



EDPS comments on the European Banking Authority’s draft Decision laying down 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 European Banking Authority (EBA) (Case 2020-0941)

1. Introduction

These comments refer to EBA’s draft Decision laying down implementing rules concerning restrictions on certain rights of data subjects (pursuant to Article 25 of Regulation (EU) 2018/1725, hereinafter “the Regulation”¹).

The EDPS’ comments refer to the document submitted on 15 October 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 Regulation².

2. General comments

- The EDPS appreciates that EBA differentiates between restrictions in the context of its administrative functioning and the exercise of its missions.
- The EDPS welcomes the fact that EBA will perform a necessity and proportionality test on the need for the restriction of data subjects’ rights, which should be documented.
- The EDPS also welcomes the fact that the draft internal rules provide for the obligation to document the application of certain restrictions.
- In relation to the 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 from their adoption and at the closure of the relevant inquiry or investigation.
- The EDPS highlights that the draft internal rules should be signed by the highest level of management of EBA.

3. EDPS recommendations

- **Recommendation 1:** The EDPS recommends that EBA make a link between the processing operations in which restrictions may be imposed and the corresponding legal grounds for restrictions (e.g. Article 1(2)(c) of the draft internal rules can be linked to Article 25(1)(f) of the Regulation). Therefore, the grounds for restrictions listed in Article 3(1) of the draft internal rules should be integrated in and linked with the processing operations enumerated in Article 1 of the same rules.

¹ OJ L 295, 21.11.2018, p. 39.

² Available on the EDPS website via https://edps.europa.eu/sites/edp/files/publication/20-06-24_edps_guidance_on_article_25_of_the_new_regulation_and_internal_rules_en.pdf.

- **Recommendation 2:** In accordance with Article 25(2)(d) of the Regulation, the safeguards to be put in place should aim to “prevent abuse or unlawful access or transfer” of the personal data in respect of which restrictions apply or could be applied and not to “avoid data breaches, leakages or unauthorised disclosure in the context of the investigations”, 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 its Article 2(1), be aligned with the wording and rationale of Article 25(2)(d) of the Regulation.
- **Recommendation 3:** Article 2(1) of the draft internal rules provides that “the safeguards in place to avoid data breaches, leakages or unauthorised disclosure [...] are the following [...]”. In addition to implementing Recommendation 2, the EDPS recommends rephrasing so as to make this provision enforceable and not descriptive.
- **Recommendation 4:** Regarding Article 3(2) of the draft internal rules, the EDPS presumes that EBA’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 intention, the EDPS recommends clarifying the text in this regard.

In respect to point (c) under Article 3(2) of the draft internal rules, “where the exercise of those rights and obligations could jeopardise EBA’s cooperation with third country or international organisations [...]”, the EDPS recommends clarifying that EBA may impose restrictions in case there is clear evidence that cooperation is likely to be jeopardised, rather than where this is simply possible. Therefore, the EDPS recommends that EBA replace “could” with “would”.

- **Recommendation 5:** Article 4(1) of the draft internal rules provides that the controller shall inform the Data Protection Officer (DPO) without undue delay whenever “the Controller restricts the application of data subjects’ rights, or extends the restriction”. Furthermore, the controller “shall provide the DPO access to the internal note containing the assessment of the necessity and proportionality of the restriction”. The EDPS recommends that EBA redraft this Article of the draft internal rules so as to reflect in the text the involvement of the DPO before the imposing of a restriction. The EDPS recalls that as a matter of good practice, the DPO should also be involved in the drafting of the “proportionality and necessity test assessment note”. This recommendation is in line with Article 44(1) of the Regulation and the EDPS Guidance on Article 25 of the Regulation.
- **Recommendation 6:** Article 6(3) of the draft internal rules states that “the provision of information referred to in paragraph 2 may be deferred, omitted or denied if it would cancel the effect of the restriction in accordance with Article 25(8) of Regulation (EU) 2018/1725”. Providing that Article 25(8) of the Regulation refers to the possibility to defer, omit or deny information if it would cancel the effect of the restriction imposed, the EDPS recommends adapting, for clarity, Article 6(3) of the draft internal rules to the text of the Regulation.
- **Recommendation 7:** Whereas the EDPS welcomes the fact that restrictions to information to data subjects (Article 5 of the draft internal rules), right of access (Article 6 of the draft internal rules) and communication of personal data breach (Article 8 of the draft internal rules) are documented, the EDPS notes that there is no provision of

documentation for the right of rectification, erasure and restriction of the processing (Article 7 of the draft internal rules). The EDPS recommends redrafting Article 7 of the draft internal rules in order to impose the obligation of documentation of restrictions to the right of rectification, erasure and restriction.

- **Recommendation 8:** The EDPS takes note of Article 5(1) of the draft internal rules, which states that EBA intends to “publish on its website data protection records that inform all data subjects of its activities involving processing of personal data, including information relating to the potential restriction of data subject rights”. In order to ensure appropriate general transparency, clarity and foreseeability of these potential restrictions towards data subjects, the EDPS recommends that EBA additionally publish data protection notices on its website informing data subjects of its activities involving processing of their personal data, including a section on the potential for restriction of data subjects' rights pursuant to Article 3 of the draft internal rules. The information shall cover which rights may be restricted, the grounds on which restrictions may be applied and their potential duration.

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