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Dear Ms...

Thank you for your consultation on the revised Common Commission - level Retention List (CRL) for European Commission files under Article 41(1) of Regulation (EU) 2018/1725[1] (the Regulation), received on 5 March 2019.

Factual background

Let me recall that the EDPS has already given recommendations regarding an earlier version of the CRL in 2007[2]. The EDPS also held a workshop on data retention practices and issues in EUIs in 2012[3] and some of the outstanding issues as regards the CRL were also raised in that context.

[1] OJ L 295, 21.11.2018, p. 39–98
[2] https://edps.europa.eu/sites/edp/files/publication/07-05-07_commentaires_liste_conservation_en.pdf
[3] case 2012-0525

The EDPS has analysed each file as indicated in the revised CRL at hand. We had also a look and made a comparison with regard to the 2012 CRL[4]:

On 25 March 2019, we had a very fruitful meeting with your service in the presence of the European Commission's DPO as well as of the SG DPC. We have discussed a number of specific retention periods which required further justifications and which did not seem to be in line with Article 4(1)(e) of the Regulation. Following that meeting you have sent us in writing further justifications on those specific retention periods which we have included them in this letter.

It was also agreed in the meeting that the Commission will add an explicit paragraph in the cover note accompanying the CRL to state that the retention periods as indicated in the retention schedule apply to files as a whole and that one should verify the personal data protection records and privacy statements to get more detailed information about the management of personal data contained in the file. Moreover, the CRL is a living instrument and the Commission will continue adapting the retention schedule in compliance with the Regulation, in close cooperation with the DPO service and SG.C1.

The Commission and the accountability principle

The Commission, being the controller, is responsible under Article 4(1)(e) of the Regulation for adopting a maximum retention period for each file containing personal data in the context of a specific processing operation which is necessary and proportionate to the purpose for which the personal data are processed.

In light of the accountability principle[5], the Commission should implement appropriate technical and organisational measures for all processing operations in accordance with the Regulation. This means that each service at the Commission (controller) should set up a maximum retention period which is as long as necessary with regard to the purpose for which the data were collected and as short as possible, so not be excessive to the purpose of the processing. Since each controller within the Commission is in charge of the different procedures, it is in the best position to know the business needs; hence it is up to the controller to assess the necessary retention period for different categories of personal data in view of minimising the risks to the respective categories of data subjects, to adopt specific maximum periods and justify them with documented reasons. The controller via that documentation would on one hand be able to **ensure** that the retention period adopted is appropriate, **verify** that it can actually achieve compliance with the Regulation and **demonstrate** that it is an adequate safeguard in view of compliance. Such documentation would also enable the controller to deal better with data subjects 'requests, complaints or EDPS inspections.

Moreover, the data subject is in the centre of the Regulation with stronger rights. The controller should take all reasonable steps to minimise any risk to the data subjects' rights and freedoms and ensure that their rights are adequately protected. This means that while controller may keep personal data for a certain period to prove that the Commission acted correctly can be justified, keeping them forever or for excessively long retention periods (beyond the limits for reacting to appeals or complaints for example), is against the spirit of the Regulation. It also means that the controller should not maintain, acquire or process additional information in order to identify

[4] https://ec.europa.eu/info/sites/info/files/sec-2012-713_en.pdf
[5] Articles 4(1)(2) and 26 of the Regulation

the data subject for the sole purpose of complying with the Regulation[6]. This idea would also be in contradiction with the data minimisation principle.

General questions and remarks

The EDPS asked the Commission whether the CRL applies also to Executive Agencies, Statutory Agencies and Bodies which are using Ares and whether the agencies have the possibility to change/adapt their retention periods according their needs and business.

The Commission stated that the CRL applies to executive agencies, but not to other institutions, statutory agencies and bodies (potentially) using Ares. Whenever an institution, statutory agency or body chooses to use Ares for its records management, it should create its own filing plan and retention schedule. SG.C1 provides consultation and guidance on the establishment of these instruments (to ensure that they can be used in Ares/NomCom). SG.C1 also provides its own retention schedule and that of the already migrated organisations (that have given permission to share) with organisations that start the migration process. Nevertheless, SG.C1 highlights that the file types and retention periods proposed should reflect their needs, business and legal context and not be a mere copy-paste of the Commission's CRL.

Specific retention periods to be re-considered:

1) **2.8.1bis – Management of independent experts**.

The EDPS stressed that this was a new category compared to the 2012 CRL and asked for some justifications for the retention periods of 10 years (successful experts) and of 5 years (unsuccessful experts).

