

EDPS comments on the draft 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 Executive Agencies EACEA, ERCEA, REA, INEA and EASME

1. Introduction

- These comments refer to the draft internal rules of the Executive Agencies EACEA, ERCEA, REA, INEA and EASME ('the Executive Agencies'), concerning restrictions of certain rights of data subjects in relation to processing of personal data in the framework of their functioning (hereinafter 'the draft internal rules'). Our comments refer to the document submitted on 17 January 2020.
- We provide these comments in accordance with Article 41(2) of Regulation (EU) 2018/1725 (hereinafter 'the Regulation')¹.

2. General comments

- We welcome that the Executive Agencies will only restrict data subject's rights based on these internal rules, which provide a clear legal basis thereto.
- The EDPS welcomes the fact that the draft internal rules provide for the obligation to document the application of restrictions and the reasons to apply them.
- The EDPS also takes note of the fact that the Executive Agencies will perform a necessity and proportionality test on the need for the restriction of data subjects' rights.
- Concerning the data subjects' right to information, we take note that the Executive Agencies will publish data protection notices and/or records on its website and intranet informing all data subjects of the potential restrictions of their rights related to personal data processing.
- The EDPS welcomes the Executive Agencies' intention to document restrictions for accountability purposes, namely to make the files available to the EDPS upon request for the purpose of investigating cases regarding the restrictions.
- The EDPS has highlighted a few of the oversights with a more significant impact on the substance below. The EDPS trusts that the Executive Agencies will fully review the text prior to adoption in line with the EDPS recommendations. Also, the EDPS trusts that the Executive Agencies will fully review the clarity and precision of the text as part of the finalisation process.

¹ OJ L 295, 21.11.2018, p. 39.

3. EDPS recommendations

- **Recommendation 1:** The EDPS recommends that the Executive Agencies make a link between the processing operations in which restrictions may be imposed and the legal grounds for restrictions (e.g. Article 1(2)(i) of the draft internal rules can be linked with Article 25(1)(b), (f) and (h) of the Regulation).
- **Recommendation 2:** The Executive Agencies 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 Executive Agencies have 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 processing medical data (Article 1(2)(vi) 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 1(2) of the draft internal rules.**
- **Recommendation 3:** Article 17 of the Regulation concerns the right of access by the data subject. The EDPS emphasizes that the general rule in all cases, also where they concern mental or physical conditions, remains direct access. However, where the provisions of Article 25(1)(h) of the Regulation apply, the data subject's access to his/her data of psychological or psychiatric nature may be restricted. In that situation access could be provided indirectly, if an assessment made on a case by case basis reveals that indirect access is necessary for the protection of the data subject, given the circumstances at stake. As such, **the EDPS recommends that the internal rules clarify that the restriction of data subjects' access rights is limited to direct access to the documents of a psychological or psychiatric nature in Article 6 of the draft internal rules.** 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 access to provide to the data subject.**
- **Recommendation 4:** In accordance with Article 25(2) (d) of the Regulation, the safeguards to be put in place should be aimed to 'prevent abuse or unlawful access or transfer' and not to 'avoid data breaches, leakages or unauthorised disclosure', as mentioned in Article 2(1) of the draft internal rules. The EDPS recommends that the terminology used in the draft internal rules, namely in Article 2(1) of the draft internal rules, is aligned with the wording of the Regulation.
- **Recommendation 5:** The draft internal rules provide in its Article 2(1) that 'The safeguards in place to avoid data breaches, leakages or unauthorised disclosure are the following [...]'. The EDPS recommends rephrasing so as to make this provision enforceable and not descriptive.

- **Recommendation 6:** Regarding Article 3(2), the EDPS presumes that the Executive Agencies intention is to be able to restrict data subject rights in *one or more* of the scenarios that follow the chapeau, such that the list (a) to (c) are alternative, not cumulative conditions. If this is the case, we recommend clarifying this by removing the wording ‘in relation to personal data exchanged with Commission services or other Union institutions, bodies, agencies and offices, competent authorities of Member States or third countries or international organisations’ from the chapeau. Including this wording in the chapeau rather than in the list that follows it would allow the Executive Agencies to, for example, restrict rights in respect of personal data obtained from a Union agency in circumstances where a Member State authority has a legal basis for restricting rights in respect of an entirely different set of personal data. This is presumably not the intention.

In respect to point (a), the EDPS recommends specifying that the Executive Agencies may restrict where both of the following conditions apply:

- where another Union institution, body or agency, *is entitled to* restrict the exercise of the listed rights (rather than simply ‘could’);
- the purpose of such a restriction by that Union institution, body or agency would be jeopardised were the Executive Agencies not to apply an equivalent restriction in respect of the same personal data.

In respect to point (b), the EDPS recommends introducing a similar dual condition linking the entitlement of a competent authority of Member States to restrict and the application of an equivalent restriction by the Executive Agencies in respect of the same personal data.

Furthermore, in respect to Article 3(2) (c), the EDPS recommends clarifying that Executive Agencies may restrict where there is clear evidence that cooperation is likely to be jeopardised, rather than where this is simply possible. Therefore, the EDPS recommends specifying that Executive Agencies may restrict where the exercise of rights *would* rather than ‘could’ jeopardise cooperation.

- **Recommendation 7:** The EDPS notes with appreciation the fact that the Executive Agencies will perform a necessity and proportionality test on the need for any restriction of data subjects’ rights, under Article 3(3) and (4) of the draft internal rules. The EDPS recommends that this test will also be conducted in the framework of the periodic review, following assessment of whether the factual and legal reasons for a restriction still apply. The internal rules shall be adapted accordingly.
- **Recommendation 8:** In relation to the necessity principle, the EDPS underlines that restrictions should be temporary and be lifted when their causes no longer apply. The EDPS takes note that, the provisions referring to the review cycle of the restrictions in the draft internal rules are unclear (‘appropriate intervals’). The EDPS recommends that the Executive Agencies apply a **6 months review cycle** in all situations, as well as in any case ‘...when new elements are brought to the attention of the(...) controller’ (Article 3(6) of the draft internal rules).

- **Recommendation 9:** The EDPS welcomes the fact that, in accordance with recital 19 and Article 4 of the draft internal rules, the Data Protection Officer (DPO) will be involved in the process concerning restrictions. Under these provisions, the DPO will be informed without undue delay of each restriction of the data subject's rights applied, or when the restriction have been revised. The EDPS recommends that the internal rules also provide for involvement of the DPO throughout all the procedure.
- **Recommendation 10:** Article 5 of the draft internal rules contains on the one hand provisions concerning the information to be provided to the data subject (paragraphs 1 and 2) and, on the other hand, provisions referring to the restrictions applicable to the data subjects' right to be informed (Article 15 and 16 of the Regulation). Given that the first paragraphs contain information applicable generally to all restrictions applied, the EDPS recommends moving them to Article 3 of the draft internal rules. We also take note that there is a typo and the number 2 has been given to two different provisions. Therefore, Article 5 of the draft internal rules requires renumbering.
- **Recommendation 11:** Article 10 provides for entry into force of the decision on the day following its publication in the *Official Journal*. We note that this represents a departure from standard practice that is justified only in exceptional cases of urgency. The reasons justifying it are also usually documented in a recital. We recommend checking whether urgent entry into force is necessary. If it is, we recommend inserting an explanatory recital.

Brussels,

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