



EDPS comments on the draft European Commission Decision and Implementing Rules on Records Management and Archives

Introduction

The EDPS' comments refer to the documents submitted by the European Commission (EC) on 18 February 2020. We provide these comments in accordance with Article 41(1) of Regulation (EU) 2018/1725 ('the Regulation')¹.

We welcome the EC's consultation and the update of the EC's records management and archives rules following the entry into force of the Regulation.

While the EDPS has already provided guidance on restrictions via internal rules for the purposes of Article 25(1) of the Regulation, the Draft Decision intends to impose restrictions for the purposes of Article 25(4) of the Regulation.

EDPS recommendations

Recommendation 1: The EDPS recommends clarifying and mentioning in the draft Decision, the roles of EC and the European University Institute (EUI) from a data protection point of view (in view of Article 3 of the Regulation) in line with the provisions of the Council Regulation (EU) 2015/496 and as specified in Article 14(3)(2) of the draft Decision's Annex - Implementing Rules.

Recommendation 2: The EDPS recommends including in Article 3 of the draft Decision:

1. a cross reference to the definitions provided in the Regulation of the following concepts: 'personal data', 'controller', 'processor';
2. a definition of the concept of 'sensitive personal data' (which is not a concept defined in the Regulation and appears to be wider than 'special categories of personal data' under Article 10 of the Regulation).

Recommendation 3: Article 15(1) of the draft Decision makes reference to Article 25(3) of the Regulation and more specifically to the derogations provided in this Article of the Regulation. Since Article 25(3) refers to scientific and historical research, the EDPS recommends removing the reference to Article 25(3) of the Regulation in Article 15(1) of the Decision or, in case it refers to Article 25(4), to adjust it accordingly. Article 25(4) is the relevant reference for the activities of the Historical Archives Service, while Article 25(3) is for the use for research and statistical services.

Recommendation 4: Article 15(2) of the Decision, mentions the 'exception to the right of rectification, based on Article 19(3)(d) of the Regulation [...]'. As Article 19 of the Regulation refers to the right to erasure, we recommend adjusting the text of the Decision accordingly. Also, the EDPS recommends motivating why the exception to the right to erasure, in accordance

¹ OJ L 295, 21.11.2018, p. 39.

with Article 19(3)(d), 'is likely to render impossible or seriously impair the objectives of that processing'.

Recommendation 5: The right to restrict processing under Article 20 is an interim safeguard before the controller has taken a decision on a data subject's request e.g. for rectification and/or objection. Since this is an interim phase, it is unlikely that any of the grounds for the right to restrict processing under 20(1) would still apply at the archiving phase. For this reason, the EDPS recommends removing from the Decision the possibility to apply this exception.

Recommendation 6: Article 15(3) of the 'Decision provides for limitations of the following rights of data subjects where personal data are processed for archiving purposes in the public interest:' the right of access; the right to rectification; the obligation to notify the rectification or erasure of personal data or restriction of processing; the right to data portability and the right to object to the processing. While Article 25(4) of the Regulation allows for the possibility to 'provide for derogations from rights referred to in Article 17, 18, 20, 21, 22 and 23, this is subject to the conditions mentioned in the same Article namely, 'in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes'. The EDPS recommends including in the Decision motivations as to why those rights for which derogations are intended to be applied 'are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes'.

Recommendation 7: Article 15(3) of the Decision provides for limitation of the data subject's right of access. The EDPS recommends justifying why exercising the right of access is 'likely to render impossible or seriously impair the achievement of the specific purposes [archiving in public interest]' and that such a derogation would be necessary 'for the fulfilment of those purposes'. Unless a strong justification can be provided, the EDPS recommends removing the possibility to apply a derogation to the right to access.

Recommendation 8: Article 15(3) of the Decision provides for limitation of the data portability. This right only applies when the lawful basis for processing this information is consent (Article 5(1)(d) of the Regulation) or the performance of a contract (Article 5(1)(c) of the Regulation) and when carrying out the processing by automated means. Since Article 5(1)(a) is the most common ground for lawfulness of processing in the EU institutions, the scope of the right to data portability is rather narrow in the EU institutions. Indeed, it is possible that the EC does not carry out any processing operations to which the right to portability applies. It is even more unlikely that personal data to which the right to data portability applies have 'transfer to historical archives' as the post-retention action under the Common Retention List. On the basis of those considerations, the EDPS recommends removing the possibility to apply a derogation to the data portability.

Recommendation 9: When referring to safeguards relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, Article 13 of the Regulation specifies that 'those safeguards shall ensure that technical and organisational measures are in place in particular in order to ensure respect for the principle of data minimisation'. The EDPS recommends making specific reference to the principle of data minimisation (Article 4(1)(c) of the Regulation) in the Decision. Furthermore, it recommends that the EC ensure that safeguards are put in place in order to ensure compliance, as provided for in Article 13 of the Regulation.

Recommendation 10: Article 22 provides for entry into force of the decision ‘on the day following that of its publication in the *Official Journal of the European Union*’. Given the standard practice for legislative texts to enter into force on the twentieth day after publication into the *Official Journal* and in order to allow for proper information of the relevant stakeholders, we invite the EC to consider whether its entry into force on the twentieth day after publication into the *Official Journal* would be more appropriate. If urgent entry into force is necessary, we recommend inserting an explanatory recital.

Recommendation 11: In relation to the ‘retention lists for the Commission files and archives schedules’ the EDPS would like to remind the Commission the recommendations on the Common Commission - level Retention List (CRL) for the European Commission files (EDPS reference 2019-0242. Letter of 3 April 2019).

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