

EDPS comments on the EPPO's draft implementing rules on DPO [2020-0804]

1. Introduction

- These comments refer to the draft implementing rules on the Data Protection Officer (DPO) at EPPO ('the draft rules'). Our comments refer to the document submitted on 27 August 2020.
- We provide these comments in accordance with Article 85(2)(d) of Regulation (EU) 2017/1939¹ ('the EPPO Regulation') and Articles 41(1) and 57(1)(g) of Regulation (EU) 2018/1725² (EUDPR).

2. General comments

- We welcome that the EPPO plans to adopt implementing rules on the DPO and the timely consultation of the EDPS.

3. EDPS recommendations

The EDPS trusts that EPPO will implement the following recommendations prior to adoption of the draft rules by the College.

Recommendation 1: Article 2 of the draft rules refers to the designation and status of the DPO. Although the term of office is specified in Article 77(4) of the EPPO Regulation, the EDPS recommends that the draft rules also contain provisions on the DPO's term of office.

Recommendation 2: Article 2(3) of the draft rules refers to the dismissal of the DPO and more specifically, state that '*If not otherwise indicated in these rules, the DPO is considered dismissed the day following that of the decision*'. We take note of the fact that any dismissal of a DPO will take place on the basis of the provisions included in the EPPO Regulation and EUDPR and '*after obtaining the agreement of the EDPS*'. Nevertheless, the EDPS recommends that EPPO further reflect on the time when the decision of dismissal would enter into force, in order to account for DPO's guarantees of independence, as well as the employment conditions specified in the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community. Furthermore, in accordance with Article 44(3) of the EUDPR and Article 78(3) of the EPPO Regulation, in order to safeguard the independence of the DPO while performing his/her duties, the EDPS recommends specifying in the draft rules that the DPO shall not be dismissed or penalised for performing his/her tasks. Also, while taking note of the fact that the DPO will be '*administratively attached to the European Chief Prosecutor*' (ECP), as provided for in Article 2(4) of the draft rules, the EDPS recommends that the draft rules provide that the DPO shall directly report directly to the ECP (as provided for in Article 78(3) of the EPPO Regulation).

¹ OJ L 283, 31.10.2017, p. 1–71

² OJ L 295, 21.11.2018, p. 39–98

Recommendation 3: Considering that the draft rules are based on both the provisions of the EPPO Regulation and the EUDPR, the EDPS recommends including in the draft rules references to both texts when specific implementing provisions are defined in both Regulations (for example, Article 2(4), *‘Without prejudice to the relevant provisions of the EPPO Regulation [...]’*; Article 3(3)(b) *‘hold the documentation regarding breaches of persona data required by Article 74(4) of the EPPO Regulation’*). We also recommend clarifying to which legal act the draft rules are referring to in some particular circumstances (for example, Article 3(9) *‘Article 44(4) of the Regulation’*; Article 8(1) [...] *‘comply with the Regulation’*; Article 10(5) *‘provisions of the Regulation’*).

Recommendation 4: The EDPS recommends that EPPO further elaborate in Article 3 on the tasks and duties of the DPO (as listed in Article 45 of the EUDPR and Article 79 of EPPO Regulation) and in particular with regards to the DPO’s role on notification and communication of data breaches (i.e. to advise when evaluating whether a particular incident determined a personal data breach, to advise on the notification to the EDPS or the communication to the data subject). The duties of the DPO could also include the cooperation of the DPO with other DPOs and in particular with the JHA area DPOs.

Recommendation 5: Article 3(11) of the draft rules provide for the DPO’s obligation to *‘report regularly to the College’*. In line with Article 79(1)(i) of the EPPO Regulation, the EDPS recommends that the draft rules specify that the DPO shall prepare an annual report, which should be communicated to the ECP and to the EDPS.

Recommendation 6: Article 8 of the draft rules refers to obligations of staff members. Given that the list of the obligations is only partial, the EDPS recommends making clear that the list is non exhaustive and including in the draft rules other important obligations of the staff members in charge of particular personal data processing, such as informing data subjects (i.e., drafting data protection notices) and carrying out data protection impact assessments, where required.

Recommendation 7: Article 10(4) of the draft rules mentions that: *‘If the request for investigation concerns processing of operational personal data the reply of the DPO to the request shall be phrased, wherever necessary, in such manner as to safeguard the confidentiality and integrity of ongoing criminal investigations, including by stating exclusively that the request has been complied with.’* The EDPS recommends clarifying the provision *‘including by stating exclusively that the request has been complied with.’*

Recommendation 8: Given that the draft rules do not contain provisions on its entry into force, we recommend including a specific Article in this sense and allow for an appropriate *vacatio legis*.

Brussels, 7th October 2020