

EDPS comments on a draft European Parliament Bureau Decision laying down internal rules on restrictions of certain rights of data subjects in relation to the transfer of personal data by the European Parliament to national authorities in the context of criminal or financial investigations

1. Introduction

- These comments refers to the draft of the European Parliament (EP) decision laying down the conditions under which the EP may restrict the application of certain rights of the data subjects in relation to the transfer of personal data to national authorities in the context of criminal or financial investigations. Our comments refer to the document submitted on 14 February 2019.
- We give these comments in accordance with Article 41(2) of Regulation (EU) 2018/1725 (hereinafter ‘the Regulation’)¹.

2. General comments

- The EDPS takes note that the rules are written in a clear and precise way.
- We welcome that the EP will only restrict data subject’s rights based on these internal rules, which provide a clear legal basis thereto.
- Concerning the right to information, we take note that the EP is going to publish data protection notices on its website informing all data subjects of its activities involving processing of their personal data.
- We also take note that the scope of these internal rules is sector-specific for certain data subject rights in relation to data transfers to national authorities in the context of criminal and financial investigations.
- The EDPS also takes note of the fact that the EP will perform a necessity and proportionality test on the need for the restriction of data subjects’ rights, according to several provisions of the internal rules.
- The EDPS welcome that the EP is documenting the restrictions for accountability purposes, namely to make the files available to the EDPS upon request.
- The EDPS welcomes that a necessity and proportionality test is carried out based on the present rules, which is documented through an internal assessment note for accountability purposes on a case-by-case basis.
- The EDPS would like to highlight that in some situations, such as the one referred to in 16(5)(b) of the Regulation, the EP may be (temporarily) exempted from information obligations. In those cases, since there is a general exemption from the obligation, there is no need to restrict its application.

¹ OJ 295, 21.11.2018.

- Additionally, it is important to note that under Article 3(13) of the Regulation, public authorities which may receive personal data in the framework of a particular inquiry in accordance with the Union or Member State law are not considered 'recipients'.

3. EDPS recommendations

- The EP should specify better under Article 3(1) of the draft internal rules **which objectives** among those mentioned **under Article 25(1) of the Regulation** the restrictions are supposed to safeguard. The EP uses slightly different terms in the draft internal rules. It is worth mentioning that 'jeopardising the purpose and confidentiality', as the EP put in the draft internal rules, has a different scope than the application of a necessary and proportionate measure/restriction, in order to safeguard the prevention, investigation, detection and prosecution of criminal offences (see Article 25(1)(b) of the Regulation). Following the same reasoning, restricting rights to 'safeguard the protection of the data subject or the rights and freedoms of others (see Article 25(1)(h) of the Regulation) is not necessarily the same as to restrict rights when they 'adversely affect the rights and freedoms of data subjects'.
- The EDPS recommends specifying under Articles 4(1) and (2) of the draft internal rules that the data protection notice published on EP website include information relating to the potential restrictions of these rights and that the information shall cover which rights may be restricted, the reasons and the potential duration. Notwithstanding being available in EP website, the EDPS recommends that the **data protection notices** including information on potential restrictions to data subject rights are also **provided in other formats**. The most appropriate format will have to be assessed on a case-by-case basis - for example, when the EP wants to (possibly) impose restrictions on the right of access, but no restriction on the right to information, then it should still communicate the data protection notice directly to the data subject.
- Article 6 of the draft internal rules mentions the right to portability (established in Article 22 of the Regulation). However, the restriction of this right does not seem necessary in the context of the transfer of personal data from the EP to national authorities in the context of criminal or financial investigations. The portability of personal data refers to the right of the data subject to receive personal data that himself /herself has provided to the controller where the processing's lawfulness is based either on consent or on necessity for fulfilling a contract. Its scope is thus very narrow - and where it does not apply, there can be no need to restrict it. Additionally, exercising the right to data portability does not automatically mean the erasure of that data by the initial controller (see Article 22(1) of the Regulation). The right to erasure is an autonomous right established in Article 19 of the Regulation. Should the EP fear that data portability may lead to evidence being lost, it should instead restrict the right to erasure (where it applies) following the exercise of data portability. Therefore, the EDPS recommends that the EP **not include possible restrictions to the right to data portability** in the draft internal rules.

- The EDPS recommends that the **terminology** used in the draft internal rules, namely in Article 5(2), is **aligned with the wording of the Regulation**. Using Article 5(2) of the draft internal rules as an example, to ‘undermine the purpose of the restriction’ is not necessarily the same as to ‘cancel the effect of the restriction’ (see Article 25(8) of the Regulation).
- In order to fulfil all the requirements of Article 25(2)(e) of the Regulation, the EDPS recommends that the EP is clearly mentioned as the controller of this data processing in the draft internal rules.
- Additionally, for a matter of completeness, the EDPS recommends that the **risks to the rights and freedoms of data subjects** (stated in Article 25(2)(g) of the Regulation) be clearly included in the draft internal rules, alongside the assessment of the necessity and proportionality of the restriction. The EDPS also highlights that one of the novelties of the Regulation is the assessment performed by the controller not only regarding the risks posed to the controller itself, but also the risks to the rights and freedoms of the persons affected. These are related, but not necessarily identical. Therefore and as mentioned above, the internal rules should mention the risks to the rights and freedoms of data subjects whose rights may be restricted.
- In relation to the necessity principle, the EDPS underlines that **restrictions should be temporary and be lifted when their causes no longer apply**. Therefore, the EDPS welcomes the fact that restrictions to the right of information will be **reviewed every six months**, to assess if its factual and legal reasons are still observable and perform a necessity/proportionality assessment. However, in some situations, the EP will only assess the need to maintain the restriction on an annual basis, which appears to be too long. The EP should apply the six months review cycle in all situations.
- The EP should keep in mind that the **restrictions must be limited to what is strictly necessary**. Restrictions to fundamental rights should always be exceptional and only when indeed needed. The EP has to give justifications explaining why the restrictions are strictly necessary and proportionate in a democratic society and respect the essence of the fundamental rights and freedoms.
- According to the Article 11 of the draft under analysis, EP will inform the DPO without undue delay of each restriction of the data subject’s rights applied pursuant to the internal rules. Additionally, the EDPS recommends that EP **document the involvement of the DPO** along the procedure.
- The EDPS would like to remind that, according to Article 25(5) of the Regulation, this decision should be **signed at the highest management level**.

Brussels, **28 FEB 2019**