



EUROPEAN DATA PROTECTION SUPERVISOR

EDPS OPINION ON THE INTERPRETATION OF ARTICLE 3(13) OF THE REGULATION IN THE CONTEXT OF THE INFORMATION PROVIDED TO DATA SUBJECTS PURSUANT TO ARTICLES 15(1)(d) AND 16(1)(e) OF THE REGULATION AND RESTRICTIONS UNDER ARTICLE 25 OF THE REGULATION (Case 2021-0786)

1. INTRODUCTION

1. This Opinion relates to the interpretation of Article 3(13) of Regulation (EU) 2018/1725¹ (the ‘Regulation’) in the context of the information provided to data subjects pursuant to Articles 15(1)(d) and 16(1)(e) of the Regulation and restrictions under Article 25 of the Regulation.
2. The EDPS issues this Opinion in accordance with Articles 57(1)(g) and 58(3)(c) of the Regulation.

2. BACKGROUND INFORMATION

3. On 17 August 2021, the Data Protection Officer of [the European Institution] (the ‘DPO’) noted the EDPS’s view, expressed in October 2018, that, when some EU institutions’ (the ‘EUIs’) services qualify as ‘independent administrative authorities’² and receive personal data in the framework of a particular inquiry in accordance with Union law, economic operators cooperating with that particular inquiry do not have a legal obligation under the General Data Protection Regulation (the ‘GDPR’) to inform the data subjects about the disclosure of their personal data to those EUIs³.
4. In this respect, the DPO referred to the definition of ‘recipient’ adopted in Article 3(13) of the Regulation and noted that the ‘independent administrative authorities’ referred to above, when receiving and processing personal data in the framework of

¹ Regulation (EU) 2018/1725 of the European Parliament and the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ, L 295, 21.11.2018, pp. 39-98.

² Such as the European Commission’s Directorate-General for Competition (DG COMP) or the European Anti-Fraud Office (OLAF), for example.

³ See page 7 of document ‘[Investigative activities of EU institutions and GDPR](#)’, issued on 22 October 2018.

a particular inquiry in accordance with Union law, are not to be regarded as ‘recipients’. He subsequently alerted the EDPS to the practical difficulties resulting from the above. Pursuant to Article 25 of the Regulation and Articles [...] and [...] of the Decision of [the European Institution] (the ‘[European Institution’s] Rules’)⁴, controllers in [the European Institution] are expected to provide reasons to the data subjects if a restriction had been applied to their right to information⁵, for example. In case of a transmission of personal data, if the entity receiving personal data is not to be regarded as ‘recipient’ however, controllers in [the European Institution] may unintentionally circumvent the [European Institution’s] Rules on restrictions if they do not need to abide by the general transparency obligation of providing data subjects with certain information pursuant to Articles 15 and 16 of the Regulation.

5. The DPO asked the EDPS to provide guidance on this matter.

3. LEGAL ANALYSIS

3.1. Introduction

6. In the context of their activities, EUIs *inter alia* collect, receive, store, transmit, or otherwise handle or process, personal data. Data subjects are entitled to know what EUIs do with their data, namely to whom they disclose it. EUIs must thus, in principle, inform data subjects about the natural or the legal persons (including public authorities), who are the recipients of their personal data⁶.
7. There are cases, however, where, in line with the Regulation, the EUI cannot inform the data subject about a processing (or about a recipient, specifically). This is the case when an exception provided for in the Regulation is applicable. For example, the EUI will not inform the data subject if doing so would make it likely to render impossible or seriously impair the achievement of the objectives of the processing⁷ or when the disclosure of the personal data is expressly laid down by Union law, which provides appropriate measures to protect data subjects’ legitimate interests⁸.
8. Similarly, the EUI will not inform a data subject when it applies a restriction of a right, in accordance with Article 25 of the Regulation. Provided an adequate legal instrument - namely of the kind included in [European Institution’s] Rules - is in place, the EUI will restrict rights, such as on the provision of information, in some situations and under specific conditions⁹.

3.2. Definition of (non) recipient - the example of OLAF (in some cases)

9. Article 3(13) of the Regulation provides for a definition of ‘recipient’:

“[a] natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not.”

10. It also provides for a definition of entity that is **not to be regarded as ‘recipient’**:

⁴ [...]

⁵ [...]

⁶ See Articles 15(1)(d) and 16(1)(e) of the Regulation.

⁷ See Article 16(5)(b) of the Regulation.

⁸ See Article 16(1)(c) of the Regulation.

⁹ See Articles 15, 16, and 25 of the Regulation.

