

EDPS comments on the EPPO's draft revised rules on processing of personal data [2020-0782]

1. Introduction

- These comments refer to the draft revised rules on processing of personal data (hereinafter 'the draft DP rules'). Our comments refer to the document submitted on 18 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 internal rules on the processing of personal data implementing data protection provisions of the EPPO Regulation as well as of the EUDPR.
- We also welcome the timely consultation of the EDPS.
- The EDPS takes note of the fact that many of the informal comments provided by the EDPS on 10 August 2020 have been considered and included in the new draft submitted to the EDPS on 18 August 2020.

3. EDPS recommendations

The EDPS asks that the EPPO implements the following recommendations prior to adoption of the draft DP rules by the College.

3.1. Operational data

- **Recommendation 1 (Recitals and final provisions):** As both recitals and final provisions (such as entry into force) are missing, the EDPS recommends including these sections in the draft DP rules.
- **Recommendation 2 (Data subjects' rights):** Article 1(3) of the draft DP rules specifies that '[REDACTED]'. Given that the list of the rights mentioned does not include all rights provided for in the EPPO Regulation, the EDPS recommends listing all data subjects' rights or referring to all rights included in 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 (Information to data subjects):** Article 4(6) of the draft DP rules mention that ‘[REDACTED]’. The EDPS recommends that the provisions of Article 4(6) of the draft DP rules are adapted so as to reflect the fact that Article 58 of the EPPO Regulation applies directly and that national laws should be considered only to the extent that a matter is not regulated by the EPPO Regulation.
- **Recommendation 4 (Identity of the data subject exercising their rights):** The EDPS recommends that Articles 5 and 20 of the draft DP rules contain provisions regarding the procedure to follow in order to confirm the identity of the requester prior to providing any information to the requester, in case the EPPO has reasonable doubts about his/her identity.
- **Recommendation 5 (Personal data breach):** Article 8 of the draft DP rules (‘Communication of a personal data breach to the data subject’) provides that, when evaluating the level of risk of a personal data breach, the following persons shall be involved in the assessment: [REDACTED], whom shall liaise with the Data Protection Officer (DPO). The EDPS recommends that the EPPO re-evaluates who would need to be involved in this assessment, [REDACTED]. The provisions of the draft DP rules shall be adapted accordingly.
- **Recommendation 6 (Personal data breach):** Also concerning Article 8 of the draft DP rules, the EDPS recommends adding a more representative title, as the article addresses both notification to the EDPS and the communication to the data subject (in accordance to articles 74 and 75 of the EPPO Regulation). The EDPS would also like to draw attention to Article 74(5) of the EPPO Regulation and recommend that the EPPO include in the internal rules that, where a personal data breach involves personal data that have been transmitted by or to another controller, the EPPO shall communicate the information to that controller as well. Furthermore, in case of high risk, any decision not to inform the data subject, should be documented, as is the case of an access request. In addition, any provision of information to data subjects related to personal data breaches concerning their personal data should be made preferably in writing, so that the EPPO is able to demonstrate compliance to Article 75 of the EPPO Regulation (i.e. that adequate information has been provided).
- **Recommendation 7 (Personal data breaches):** With regards to personal data breaches, the EDPS recommends that Articles 8 and 21 of the draft DP rules contain provisions as regards the documentation of personal data breaches in accordance with Article 74(4) of the EPPO Regulation and 34(6) of the EUDPR.
- **Recommendation 8 (Exceptions and restrictions to data subjects’ rights):** Article 9 of the draft DP rules provides for exceptions and restrictions applicable to operational personal data. The EDPS recommends that the DPO be involved throughout the procedure (such as when applying a restriction is being considered and when applied restrictions are reviewed). The EDPS recommends that the DPO’s involvement be documented.
- **Recommendation 9 (Transfers):** Since Article 11(1) of the draft DP rules deals with one means of transferring personal data to third countries (adequacy - Article 82 of the EPPO Regulation) whereas Article 11(2) of the draft DP rules further details one general rule of Article 81 of the EPPO Regulation, we recommend that the provisions

on adequacy be included in a separate paragraph after the general provision of Article 11(2) of the draft DP rules. As regards transfers based on adequate decision, we recommend that the draft DP rules do not contain provisions on DPO's advice (as it is currently in the case in Article 11(1)) considering the nature of adequacy decisions).

