

## EDPS joint comments on three draft Decisions of the Chair of the Single Resolution Board on internal rules concerning restrictions of certain rights of data subjects

### 1 Introduction

- These comments refer to three separate draft Decisions of the Chair of the Single Resolution Board on internal rules concerning restrictions of certain rights of data subjects in relation to the processing of personal data in the framework of activities carried out by the Single Resolution Board (hereinafter '**draft internal rules**'), which were jointly presented to the EDPS. Our comments refer to the documents submitted on 21 May 2019.
- The documents submitted by the Single Resolution Board ('SRB') were the following:
  - A draft "Decision of the Chair of the Single Resolution Board on internal rules concerning restrictions of certain rights of data subjects in relation to processing of personal data in the framework of administrative inquiries/disciplinary proceedings/investigations/other carried out by the Single Resolution Board" (hereinafter '**draft internal rules AI&DP**');
  - A draft "Decision of the Chair of the Single Resolution Board on internal rules concerning restrictions of certain rights of data subjects in relation to processing of personal data in the framework of informal procedure of the SRB policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment" (hereinafter '**draft internal rules PSH**');
  - A third draft decision was mistakenly given the same title as the draft internal rules AI&DP. We note however that in practice this decision concerns only internal security incident investigations (hereinafter '**draft internal rules ISEC**').

We will first provide comments and recommendations that are generally applicable to all of SRB's draft internal rules. Afterwards, we will provide our specific recommendations on some of the draft internal rules under their respective headings.

- We give these comments in accordance with Article 41(2) of Regulation (EU) 2018/1725 (hereinafter 'the Regulation')<sup>1</sup>.

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<sup>1</sup> OJ L 295, 21.11.2018, p. 39.

## 2 General comments

- The EDPS takes note that the files submitted by the SRB constitute an early draft version of the internal rules and trusts that for legal clarity the SRB will edit drafting errors, such as those in titles and numbering, at a later stage.
- **The EDPS welcomes that the SRB has opted to draft specific documents for different subsets of processing operations.** The EDPS emphasises the importance of duly limiting the grounds for restriction listed in Article 25 of the Regulation to those justified in the light of the processing operations the SRB performs or expects to perform. There should always be a clear link between the grounds for restrictions and the processing operations for which restrictions may be imposed.

## 3 EDPS recommendations

### 3.1 General recommendations

#### 3.1.1 Publication of data protection notices

- Concerning the provision of information to the data subject (Article 5 of the draft internal rules), we take note that the SRB is going to publish data protection notices on its website informing all data subjects of the potential restrictions of their rights related to personal data processing. However, in case the SRB has an intranet available, it may want to publish certain data protection notices only on its intranet, for instance for processing operations for which only staff members can be data subjects. If the SRB chooses to do so, in order to clarify to data subjects that not all data protection notices will be available on SRB's publicly accessible website, we **recommend to replace "website" with "intranet and/or public website"**.

#### 3.1.2 Right to data portability & confidentiality of electronic communications

- Article 1(1) mentions possible restrictions to Article 22 of the Regulation. The portability of personal data refers to the right of the data subjects to receive personal data that they themselves have provided to the controller where the lawfulness of the processing operation 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. While the partial reference to Article 22 may be an editorial mistake, restricting the right to data portability does not seem necessary in the context of the SRB's activities, notably because it may not apply in the first place.
- Additionally, it should be noted that exercising the right to data portability does not automatically entail the erasure of that data by the initial controller. The right to erasure is an autonomous right established in Article 19 of the Regulation. Should the SRB 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 the SRB to **remove all references to the potential restriction of the right to data portability** from the draft internal rules.
- Article 1(1) of the draft internal rules similarly mentions the possible restriction of Article 36 of the Regulation, the confidentiality of electronic communications. The EDPS would like to reiterate **that a restriction to the confidentiality of electronic communications may interfere with the essence of the right to data protection**. As such, it is only under

extraordinary circumstances that this right can be restricted. It should be noted that the current version of the draft internal rules does not contain any further mention of the possibility to restrict the confidentiality of electronic communications. As a result, **it does not provide for a sufficiently clear basis to apply such a restriction.**

#### 3.1.3 Specification of the controller

- Regarding the specification of the data controller in Article 2 of the draft internal rules, the EDPS would like to highlight that legally speaking the controller is “the Union institution, body, office or agency or the Directorate-General or any other organisational entity which, alone or jointly with others, determines the purposes and means of the processing of personal data”. As such, **Article 2 of the draft internal rules should be updated to first reflect the SRB’s position as controller and indicate a representative of the SRB in this sense.** We note that Recital 4 of both the draft internal rules AI&DP and the draft internal rules ISEC already refers to the SRB as data controller with its Chair as representative. We therefore recommend keeping this formulation for Article 2 as well.
- At the same time, the **EDPS recognises that in practice, top management is accountable for compliance with the rules, but responsibility is usually assumed at a lower level.**<sup>2</sup> To reflect this, the SRB could still choose to indicate certain staff members, such as the SRB Anti-Harassment Coordinator, as persons responsible for the processing operation in the internal rules.

#### 3.1.4 Involvement of the DPO

- According to the Article 4 of the draft internal rules, the DPO will be informed without undue delay of each restriction of the data subjects’ rights applied pursuant to the internal rules. The EDPS recommends the SRB to **document the involvement of the DPO** along all the procedures, and not only when applying a restriction.

#### 3.1.5 Risks to the rights and freedoms of data subjects

- The EDPS welcomes that Article 3 (6) of the draft internal rules includes a reference to risks to the rights and freedoms of the data subjects. However, it is unclear from the current version of the draft internal rules that these risks are to be taken into account as part of the overall necessity and proportionality test mentioned in Article 3 (2). **The EDPS recommends amending Article 3 (6) to include this information, as well as the fact that the risks therein stated are not a comprehensive list.**

### 3.2 Specific recommendations regarding the draft internal rules AI&DP

#### 3.2.1 Relationship with the draft internal rules PSH

- According to Article 1 of the draft internal rules AI&DP, this document lays down restrictions to the exercise of data subjects’ rights in the framework of internal investigations, disciplinary proceedings and administrative inquiries. One of the situations in which an administrative inquiry may be launched is the case of psychological or sexual harassment. Such an inquiry could then be followed by disciplinary proceedings at a later stage.

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<sup>2</sup> According to the EDPS ‘Accountability on the Ground’ Guidance, ‘Responsible’ means having the obligation to act and take decisions to achieve required outcomes; while ‘accountable’ means to be answerable for actions, decisions and performance. See [https://edps.europa.eu/data-protection/our-work/publications/guidelines/accountability-ground-provisional-guidance\\_en](https://edps.europa.eu/data-protection/our-work/publications/guidelines/accountability-ground-provisional-guidance_en).

- As the SRB has its own informal procedure for this specific type of inquiry and it has prepared a separate set of internal draft internal rules PSH relating to restrictions of data subject rights connected to this procedure, **the EDPS recommends to clearly indicate the relationship between these two sets of internal rules in Article 1 of both documents.**

### 3.3 Specific recommendations regarding the draft internal rules PSH

#### 3.3.1 Communication of a personal data breach to the data subject

- Article 1 and 8 of the draft internal rules PSH allow the SRB to restrict the communication of personal data breaches to the data subject. However, it is unclear in the context of this set of internal rules which of the grounds in Article 25(1) of the Regulation would require restricting communication of personal data breaches. Therefore, **the EDPS recommends removing the possibility to restrict the communication of personal data breaches from the draft internal rules PSH.**

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