 6(1)(c) of the GDPR).

The EDPS also notes that Article 6(1)(f) does not provide a suitable legal basis for processing carried out by public authorities in the performance of their tasks, and is therefore not relevant for data processing by national statistical institutes for statistical purposes⁸.

In the case of preparation of official statistics, in cases where responses to survey questions are voluntary, processing is normally based on consent under Article 6(a) of the GDPR. In other cases, the processing of personal data is typically based on one of the following two legal grounds.

First, processing may be based on the legal ground of the necessity for compliance with a legal obligation to which the controller is subject (Article 6(1)(c) of the GDPR). As far as these processing activities are concerned, the right to object would not apply.

Second, processing operations that would not directly follow from an explicit legal obligation could be based on the legal basis of Article 6(1)(e), since the purposes of producing official statistics can be considered to be necessary for a performance of a task carried out in the public interest. In that case, however, Article 21(6) of the GDPR already excludes the right to object where *'such processing is necessary for the performance of a task carried out for reasons of public interest'*. Therefore, an additional derogation on top of the one already provided under Article 21(6) does not appear necessary.

In light of the foregoing, it appears that there is no need for additional derogations from Article 21 of the GDPR, as this right either simply does not apply or another, appropriate derogation has already been set out in the GDPR.

Other considerations regarding the right of restriction of the processing

As far as the right of restriction of the processing is concerned, the Council has so far not provided convincing arguments to justify why this right should be derogated from. In any event, the EDPS considers that if an individual, after exercising their rights of access and rectification, corrects inaccurate data (for example, they point out that due to a typographical error, their data includes ten thousand, rather than one thousand dairy cows), this can only help, and not hinder, the reliability of European farm statistics.

Conclusions and recommendations on necessity

In light of the foregoing, the **EDPS recommends that the Council re-assess the necessity for the proposed derogations in the light of the standard established under Article 89(2) of the GDPR read in the light of Article 52(1) of the Charter.** The EDPS recommends instead considering to what extent **Article 11 of the GDPR may help address legitimate concerns of national statistical institutes.** In particular, it may be relevant at stages of the data processing when the keys connecting the individuals to the datasets about them have already been deleted, and other technical and organisational measures have been taken to ensure that the individuals can no longer be re-identified by the statistical institutes or by any other party. Should derogations still be considered necessary on the basis of further evidence, their scope should be, in any event, narrower than in the current proposal.

3. RECOMMENDATIONS ON PROVISIONS ON SAFEGUARDS IN THE PROPOSED AMENDMENTS

3.1. Safeguards relating to processing for statistical purposes under Article 89 of the GDPR

Article 89 of the GDPR sets out safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes. To put our recommendations into context, below is a brief summary of the relevant provisions on safeguards, focusing on processing for statistical purposes only. Note that these safeguards apply in full, whether or not a derogation is in place.

Examples specified in the GDPR: data minimisation, pseudonymisation and anonymisation

Article 89(1) of the GDPR sets out the requirement that processing for statistical purposes shall be subject to appropriate safeguards, in accordance with the GDPR, for the rights and freedoms of the data subject. Article 89 does not provide an exhaustive list of the safeguards necessary. The non-exhaustive list of safeguards set out in Article 89 focuses on the following:

- safeguards shall ensure that technical and organisational measures are in place in particular in order to ensure respect for the principle of data minimisation;
- these measures may include pseudonymisation;
- however, in cases where the purposes of the processing (or further processing) can be fulfilled without identification of the individuals, the controller must go beyond pseudonymisation and must ensure that individuals can no longer be identified.

Functional separation and the notion of statistical confidentiality

It is important to bear in mind that pseudonymisation, while essential in many cases in the field of statistics, is just one of the many technical and organisational measures a controller is expected to take under Article 89 of the GDPR.

In the field of statistics, many of these technical and organisational measures are designed to ensure ‘*functional separation*’. This is a requirement flowing from the principle of statistical confidentiality⁹, but is also considered by data protection authorities as an essential safeguard when processing personal data for statistical purposes¹⁰. Functional separation and statistical confidentiality require organisations to put in place technical and organisational measures to ensure that personal data processed for statistical purposes cannot be used for non-statistical purposes. This requirement, importantly, includes the prohibition of using confidential data used for statistics for informing decisions or measures that would directly affect the individuals concerned. For example, the responses of an individual to a statistical survey cannot be used by tax authorities to determine the respondent’s tax liability.

While in most cases pseudonymisation is an essential minimum requirement to ensure functional separation and statistical confidentiality, the range of additional technical and organisational measures required are typically much larger¹¹.

3.2. EDPS recommendations on the safeguards proposed

The draft Article 12a(1) as proposed during discussions in the Council provides the following conditions for the derogations to apply:

- personal data must be processed by national statistical offices and/or other national authorities;
- personal data must be processed in the public interest for the statistical purposes falling within the scope of the [Farm Statistics Regulation];
- personal data must be kept in a form which permits identification of data subjects for no longer than is necessary for the sole purpose of creating Union statistics.

Article 12a(2), in turn, provides for the following safeguards:

- the personal data shall only be used for statistical purposes;
- the personal data shall not be used for taking measures or decision regarding any particular data subject;
- the personal data shall be subject to pseudonymisation or other appropriate safeguards within the meaning of Article 89(1) of the [GDPR] (emphasis added); and

- the personal data (sic) shall comply with the requirements of statistical confidentiality laid down in Regulation (EC) No 223/2009.

As explained in Section 2 above, the main concern of the EDPS relates to the lack of sufficient justification for the proposed derogations to data subjects' rights. However, should the necessity for specific derogations be justified at the later stage, the EDPS would offer the following additional recommendations regarding Article 12a related to the conditions and safeguards.

