

EDPS comments to the seven Joint Undertakings concerning the Data Protection Officer implementing rules (Case 2021-0037)

I. General Comments

1. The EDPS welcomes that the Joint Undertakings (JU) plan to adopt implementing rules concerning the Data Protection Officer (DPO) in line with Article 45(3) of Regulation (EU) 2018/17251 (the Regulation). The EDPS provides these comments and recommendations in accordance with Articles 41(1) and 57(1)(g) of the Regulation. The EDPS comments also rely on the [EDPS Position Paper on the role of DPOs of EUIs \(30 September 2018\)](#).
2. These comments refer to the draft decision of the Governing Boards of the Joint Undertakings (JU) Clean Sky 2 (CSJU2), Single European Sky Air Traffic Management Research (SESAR), Shift2Rail (S2R), Bio-based Industries (BBi), Fuel Cells and Hydrogen 2 (FCH2), Electronic Components and Systems for European Leadership (ECSEL) and Innovative Medicines Initiative 2 (IMI2) on implementing rules concerning the Data Protection Officer (DPO). The JU have prepared a template they will all use, adapting it with references to their respective establishing acts and tasks.

II. EDPS Recommendations

1. The title of the draft implementing rules (draft rules) refers to the implementing rules concerning the DPO and, additionally, “restrictions of data subjects’ rights”. The EDPS is of the opinion that reference to the latter could create confusion and could potentially mislead data subjects into understanding that these rules cover both the functions relating to the DPO and the restrictions of data subjects’ rights under Article 25 of the Regulation. Since restrictions of data subjects’ rights are covered by different JU decisions, already reviewed by the EDPS, we recommend omitting their reference from the title of these draft rules.
2. Article 4 of the draft rules, which refers to the designation and position of the JU DPO, does not provide any information on the deputising or assisting of the DPO, which would ensure the continuity of the function in the event of absence of the DPO. Additionally, Article 4 of the draft rules makes no reference to the registration of the DPO with the EDPS upon their designation, nor does it refer to their dismissal from their post under the condition that they no longer fulfil the conditions to perform their duties and only with the consent of the EDPS. The EDPS recommends adding this information in the text of the draft rules, to ensure compliance with Article 44(8) of the Regulation.

3. Article 5 of the draft rules lists the tasks and duties of the JU DPO, which are however not identical to these listed under Article 45 of the Regulation. In order to ensure that the relevant provision of the Regulation is respected, the EDPS recommends that JU add in the beginning of the first paragraph of Article 5 of the draft rules the following sentence: “Without prejudice to the tasks as described in Article 45 of the Regulation, (...)”.
4. The second subparagraph of Article 6 of the draft rules refers to the “arrangements referred to in point (b) of the first subparagraph”. We understand that this is a reference to point (d) of the first subparagraph, which is about “internal arrangements with other Commission Directorates-General or Services”, and not point (b), which is about the power of the JU DPO to conduct investigations. We recommend adjusting the text accordingly, in order to avoid misinterpretation.
5. The draft internal rules fail to refer to some key elements of the position of the DPO under the Regulation, among which, the following:
 - a) The DPO should be involved early and systematically in all issues relating to data protection within the JU (Article 44(1) of the Regulation). In order to enable the DPO to carry out the assigned tasks and responsibilities, the JU should provide them with adequate support on a material, staff and managerial level (Article 44(2) of the Regulation).
 - b) The Regulation emphasises the independence of the DPO, which prevents them from receiving instructions regarding the exercise of their tasks. No DPO should suffer any prejudice in the workplace because of their function (Article 44(3) of the Regulation).
 - c) The controller should ensure that no tasks and duties, outside of the ones linked to the DPO position, result in a conflict of interest. The absence of conflict of interest is closely linked to the requirement to act in an independent manner (Article 44(6) of the Regulation).

Moreover, we take the view that the evaluation of the performance of the DPO for their function should be clearly separated from the evaluation of other tasks (see p. 12 of the abovementioned Position Paper).

The EDPS therefore recommends that JU adapt the text of the draft rules, including additional Articles where necessary, so that the abovementioned elements are reflected in the text.

6. Articles 9 to 14 of the draft rules refer to the restriction of data subjects’ rights. We understand that this information is linked to the restrictions that are put in place in order to ensure that the tasks of the JU DPO are not hampered. The EDPS welcomes transparency towards data subjects in this regard. However, any restriction of data subjects’ rights under Article 25 of the Regulation can only take place in exceptional circumstances and with the

safeguards laid down in the Regulation. Since the JU have already adopted respective decisions laying down internal rules on the restrictions of data subjects' rights, which have been reviewed by the EDPS in a joint consultation, we recommend referring to these Decisions in the text of the draft rules, to ensure that the safeguards foreseen there are applicable in the restrictions described in the current draft rules.

7. With regard 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.

Brussels, 04 March 2021