



EDPS comments to the executive agencies concerning the draft implementing rules for the data protection officer (case 2021-0244)

I. General Comments

1. The EDPS welcomes the executive agencies' 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 steering committees of the respective executive agencies laying down implementing rules concerning the DPO. The executive agencies have prepared a template they will all use, adapting it with references to their respective establishing acts and tasks.

II. EDPS Recommendations

1. We note that the draft decision contains a page and a half of recitals concerning data subject rights and potential restrictions of these rights under Article 25 of the Regulation, although this is not the subject of the decision¹. We recommend reviewing the recitals from a drafting perspective, given that their purpose is to explain the reasons for the operative provisions (i.e. implementing rules on the DPO) and that the agencies can discharge their information obligation to data subjects in a data protection notice. To avoid confusion with the operative part of the text, they also do not normally contain words such as "shall" and "may".
2. We recommend mentioning Article 45(3) of the Regulation in the recitals and Article 1 of the decision, given that the decision is intended to fulfil the obligation in that provision to adopt implementing rules concerning the DPO.
3. Article 4 (*Designation and position*) provides that the DPO can be assigned to a unit for administrative purposes, and that his or her performance as a DPO can be reviewed either by the agency director, or a reporting officer, or both. This risks creating unclear reporting lines and diminishing the authority and independence of the DPO. We recommend that the DPO report only to the agency director, as required by Article 44(3) of the Regulation, and that the director review the DPO's performance. We would therefore delete the wording "and/or his/her Reporting Officer at the agency". We also recommend that the DPO's place in the agency's organisation chart reflect his or her direct reporting line to the director.

¹ On 2 March 2020, the EDPS issued comments on draft internal rules concerning restrictions of certain rights of data subjects in relation to the processing of personal data in the functioning of the executive agencies (case 2020-0057): [20-03-02_edps_comments_2020-0057_en.pdf \(europa.eu\)](#).

4. Article 4 also provides for optional consultation of the EDPS on the DPO's appraisal report. We appreciate that EU institutions, offices, bodies and agencies sometimes request feedback from the EDPS on DPOs' work, generally at the request of the DPO concerned. If you wish to recognise this practice formally in the implementing rules, we suggest wording the provision so as to reconcile requests for feedback with the need for both the EDPS and DPOs to carry out their tasks independently. As a result, we recommend deleting the wording "and consultation of the EDPS in this respect could be launched before completing the appraisal report", and replacing it with a bullet point (d) on the following lines: "at the DPO's request, the Agency Director may request feedback from the EDPS on the DPO's performance in the context of its co-operation with DPOs."
5. Article 5 specifies the tasks of the DPO. We recommend that the agencies further reflect on what implementing details could usefully be included in the decision with respect to the tasks of the DPO, and avoid extensive overlaps with the text of the Regulation for reasons of legal certainty. The purpose of the implementing rules is, of course, to supplement the text of the Regulation in light of the agencies' specific needs, rather than to repeat it. You may wish to consult section 5 of our position paper or Article 4 the [EDPS's implementing rules](#) in this regard.
6. In Article 8(2)(a) (*Role of the controller*), we presume that the intention is to encourage the controller to consult the DPO on the 'compliance' of processing operations rather than their 'conformity'. We suggest adjusting the text accordingly.
7. We trust that the executive agencies will undertake a general check of the drafting when finalising the text.

Brussels, 17 March 2021

(e-signed)

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