The Commission explained that this new category was linked to the corporate Participant Portal and the fact that the Commission wanted a coherent way in managing independent experts. The services managing these files agreed on a 10 years retention period (based on their practical experience). These files have a close link with Project and programme management and hence financial aspects (10 years is the default retention period when there is a contractual link: it covers audit and litigation when the programme or project as a whole is assessed, including experts).

As to the personal data kept in the files and in the database:

a) personal data are deleted from the supporting documents when no longer needed;
b) when the expert has not yet been selected, their personal data are only kept for the duration of the Programme activities and
c) the personal data for unsuccessful or withdrawn experts are kept for 5 years (to be able to manage appeals).

In the database, the personal data are anonymised or encrypted and all personal data relating to experts are removed from the database after 10 years of non-updating.

The EDPS reminds the Commission that an unsuccessful candidate may submit a complaint to the Ombudsman or to the EDPS within 2 years after the decision has been taken. This means that the retention period of 5 years is far too long and it cannot be justified. As to the experts who have voluntarily withdrawn from the list, the audit purposes could be a justification for

[6] Article 12(1) of the Regulation.

keeping their data for 5 years. In both cases, the Commission should provide specific examples which could justify the necessity to keep personal data of unsuccessful or withdrawn experts for 5 years.

2) **9.3.3: Visits to Commission**

The EDPS noted that the 10 years retention period in this field appears to be too long compared to the official visits of Member States (**point 2.7.5**), the official visits to third countries (**point 8.5**) and organisation of events (**point 9.3**), which are all kept for 5 years. The Commission refers to the Financial Regulation, but the EDPS would like to know the reasons for which a longer period is necessary in the context of the visits organised by the Commission compared to the other processing operations mentioned above. The EDPS asked as to whether it would have been possible to split the file and only keep the financial part on the basis of the Financial Regulation's requirements.

The Commission replied that DG COMM is the controller in charge of the above processing operations. The splitting of these files in an administrative and financial file is not feasible. The visitors' personal data (needed for access) are kept for a max of 1 year and then anonymised. The personal data of the group leader responsible for the visit are kept for a 5 year maximum retention period.

The EDPS accepts that the retention periods of 1 year for the visitors' personal data and of 5 years of the group leader's personal data respectively are reasonable with regard to the purpose for which they were collected in line with Article 4(1)(e) of the Regulation. The CRL should be updated accordingly.

3) **9.6.6: Citizens' contact with OLAF**
The EDPS asked whether there was a special reason for not aligning the 20 years retention period for this processing operation to the (now) 15 years' period for OLAF investigations. It does not appear justified that contacts with citizens that do not lead to any action are kept for a longer administrative retention period than contacts that lead to OLAF opening an investigation (in which case the information submitted would presumably become part of the investigation file, with a 15 years administrative retention period, **point 4.7**).

The Commission replied that they will verify with OLAF. This category used to be about the Freephone facility which no longer exists. In their view this might have been overlooked by OLAF.

4) **9.6.7 - Applications for the exercise of data subjects rights (new category).**
The EDPS sought for some explanations regarding the 5 years retention period for the above applications, then their Transfer to the Historical Archives (THA) and finally their Permanent Preservation (PP).

The Commission replied that the 5 year retention period is linked to the principle of accountability of the Commission that the necessary follow-up has been given to these request

While that purpose may justify a retention period of 5 years, it does not justify the permanent preservation in the historical archives afterwards of the complete files. The EDPS highlights

that keeping the data longer than necessary only to be able to prove compliance with the Regulation would actually be against the spirit of the Regulation (see above on accountability).

5) **9.6.8 - Complaints to the Commission about maladministration: infringements of data protection rules**.

The EDPS asked for reasons regarding the 5 years retention period for the complaints, then their THA and finally their 2nd review.

The Commission replied that the approach is similar to the above; all complaints to the Commission for all sorts of maladministration are linked to the principle of accountability of the Commission: to prove they did what it was necessary. With regard to the 2nd review, the historical need to retain these files permanently or rather eliminate them will be assessed by the historical archives in cooperation with the DPO service.

The EDPS reminds the Commission that if they decide to archive them, they can in principle be opened to the public after 30 years, so they should have a prudent approach in line with the data minimisation principle.

6) **10.5 - Infringement pre-litigation:**

The EDPS pointed out that compared to the 2012 CRL, the above category is more detailed in the revised version and asked for justifications why the retention period has now been increased to 10 years and Elimination (EL), instead of 5 years with THA and PP as it used to be in 2012.

The Commission clarified that a distinction has been made between pre-litigation cases and infringements. Based on practical experience, the services in charge have decided that everything with follow-up is managed under the following categories and that the pre-litigation cases have no historical administrative value for the Commission. For caution reasons (since they are eliminated) they are however kept for 10 years.