“[p]ublic authorities which may receive personal data *in the framework of a particular inquiry in accordance with Union or Member State law...; the processing of those data by those public authorities shall be in compliance with the applicable data protection rules according to the purposes of the processing*”.
(emphasis added)

11. It follows that public authorities to whom personal data are transmitted in accordance with a legal obligation for the exercise of their official mission, such as the European Anti-Fraud Office (‘OLAF’) for example, are not recipients if they receive personal data in the framework of a particular inquiry¹⁰. The fact that, in such circumstances, OLAF is not a recipient should not be understood as meaning that EUIs can automatically disregard their information obligations towards data subjects, however.
12. Below, we offer some practical examples of how [the European Institution] could comply with its information obligations towards data subjects in practice, depending of its interaction with OLAF:

3.2.1. Situation 1: OLAF is conducting an investigation at [the European Institution’s] premises

13. [The European Institution’s] Rules provide that when OLAF processes personal data held in the [European Institution’s] premises, that is, when OLAF accesses any relevant information stored there¹¹ for example, it act as controller¹². The EDPS agrees with this understanding.
14. In such circumstances, there is no transmission of personal data from the [European Institution] to OLAF¹³. OLAF collects personal data from [the European Institution]. It is thus OLAF’s responsibility to comply with the obligations stemming from the Regulation relating to provision of information to data subjects, pursuant to Articles 15 and 16 of the Regulation and, where needed, to apply its internal decision on restrictions under Article 25. [The European Institution] has no such obligation in this case.

3.2.2. Situation 2: OLAF is investigating a suspected case of corruption or fraud and [the European Institution] transmits personal data to OLAF during that investigation following a request from OLAF

15. If [the European Institution] discloses personal data to OLAF following a request from the latter in the framework of an ongoing OLAF investigation¹⁴, OLAF is the controller of the data processed in the framework of the investigation and has therefore the obligation to inform the individuals concerned about the investigation, unless it applies a restriction under its own internal rules on the matter. [The European Institution] is, this notwithstanding, the controller of the data it holds and sends to OLAF. Thus, [the European Institution] should perform its due diligence and carefully assess OLAF’s request, before transmitting the personal data¹⁵. In addition,

¹⁰ See Article 8 of [Regulation No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by OLAF \(the ‘OLAF Regulation’\)](#).

¹¹ Pursuant to Article 4(2) of OLAF Regulation.

¹² [...]

¹³ [...]

¹⁴ Article 8 of OLAF Regulation. The EDPS highlights that a particular inquiry should be interpreted as a targeted investigation and not as the disclosure of all staff’s personal data to look for potential infringements.

¹⁵ See Recital 21 of the Regulation: “In accordance with the principle of accountability, where Union

the information requirements stemming from Articles 15 and 16 of the Regulation apply, in principle, to such transmission.

16. At the same time, EUIs have a legal obligation to ensure that the confidentiality of the investigations conducted by OLAF is respected *together with* the legitimate interests of the persons concerned¹⁶.
17. This is where Article 3(13) of the Regulation comes into play: OLAF is not considered as a recipient when it receives data in the framework of its investigations.
18. However, the exclusion of certain public authorities from the definition of recipient of Article 3(13) should not be regarded in isolation and considered as yet another, somewhat overarching, exception provided for in the Regulation which would allow controllers evade their information obligations. Therefore, EUIs will abide by their obligation to respect the confidentiality of OLAF's investigations and take the legitimate interests of the individuals concerned by making use of either the legal acts adopted on the basis of the Treaties providing for the possibility of restricting the provision of information to the data subjects, if available, or its own decisions of the sort of the relevant provisions included in the [European Institution's] Rules¹⁷.
19. EUIs may also apply the exceptions provided for in the Regulation, if available and appropriate (for EUIs like OLAF, whose core business activity is to conduct fraud investigations, they should have rules on restrictions in place and not apply exceptions, at least as regards the persons suspected of fraud). This is the case also in [the European Institution]: according to [the European Institution's] Rules, before resorting to a restriction, the controller considers whether an exception is applicable¹⁸. Should no exception be available, [the European Institution] will make use of a restriction to the provision of information, applied in accordance with the relevant articles of [the European Institution's] Rules, when it discloses information to OLAF in the context of an investigation by the latter¹⁹.
20. The EDPS is favourable towards EUIs applying a restriction irrespective of an exception being potentially available²⁰ in such cases, as this would further support the requirement to protect the legitimate interests of data subjects. Hence, when [the European Institution] replies to a request from OLAF addressed during one of its investigations, [the European Institution] should consider, also from its side, whether restricting the provision of information to the data subject in the case at stake is necessary to protect the confidentiality of the relevant OLAF investigation²¹, which

institutions and bodies transmit personal data... to other Union institutions or bodies, they should verify whether such personal data are required for the legitimate performance of tasks within the competence of the recipient. In particular, following a recipient's request for transmission of personal data, the controller should verify the existence of a relevant ground for lawfully processing personal data and the competence of the recipient. The controller should also make a provisional evaluation of the necessity of the transmission of the data. If doubts arise as to this necessity, the controller should seek further information from the recipient. The recipient should ensure that the necessity of the transmission of the data can be subsequently verified."

