

EDPS comments on a draft Decision of the Secretary General of the European External Action Service on internal rules concerning restrictions of certain rights of data subjects in relation to processing of personal data in the framework of its functioning

1. Introduction

- These comments refer to the draft Decision of the Secretary General of the European External Action Service (EEAS) on internal rules concerning restrictions of certain rights of data subjects in relation to processing of personal data in the framework of the functioning of the EEAS (herein after the ‘draft internal rules’). Our comments refer to the document submitted on 17 April 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 EEAS will restrict data subject’s rights based on these internal rules, which provide a clear legal basis thereto, or on legal acts adopted on the basis of the Treaties.
- The EDPS also takes note of the fact that the EEAS will perform a necessity and proportionality test on the need for the restriction of data subjects’ rights, according to several provisions of the draft internal rules.
- 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.
- The EDPS welcomes that a necessity and proportionality test is carried out based on the draft internal rules, which is documented through an internal assessment note for accountability purposes on a case-by-case basis.
- The EDPS welcomes that the EEAS **document the involvement of the DPO** along the restriction procedure, including its review procedure.
- 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

¹ OJ 295, 21.11.2018.

- The EEAS should keep in mind that the **restrictions must be limited to what is strictly necessary**. The draft internal rules do not contain any mention to the need to restrict data subjects' rights on a case-by-case basis only. Therefore, the EDPS recommends that the EEAS **include a provision in the draft internal rules containing an explicit reference to the assessment of the application of a restriction only on a case-by-case basis**.
- Additionally, recital 2 and Article 1(1) of the draft internal rules mention Article 22 of the Regulation. However, the draft internal rules do not set out the conditions under which the right to portability (Article 22 of the Regulation) may be restricted. It appears that the reference to Article 22 of the Regulation is an oversight. Therefore, EDPS recommends that the EEAS **remove the reference to Article 22 (right to data portability)**, since this right will not be restricted according to the draft internal rules.
- Despite the fact that the **categories of personal data** mentioned in Article 25(2)(b) of the Regulation are referred to in recital 7 of the draft internal rules, the EDPS recommends that the information therein mentioned be clearly **included in the body of the draft internal rules**.
- The EEAS 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 imposed when indeed needed. The EEAS 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. In our view, restrictions to the right to information concerning the activities of the EEAS Medical service (Article 1(2)(vii) of the draft internal rules) need to be better contextualised in the draft internal rules. There seems to be no clear case to restrict this kind of right within the medical context. **Please explain or remove this reference in Article 5(2) of the draft internal rules**.
- In this regard, Article 17 of the Regulation concerns the right of direct access by the data subject. In that sense, granting indirect access through the intermediary of a physician is a restriction of the right of access, which may in very limited cases be justified as a safeguard to the patients/data subjects, due to the impact which that information may have on them. In addition, patients are entitled to obtain a second opinion from another doctor, which may not necessary be the same as the previous one. Therefore, the EDPS recommends that the draft internal rules clarify that the restriction of data subjects' rights regarding medical files is limited to direct access – and not to indirect access – to documents of a psychological or psychiatric nature. Hence, these internal rules should not imply that either indirect access, or the right to rectification and communication of a personal data breach will be limited. Therefore, **the intermediary physician should be given access to all the information and discretionary power to decide how and what information to provide to the data subject**. In addition, the references to Article 1(2)(vii) of the draft internal rules in Articles 7 has to be contextualised and in Article 8 should be removed.
- Following the same reasoning, **restrictions to the right of access regarding selection procedures and staff evaluation (Article 1(2)(x) of the draft internal rules) do not seem necessary**. The EEAS can ensure the 'secrecy of the jury' in

recruitment procedures by referring to the jury in an aggregated manner when evaluating candidates, instead of having separate assessments per juror. There seems to be **no obvious use case for restricting the right of access in staff evaluation procedures** either. The same remarks seem applicable to the **restrictions to the right of access regarding public procurement procedures** (Article 6(viii) of the draft internal rules). The EDPS, therefore, **recommends that the EEAS remove the possibility to restrict this right in the abovementioned situations**. Nonetheless, the EDPS may reconsider this position if the EEAS provides clear documentation of its use cases in this regard.

Brussels, 28 June 2019