The EDPS considers such distinction reasonable and has no objection to the retention periods.

7) **12.3.4 E - Files of candidates for posts as Auxiliary Conference Interpreters (ACIs; freelance interpreters).**

The EDPS asked the reasons for which the personal data of the Auxiliary Conference Interpreters are kept for 20 years, a retention period much longer than the officials' personal data.

The Commission will verify this with the DMO and DPC of DG SCIC. It might be linked to the necessity of DG SCIC, which is the payment office of the Auxiliary Conference Interpreters in order to establish or rectify their financial rights.

8) **12.3.7 - Personnel files**

The EDPS noted that the 120 years of the retention period of the personal files has been reduced to 100, which is still excessively long period and would like some justifications.

The Commission replied that DG HR is aware of the EDPS Guidelines and SG/DG HR have had discussions on this aspect. DG HR remains of the view that the retention period of 10 years

recommended by the EDPS after termination of duties is too short and too difficult to implement in practice. For example, in the case of a surviving spouse of a former official (art. 79 Staff Regulations) or of orphan children (art. 80 of SR), the official's personnel file is still necessary to be consulted many years after his/her death. A longer retention period is also necessary for temporary and for contractual staff in cases when someone has resigned and is entitled to a retirement pension. In such cases, their personnel file is necessary in order to establish the pension. In such cases, a period between 20 and 30 years is necessary after the cessation of contracts.

Based on the 2 specific examples provided, the 10 years' retention period after extinction of all rights could be feasible. This retention period could cover cases of orphans and the survivor's pension, but also if for example a staff member passes away at the age of 30 leaving small children behind, who could receive allowances until they are 25 years old and 10 years after the extinction of all their rights, the personal file could be deleted.

The EDPS invites DG HR to re-consider the 10 year retention period after the extinction of all rights and recommends that DG HR provide more specific examples and cases which could justify the necessity of 100 years.

9) **12.3.10 - Medical files**

The EDPS asked the justification for keeping 30 years the medical data of the children in the Commission's nurseries.

The Commission replied that since 1st January 2011, the original medical files are handed to the parents 3 months after the children no longer attend the nurseries. The 30 years rule (30 years after the last medical consultation) concerns the medical files of children that left the nurseries before 1st January 2011. These files only exist in paper and they are kept under lock and key.

As to those medical files in paper before 2011, the EDPS recommends that the OIB in charge of nurseries communicate to all parents the possibility of receiving the medical files of their children. Once the parents collect them, OIB should destroy them immediately. This should be clarified in the CRL.

With regard to the retention periods of different medical files, the EDPS will be in direct contact with the DPO and the Commission's medical service. As to the medical data of staff who have been exposed to dangerous substances, the EDPS accepted the necessity of keeping them for at least 30 or 40 years.

10) **12.3.10bis - Mediation service recommendations**.

The EDPS pointed out that this is a new category and it seems to relate to informal procedures carried out by confidential counsellors in the context of anti-harassment procedures. The EDPS would like to know the reasons for 4 years retention period.

The Commission replied that the 4 years retention periods was proposed by the service. Following the EDPS question, they have verified the Commission Decision (C(2002)601) on the revised Mediation Service and the data protection notification (DPO-2731-3). In their view

the retention period should be changed to 5 years since art. 6.5 points out the following: "brief record of cases treated and solutions proposed and outcome, confidential and to be destroyed after 5 years."

The EDPS considers the 5 year retention period as reasonable as long as it concerns only the brief record of cases treated and solutions proposed and outcome. Any other notes relevant to those cases, they should be destroyed at the end of the informal procedure. The CRL should be updated accordingly.

11) **12.3.11 - Complaints under Article 90(2) etc**.

The EDPS asked the reason for a 15 years retention period and not for 5 years as indicated in the "observations". Furthermore, the EDPS asked for a clarification on the following sentence: "The metadata in the internal database are kept permanently", in particular with regard to the specific metadata kept

The Commission replies that the 15 years are based on the administrative needs as expressed by DG HR. The database concerned is RecArt. Even when digital files are destroyed, the metadata remain in the DB. The Commission will verify this with DG HR.

The EDPS needs justifications on the 15 years retention period and more information regarding the metadata.

12) **12.3.12.B - Financial social assistance and psychological assistance**.

The EDPS asked the reasons for which the above category of personal data are kept for 3 years from the death of the person concerned instead of 30 from termination of service, as indicated in 2012 CRL.

The Commission replied that DG HR has indicated that any financial social assistance ceases and it has no impact on descendants or spouse. They will check again with DG HR.

13) **12.3.12.E - Special leave**.

The EDPS asked why it is necessary to keep those data for 7 years.

The Commission will check with DG HR.