EDPS recommendations on Article 12a(1)

The EDPS welcomes the clear specification and limitation of the purpose; and limitation of the period of retaining data in a form which permits identification.

The EDPS would welcome further clarification on who the '*other national authorities*' are who may have access to the data, why they need access (and derogations) and what safeguards they provide. He points out that statistical institutes in Member States are typically carefully regulated and have a long tradition of applying the principle of statistical confidentiality. This may not always be the case with regard to other national authorities, and they may also have a conflict of interest and a potential incentive to use the data for non-statistical purposes. If any derogations apply to data processing by these additional national authorities, it should be ensured that equivalent safeguards are also applied to their processing of personal data under Union and/or national law.

EDPS recommendations on Article 12a(2)

The EDPS welcomes the clear statement that the personal data shall not be used for taking measures or decision regarding any particular data subject and the provision requiring that personal data shall only be used for statistical purposes.

The EDPS also welcomes reference to safeguards under Article 89(1) and pseudonymisation in particular. However, he warns that pseudonymisation is only one of the technical and organisational measures required and must always be combined with additional measures to be effective. Therefore, using the connector 'or' as in '*pseudonymisation or other appropriate safeguards*' should be reconsidered.

To this end the EDPS recommends replacing the text '*the personal data shall be subject to pseudonymisation or other appropriate safeguards within the meaning of Article 89(1)*' by the following, or similar, text: '*the processing of personal data shall be subject to pseudonymisation and other appropriate safeguards under Article 89(1)*'.

4. CONCLUSIONS

If the proposed amendments were to be included in the final text, the draft Regulation would become the first EU legislative instrument that would provide a derogation from the rights of access, rectification, as well as from the right of restriction and the right to object for the processing of personal data for statistical purposes pursuant to Article 89 of the GDPR. Given the novelty and importance of this subject, the EDPS welcomes and appreciates the Council's consultation and concerns for the impact this Proposal may have on the protection of personal data.

- The EDPS recommends that the Council re-assess the necessity for the proposed derogations in the light of the standard established under Article 89 of the GDPR read in the light of the Charter.
- Unless the EU legislator can provide further justifications for the need for such derogations, and tailor the scope of the provisions more narrowly, the EDPS recommends instead considering to what extent Article 11 of the GDPR may help address legitimate concerns of national statistical institutes. In particular, it may be relevant at stages of the data processing when the keys connecting the individuals to the datasets about them have already been deleted, and other technical and organisational measures have been taken to ensure that the individuals can no longer be re-identified by the statistical institutes or by any other party.

Should the necessity for specific derogations be justified at the later stage, the EDPS would offer the following additional recommendations regarding Article 12a related to the conditions and safeguards:

- The EDPS welcomes the clear statement that the personal data shall not be used for taking measures or decision regarding any particular data subject.
- The EDPS also welcomes the provision that requires that personal data shall only be used for statistical purposes.
- The EDPS recommends that the text be revised to clearly provide that the processing of personal data shall be subject to pseudonymisation and (rather than or) other appropriate safeguards under Article 89(1).

Brussels,

Giovanni BUTTARELLI
European Data Protection Supervisor

Notes

¹ OJ L 281, 23.11.1995, p. 31.

² OJ L 119, 4.5.2016, p. 1.

³ OJ L 8, 12.1.2001, p. 1.

⁴ COM/2016/0786 final - 2016/0389 (COD).

⁵ See Note from the Presidency to delegations on ‘recital 16a and Article 12a in the Presidency text (data protection)’ (ref nr 12351/17) dated Brussels, 21 September 2017. This document is also publicly available in the Council's register under <http://data.consilium.europa.eu/doc/document/ST-12351-2017-INIT/en/pdf>.

⁶ See Court of Justice, 7 May 2009, *College van burgemeester en wethouders van Rotterdam v. M.E.E. Rijkeboer*, C-553/07, paragraphs 49 to 54.

⁷ See, e.g. EDPS Opinion 7/2015 on Meeting the challenges of Big Data, call for transparency, user control, data protection by design and accountability, Section 3.3 ‘*New, innovative ways to provide information, access and control to individuals*’, page 14.

⁸ See Article 6(1) of the GDPR, last sentence following Article 6(1)(f).

⁹ See Article 2(e) of Regulation (EC) No 223/2009 on European Statistics, which defines statistical confidentiality as ‘the protection of confidential data related to single statistical units which are obtained directly for statistical purposes or indirectly from administrative or other sources and implying the prohibition of use for non-statistical purposes of the data obtained and of their unlawful disclosure’ (emphasis added).

See also Article 20(1) and (2) of the same regulation, which sets out that ‘confidential data obtained exclusively for the production of European statistics shall be used by the [national statistical institutes] and other national authorities and by the Commission (Eurostat) exclusively for statistical purposes unless the statistical unit has unambiguously given its consent to the use for any other purposes’. Further, see Article 338 of the Treaty on the Functioning of the European Union (‘TFEU’), which requires that ‘*the production of Union statistics shall conform to impartiality, reliability, objectivity, scientific independence, cost-effectiveness and statistical confidentiality*’ (emphasis added).

¹⁰ See Section 3.2.3, ‘*Further processing for historical, statistical or scientific purposes*’, on pages 28-33 of Opinion 3/2013 of the Article 29 Data Protection Working Party on purpose limitation adopted on 2 April 2013 (WP203).

¹¹ See Section 3.2.3, pages 28-33 of WP29 Opinion 3/2013 cited above in full.