¹⁶ Article 10(3) of OLAF Regulation.

¹⁷ Articles 3(13) and 25(1) of the Regulation, Articles 8 and 52 of the Charter of Fundamental Rights of the European Union, and Articles [...] to [...] of [the European Institution's] Rules.

¹⁸ [...]

¹⁹ [...]

²⁰ Such as that of Article 16(5)(c) of the Regulation, for example ('Obtaining disclosure is expressly laid down by Union law, which provides appropriate measures to protect the data subject's legitimate interests').

²¹ [...]

is more protective for data subjects (i.e. limited in time, subject to review, scrutinised by the DPO).

21. The above is, of course, in addition to [the European Institution's] obligation towards data subjects, pursuant to Article 14 of the Regulation, to provide general and transparent information, namely by means of a general data protection notice published on its website, stating clearly that [the European Institution] may send personal data to public authorities, including OLAF, in the context of its activities²².

3.2.3. Situation 3: [The European Institution] suspects a case of corruption or fraud and sends personal data to OLAF who is not (yet) investigating the matter

22. If [the European Institution] discloses personal data to OLAF relating to a suspected case of corruption or fraud without there being an OLAF investigation ongoing relating to the same subject matter, it clearly acts as the controller of that personal data and the information requirements stemming from Articles 15 and 16 of the Regulation thus apply, in general. There is no question here of Article 3(13) as OLAF would not receive the data 'in the framework of a particular inquiry', as no such inquiry would have started yet.
23. EUIs have a legal obligation to transmit to OLAF without delay any information relating to possible cases of fraud, corruption or any other illegal activity affecting the financial interests of the Union²³.
24. When handling personal data of a person suspected of having engaged in corruption or fraud, [the European Institution] will consider whether an exception to its obligation to inform is applicable or whether it should resort to a restriction in order to not inform the data subject about the processing of his/her personal data and of its subsequent transmission to OLAF.
25. Hence, once [the European Institution] has obtained personal information sufficient to support a suspicion of fraud and it sends that information to OLAF, it will need to (continue to) apply the exception or (preferentially) a restriction, as the case may be, in order to not inform the data subject.
26. All of the above is, yet again, additional to [the European Institution's] obligation towards data subjects, as described above, to provide general and transparent information, namely by means of a general privacy statement published on its website, thus enabling data subjects exercise their rights²⁴.

4. CONCLUSION

27. In light of the above, and in an effort to provide clear guidance on this matter, the EDPS emphasises that

(i) a public authority, such as OLAF, will only be considered as a non-recipient if it receives personal data in the framework of a particular inquiry of theirs, in accordance with Union or Member State law (Article 3(13) of the Regulation);

²² See also Articles 4(1)(a) of the Regulation and Article 8(1) of OLAF Regulation.

²³ Article 8(1) of OLAF Regulation.

²⁴ See also Article 16(6) of the Regulation and Point 64 of [Article 29 Working Party Guidelines on transparency under Regulation 2016/679 adopted on 29 November 2017 \(as last Revised and Adopted on 11 April 2018\)](#).

(ii) in such cases, where OLAF requests the transmission of personal data to the [European Institution], [the European Institution] will not inform data subjects of this transmission in accordance with Articles 3(13) and 16(5)(c) of the Regulation. [The European Institution] could also decide to apply a restriction to the right of information in these cases, as it would support the protection of the legitimate interests of data subjects. In any case, a general information notice to data subjects has to be in place, in line with Articles 4(1)(a) and 14 of the Regulation. In this scenario, if the data subjects exercise their right of access the [European Institution] will apply a restriction, pursuant to Article 25 of the Regulation and [the European Institution's] Rules;

(iii) when the [European Institution] transmits personal data to OLAF outside the scope of an OLAF investigation, it should make use of a restriction provided for in Union law or in [the European Institution's] Rules in order to not inform data subjects about the disclosure of their personal data to OLAF.

Done at Brussels on 17 December 2021

[e-signed]

Wojciech Rafał WIEWIÓROWSKI