14) **12.4 - Professional conduct and discipline:**

The EDPS noted that in the CRL the Commission has referred to the EDPS prior-checking Opinions relating to IDOC. In the meantime, the EDPS has updated the Guidelines on processing personal information in administrative inquiries and disciplinary proceedings[7], including the retention periods of the different files.

The EDPS in his Guidelines recommended that EUIs make a distinction between the following scenarios:

[7] https://edps.europa.eu/sites/edp/files/publication/16-11-18_guidelines_administrative_inquiries_en.pdf

1. Pre-inquiry file: When the EUI makes a preliminary assessment of the information collected and the case is dismissed. In such cases, the EUI should set up a maximum retention period of **two years** after the adoption of the decision that no inquiry will be launched. This maximum retention period could be necessary for audit purposes, access requests from affected individuals (i.e. from an alleged victim of harassment) and complaints to the Ombudsman

2. Inquiry file: When the EUI launches an inquiry including the collection of evidence and interviews of individuals, there could be three possibilities:

i) the inquiry is closed without follow-up,

ii) a caution is issued or

iii) the Appointing Authority of your institution adopts a formal decision that a disciplinary proceeding should be launched.

For cases i) and ii), a **maximum of five-year-period** from closure of the investigation is considered to be a necessary retention period, taking into account audit purposes and legal recourses from the affected individuals.

For case iii), the EUI should transfer the inquiry file to the disciplinary file, as the disciplinary proceeding is launched on the basis of the evidence collected during the administrative inquiry.

3. Disciplinary file (in cases where the EUI is in charge of the disciplinary proceeding): the EUI carries out a disciplinary proceeding with the assistance of internal and/or external investigators on the basis of a contract. The EUI should take into consideration the nature of the sanction, possible legal recourses as well as audit purposes and set up a maximum retention period, after the adoption of the final Decision. If the staff member submits a request, under Article 27 of Annex IX to the Staff Regulations, for the deletion of a written warning or reprimand (3 years after the Decision) or in the case of another penalty (6 years after the Decision, except for removal from post) and the Appointing Authority grants the request, the disciplinary file which led to the penalty should also be deleted.

If the Decision on the penalty stored in the personal file is deleted, there is no reason to keep the related disciplinary file. In any case, the EUI could grant the possibility to the affected individual to submit a request for the deletion of their disciplinary file 10 years after the adoption of the final Decision. The Appointing Authority should assess whether to grant this request in light of the severity of the misconduct, the nature of the penalty imposed and the possible repetition of the misconduct during that period of 10 years.

4. Disciplinary file (for which IDOC is in charge of the disciplinary proceeding): The EUI concluded a SLA with IDOC to carry out the disciplinary proceeding and the EUI would transfer the evidence collected to IDOC. The EUI should adopt a retention period in light of the outcome of the disciplinary proceeding carried out by IDOC; as soon as IDOC adopts its final Decision and conclusions, all information kept by the EUI before their transfer to IDOC, should be erased.

The Commission pointed out that the reference will be updated. The EDPS Guidelines were discussed with IDOC and they consider that the proposed retention periods are justified based on their practical management of cases and that they have appropriate protective measures in place to manage the files as set out in the CRL.

In light of the above, the EDPS will be in contact with IDOC directly about this issue.

15) **12.8.5 - Implementation of DP rules.**

The EDPS noted that this is a new category and wonders whether there are any personal data involved.

The Commission clarified that this category has been created to cover internal guidance, advice, training and other measures both at the level of the SG DPO and at the level of the data protection controllers in the DGs and services and no (sensitive) personal data are processed in these files.

The EDPS reiterates that each controller is responsible for adopting a maximum necessary and proportionate retention periods for each category of personal data they process and store in line of Article 4(1)(e) of the Regulation. They are the best in place to know if they really need those data or not and in light of the accountability principle they should be able to demonstrate the necessity for keeping them for a certain retention period with documented justifications, always having in mind how to best ensure and protect the data subjects' rights.

The EDPS recommends that the Commission re-considers in the CRL those documents containing personal data which are not necessary to be retained for the entire period indicated in the CRL and reflect for a possible gradual elimination of those documents. Clearly defining the starting point of the retention period is a very important reflexion as well.

The role of the DPO's Commission is fundamental under the new Regulation, being the cornerstone and the internal adviser and expert in data protection. The EDPS therefore strongly recommends that each DG/service responsible for the above pending issues (namely 1,3,4,5 7, 8, 11, 12 and 13) get in direct contact with the DPO, involving of course their respective DPCs.

The EDPS is of course at your disposal for any further doubts or clarifications.

Yours sincerely,

Wojciech Rafał WIEWIÓROWSKI