

# **EDPS' comments on EASO's draft internal rules concerning restrictions of certain rights of data subjects (Article 25 of the Regulation (EU) 2018/1725)**

## **1. Introduction**

These comments refer to EASO's draft implementing rules concerning restrictions on certain rights of data subjects (pursuant to Article 25 of Regulation (EU) 2018/1725, hereinafter 'The Regulation'<sup>1</sup>).

The EDPS' comments refer to the document submitted on 24 April 2020 (hereinafter 'the draft internal rules'). We provide these comments in accordance with Article 41(2) of the Regulation.

We would also like to highlight the updated EDPS Guidance on Article 25 of the Regulation<sup>2</sup>, published on 9 March 2020.

## **2. General comments**

- We welcome that EASO will only restrict data subject's rights based on the draft 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.
- The EDPS also takes note of the fact that EASO will perform a necessity and proportionality test on the need for the restriction of data subjects' rights.
- In relation to this necessity principle, the EDPS has underlined that restrictions should be temporary and be lifted when their causes no longer apply. Therefore, the EDPS notes with satisfaction that restrictions will be reviewed every six months.

## **3. EDPS recommendations**

- **Recommendation 1:** 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 2:** The draft internal rules provide in Article 2(1) that 'The safeguards in place to avoid data breaches, leakages or unauthorised disclosure are the following [...]'. The EDPS reminds that the adoption of appropriate safeguards is not a static exercise and different safeguards will have to be adopted over time. Therefore, the EDPS

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

<sup>2</sup> Available on the EDPS website via: [https://edps.europa.eu/data-protection/our-work/publications/guidelines/guidance-art-25-regulation-20181725\\_en](https://edps.europa.eu/data-protection/our-work/publications/guidelines/guidance-art-25-regulation-20181725_en)

recommends rephrasing this sentence so as to make this provision prescriptive ('shall put in place') and not descriptive.

- **Recommendation 3:** The EDPS recommends clarifying certain aspects included in the draft internal rules in order to avoid ambiguities. More specifically, it is recommended to clarify the meaning of: 'Replacing users is strictly prohibited' (Article 2(1)(c) of the draft internal rules) and 'the database' (Article 2(1)(c) of the draft internal rules).
- **Recommendation 4:** Regarding Article 3(2), the EDPS presumes that EASO's 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 EASO 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) of Article 3(2), the EDPS recommends specifying that EASO may restrict where both of the following conditions apply:

- where another Union institution, body, office 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 office or agency would be jeopardised were EASO not to apply an equivalent restriction in respect of the same personal data.

In respect to point (b) of the same Article, 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 EASO in respect of the same personal data.

Furthermore, in respect to Article 3(2)(c), the EDPS recommends clarifying that EASO 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 EASO may restrict where the exercise of rights *would* rather than 'could' jeopardise cooperation.

- **Recommendation 5:** The EDPS calls for limiting the grounds for restriction listed in Articles 5, 6, 7, 8 of the draft internal rules. These grounds should only reflect the specific processing operations justifying each the restrictions. For instance, conducting administrative inquiries and disciplinary proceedings, on the basis of Article 86 and Annex IX of the Staff Regulations of Officials of the EU, may be based on Article 25(1)(b),(c),(f),(g),(h) of the Regulation. Therefore, the grounds for restriction should be limited to those justified in the light of specific processing operations performed by EASO, linking each specific purpose of processing with the applicable ground for restricting data subjects' rights in Article 25 of the Regulation.

- **Recommendation 6:** Article 5 of the draft internal rules contain on the one hand provisions concerning the information to be provided to the data subject (Article 5(1) paragraph 2 and Article 5(2)) and, on the other hand, provisions referring to the restrictions applicable to the data subject's right to be informed (in accordance with Article 15 and 16 of the Regulation). Given that the second paragraph of Article 5(1) and Article 5(2)) contain information generally applicable to all restrictions applied, the EDPS recommends moving the references concerning the information to be provided to data subjects in Article 3. Furthermore, given that the title of Article 5 is 'Provision of information to data subject' and after moving the above-mentioned provisions related to information to be provided to the data subject as recommended, the EDPS recommends renaming Article 5 as 'Right of information of data subjects'.
- **Recommendation 7:** The EDPS notes with appreciation the fact that EASO will perform a necessity and proportionality test on the need for any restriction of data subjects' rights, under Article 3 of the draft internal rules. The EDPS recommends that this test will also be conducted in the framework of the periodic review, following an assessment of whether the factual and legal reasons for a restriction still apply. The internal rules should be adapted accordingly.
- **Recommendation 8:** The EDPS welcomes the fact that, in accordance with recital 16 and Article 4, the Data Protection Officer (DPO) will be informed about restrictions. Under these provisions, the DPO will be informed 'at the moment of deferral and during the revisions' (Recital 16) and 'whenever the controller restricts the application of data subjects' rights, or extends the restriction' (Article 4(1)). The EDPS recommends that the internal rules also provide for involvement of the DPO throughout the entire procedure, including during the discussion on a possible restriction and therefore before applying a restriction.
- **Recommendation 9:** Article 8 of the draft internal rules allows EASO to restrict the communication of personal data breaches to the data subject in the framework of its anti-harassment procedures. However, in this context it is unclear which of the grounds in Article 25(1) of the Regulation would require restricting communication of personal data breaches. Therefore, the EDPS recommends adapting Article 8 so as to remove the possibility to restrict the communication of personal data breaches to the data subject in the framework of its anti-harassment procedures.
- **Recommendation 10:** Article 9 provides for entry into force of the decision on the day following its publication in the *Official Journal*. In this sense, we would like to remind EASO that these internal rules would allow for the restriction of fundamental aspects of the right to data protection. Therefore, it should consider if it would not be appropriate for the decision to enter into force on the twentieth day after publication into the *Official Journal*, as is standard practice for legislative texts. If urgent entry into force is necessary, we recommend inserting an explanatory recital.

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