- **Recommendation 10 (Transfers):** Article 11(2) of the draft DP rules refers to the possibility of transferring operational personal data to third countries and international organisations where the EPPO has not obtained '[REDACTED]'. The EDPS recommends that the terminology of the Article 11(2) of the draft DP rules be aligned with the provisions of Article 80(1)(c), which refers to 'prior authorisation' and not to 'prior consent'. Furthermore, we recommend clarifying that the transfer provided for in Article 80(2) of the EPPO Regulation can take place 'only if the transfer of the operational personal data is necessary for the prevention of an immediate and serious threat to public security of a Member State of the European Union or a third country or to essential interests of a Member State of the European Union and the prior authorisation cannot be obtained in good time.'
- **Recommendation 11 (Transfers):** Article 12 of the draft DP rules refer to 'Transfers to third countries or international organisations subject to appropriate safeguards'. Should the transfer mentioned to in Article 12(1) refer to Article 82(1)(b) of the EPPO Regulation, the EDPS recommends that the EPPO reconsiders whether the European Delegated Prosecutor might be the most appropriate level to take such as decision. Since Article 12 seems to refer only to the scenario mentioned in Article 82(1)(b) of the EPPO Regulation, we also recommend that Article 12 of the draft DP rules contain provisions covering Article 82(1)(a) of the EPPO Regulation.
- **Recommendation 12 (Transfers):** Article 13 of the draft DP rules refer to 'Transfers to third countries or international organisations subject to derogations for specific situations'. Given the extraordinary nature of such transfers, the EDPS recommends adding in the draft DP rules a reference in line with Recital 72 of Directive 2016/680³ and specifying in particular the following: 'Those derogations should be interpreted restrictively and should not allow frequent, massive and structural transfers of personal data, or large-scale transfers of data, but should be limited to data strictly necessary.'
- **Recommendation 13 (Temporary processing):** We take note of the explanation provided by email regarding the deletion from the latest version of the draft DP rules (version submitted to the EDPS on 18 August) of the provision regarding temporary processing of personal data. More specifically, it was indicated that '[REDACTED]'. Therefore, the EDPS recommends that the EPPO further reflect on the workflow and the processing of personal data before concluding as to whether the personal data received or acquired by the EPPO falls within its mandate. As a result, we thus recommend that the draft DP rules contain detailed provisions, in line with Article 49(4) EPPO Regulation, 'further specify[ing] the conditions relating to the processing of such operational personal data, in particular with respect to access to and the use of the data, as well as time limits for the storage and deletion of the data.' The EDPS would like to recall the principle of accountability and the obligation to ensure compliance with the applicable data protection framework, including with regards to the exercise of the data

³ OJ L 119, 4.5.2016, p. 89–131

subjects rights and the principle of storage limitation, including during temporary processing for relevance checking.

- **Recommendation 14 (Joints controllers and processors):** Article 16 of the draft DP rules refer to ‘joint controllers’ and ‘processors’. Considering the possible overlaps between the EPPO Regulation and national laws (such as national laws implementing Directive 2016/680 or national procedural laws), the EDPS recommends that the draft DP rules clarify the notion of controllership regarding operational personal data taking into account specific situations mentioned in the EPPO Regulation (such as where personal data has been received by the EPPO or transmitted by the EPPO, as it is the case where the EPPO considers that the situation does not falls within its mandate).
- **Recommendation 15 (Time limits for storage):** The EDPS notes that, while for administrative personal data Article 25 of the draft DP rules refer to time limits of storage, the draft DP rules do not contain provisions regarding storage limitation of operational personal data. As a result, the EPDS recommends that the draft DP rules refer to retention periods applicable to operational personal data.
- **Recommendation 16 (Automated data files):** Article 64 of the draft RoP refers to the establishment of automated data files other than case files for the processing of operational personal data, mentioning that [REDACTED]. However, since the draft DP rules do not include provisions as regards the procedure applicable for personal data processing in such a case, the EDPS recommends that the draft DP rules contain such provisions and in particular explain in which specific circumstances Article 44(5) of the EPPO Regulation may apply. The EDPS considers that processing in CMS should remain the rule.

3.2. Administrative data

- **Recommendation 17 (Exceptions and restrictions):** Article 22 of the draft DP rules referring to ‘Applicable exceptions and restrictions’ provides that [REDACTED]. Article 25(1) of the EUDPR provides that ‘Legal acts adopted on the basis of the Treaties or, in matters relating to the operation of the Union institutions and bodies, internal rules laid down by the latter may restrict the application of Articles 14 to 22, 35, and 36, as well as Article 4 in so far as its provisions correspond to the rights and obligations provided for in Articles 14 to 22 [...]’. As such, the draft DP rules do not provide for restrictions of Articles 14, 15, 16, 36 or Article 4, as provided for in Article 25(1) of the EUDPR. However, it provides for the possibility to restrict Article 23, which is not in accordance with Article 25(1) of the EUDPR. Since the EPPO has prepared draft internal rules on restricting data subjects’ rights on the basis of Article 25 of the EUDPR and in order to avoid any discrepancy, the EDPS recommends that the draft DP rules only make reference to the internal rules on restrictions on the basis of Article 25 of the EUDPR.
- **Recommendation 18 (Records):** Given that records of transfers of operational data must be kept by the DPO in accordance with Article 79(1)(d) of the EPPO Regulation, the EDPS recommends that the documentation mentioned in Articles 23(2) and 24(2) of the draft DP rules shall also be kept by the DPO.



- **Recommendation 19 (Transfers):** Article 48 of the EUDPR defines the conditions under which transfers of personal data to a third country or to an international organisation can take place (subject to appropriate safeguards). This legal provision does not explicitly refer to an ‘assessment’ by the controller or by the DPO. As a result, the EDPS recommends that EPPO aligns the provisions of Article 23 of the draft DP rules with Article 48 of the EUDPR in order that such transfers could be done on the basis of one of the instruments authorised by Article 48 of the EUDPR. Also, since the current provision of the draft DP rules refer to one of the two scenarios mentioned in Article 48 of the EUDPR (more specifically, in paragraphs 1 and 2), we recommend that the draft DP rules include provisions covering both scenarios of the EUDPR.
- **Recommendation 20 (Transfers):** Article 24 of the draft DP rules provides that ‘[REDACTED]’. Since it is unclear whose opinion will be asked, the EDPS recommends that the opinion of the DPO should be requested. The text of the draft DP rules should be adapted accordingly.

Brussels, 17 September 2020