

EDPS comments to the EIB concerning the DPO implementing rules and the procedure for the exercise of data subjects' rights (Case 2020-0683)

I. General Comments

1. The EDPS welcomes that the EIB plans to adopt implementing rules concerning the Data Protection Officer (DPO) in line with Article 45(3) of the Regulation (EU) 2018/1725¹ (hereinafter 'the Regulation'). The EDPS provides these comments and recommendations in accordance with Articles 41(1) and 57(1)(g) of the Regulation.
2. The EDPS welcomes the fact that the draft implementing rules (hereinafter 'the draft rules') not only include provisions of the Regulation as such, but also further explain how the Regulation's provisions will be implemented in practice by the EIB.

II. EDPS Recommendations

1. Regarding the reference to '*supplementary internal rules*' in the title of the draft rules, the EDPS is of the opinion that such reference could create confusion and could potentially mislead the data subjects into understanding that there are other rules to which the implementing rules at hand are supplementary. For this reason, the EDPS recommends renaming the rules, omitting reference to '*supplementary*' or replacing '*supplementary internal rules (...)*' to '*data protection implementing rules (...)*'.
2. Article 2 paragraph 1 of the draft rules, which refers to the designation of the DPO, states that '*the procedure of designation can also be subject to the external selection procedure*'. The EDPS recommends that the EIB further explain the meaning of this provision. If this is a reference to the provisions of Article 43(4) of the Regulation that provides that a DPO can fulfil his/her tasks based on a service contract, we recommend clarifying this in order to avoid misinterpretation.
3. Article 2 paragraph 5 of the draft rules foresees that the DPO reports directly to the highest management level of EIB. The EDPS advises including a provision according to which this reporting obligation shall be taken into account in the context of the annual performance appraisal of the staff member appointed as DPO (in particular with regard to the specific DPO duties), for which the EIB highest management shall ensure an equal and fair treatment.
4. Article 2 paragraph 9 foresees that the Secretary General (SG) of EIB will determine the deputising arrangements for the DPO in case of need, '*having regard to the agreement between EIF and EIB regarding replacement of the respective DPOs*'. Article 4 paragraph 4 of the draft rules provides for the replacement of the EIF and EIB DPOs by each other in case of need. This provision of Article 4 seems to imply that such a replacement will always take place, which is contradictory to the above mentioned provision in Article 2 that gives the EIB SG the *discretion* to determine the deputising arrangements for the DPO in accordance with the agreement or not. Therefore, the EDPS recommends that EIB redraft the text to reflect that the EIB SG has the discretion to make deputising arrangements only when replacement by the EIF DPO is impossible (e.g. because he/ she is also absent) or to otherwise clarify the provisions' interrelation.

¹ OJ L 295, 21.11.2018.

5. Article 7 of the draft rules seems to describe the tasks and duties of the controller mainly in relation to the involvement of the DPO in those tasks and duties. In this context, we note that paragraph 2 on joint controllership and paragraph 7 on security in rules on the DPO do not refer to any DPO involvement. The EDPS recommends adding in paragraph 2 that the controller shall consult the DPO on draft agreements on joint controllership and in paragraph 7 that the DPO shall have the support of the IT services of the EIB as regards compliance with data protection security. The EDPS also recommends clarifying in the beginning of Article 7 that these provisions of the implementing rules mainly cover interactions between the controller and the DPO and are without prejudice to the (remaining) obligations of the EIB as controller as mandated by the Regulation.
6. Article 9 of the draft rules, which refers to the tasks and obligations of EIB as a processor, only partially lists the elements that should be included in the contract or other legal act concluded between the controller and the processor, as prescribed by Article 29(3) of the Regulation. The EDPS thus recommends either aligning the provisions of this article to those of the Regulation or including a disclaimer sentence in the beginning of Article 9 to explain that the provisions under this article are without prejudice to the (remaining) obligations of the processor as mandated by the Regulation. Furthermore, the EDPS recommends adding another paragraph under Article 9 of the implementing rules explicitly stating that when the EIB acts as a processor, it shall maintain a record of all categories of processing activities carried out on behalf of the controller, in line with Article 31(2) of the Regulation. Finally, the EDPS recommends that the DPO be consulted on draft data protection contractual clauses with processors.
7. Paragraph 2 of Article 11 of the draft rules states that EIB staff and any other individual ‘*may consult the DPO before addressing the EDPS or lodging a complaint with the EDPS pursuant to Article 63 of the Regulation*’. Although Article 11 refers to the exercise of data subject’s rights, the EDPS recommends rephrasing this provision, for clarification purposes, in order to reflect that such contact with the DPO and/ or the EDPS refers to cases where data subjects consider that the processing of personal data relating to them infringes the Regulation.
8. Paragraph 1 of Article 12 of the draft rules provides that the controller may restrict data subjects’ rights ‘*if legitimate reasons such as those specified in Article 25 of the Regulation clearly so justify (...)*’. Article 25 of the Regulation provides an exhaustive list of conditions under which data subjects’ rights can be restricted, meaning restrictions cannot be carried out under any other conditions than the ones listed in paragraph 1 of this Article. Using the words ‘*such as*’ gives the impression that there might be other, additional, conditions that would allow the restrictions of data subjects’ rights, which is not the case. Therefore, the EDPS recommends rephrasing this provision in order to clarify that restrictions can only be applied if one or more of the conditions listed under Article 25(1) of the Regulation are met. The EDPS welcomes the reference to the implementing rules, based on which such restrictions can apply.
9. With regards to the entry into force of the implementing rules, and given the importance of all persons concerned being aware of their provisions, the EDPS recommends a longer *vacatio legis*, namely 20 days after its adoption.