

#### DECISION OF THE EUROPEAN DATA PROTECTION SUPERVISOR

## of 27 September 2023

# on the Rules on the Hearing in EDPS' Investigations

#### THE EUROPEAN DATA PROTECTION SUPERVISOR

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the EDPS's Rules of Procedure<sup>1</sup>, and in particular Article 36 thereof,

#### WHEREAS:

- (1) The Treaty on the Functioning of the European Union provides that an independent authority is to control the compliance with the rules on protection of personal data processed by Union institutions, bodies, offices and agencies.
- (2) Regulation (EU) 2018/1725² has established the European Data Protection Supervisor ('EDPS') that is to be responsible for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to data protection, are respected by Union institutions, bodies, offices and agencies. Under that Regulation, the EDPS conducts investigations on its application and may conduct proceedings leading to the imposition of administrative fines. The EDPS also conducts inquiries under Regulations (EU) 2016/794, 3 2017/1939⁴ and 2018/1727.5

Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA (OJ L 295, 21.11.2018, p. 138).



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Decision of the European Data Protection Supervisor of 15 May 2020 adopting the Rules of Procedure of the EDPS (OJ L 204 26.6.2020, p. 49).

<sup>&</sup>lt;sup>2</sup> Regulation (EU) 2018/1725 of the European Parliament and of 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 (UL L 295, 21.11.2018, p. 39).

Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ L 135, 24.5.2016, p. 53).

<sup>&</sup>lt;sup>4</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the EPPO) (OJ L 283, 31.10.2017, p. 1).

- (3) The EDPS has to conduct its proceedings fairly, impartially and objectively and must ensure that the rights of the defence are respected. In particular, the rights of persons to be heard before the adoption of any individual decision adversely affecting them is a fundamental right protected by the Charter of Fundamental Rights of the European Union.
- (4) In order to ensure the proper exercise of the right to be heard, it is appropriate to provide for rules applicable to the hearing of the persons that could be adversely affected by an EDPS' final decision adopted in own-initiative investigations and inquiries.

HAS DECIDED AS FOLLOWS:

#### Article 1

The rules on the hearing in EDPS' investigations are laid down in the Annex to this Decision.

#### Article 2

The present decision shall enter into force on the day of its adoption. It shall be given adequate publicity, including through publication on the EDPS' website.

Done at Brussels, 27 September 2023

[e-signed]

Wojciech Rafał WIEWIORÓWSKI

European Data Protection Supervisor

# Annex Rules on the Hearing in EDPS' Investigations

#### 1. Entities concerned

- 1.1. In these Rules, any controller or processor as defined in Regulation (EU) 2018/17256 that could be affected adversely by the EDPS' final decision adopted in own-initiative investigation proceedings are referred to as the "entities concerned". Those proceedings relate to investigations carried out under Article 57(1)(f) of Regulation (EU) 2018/1725 as well as inquiries carried out under Article 43(2)(b) of Regulation (EU) 2016/794,8 Article 85(2)(b) of Regulation 2017/19399 and Article 40(2)(b) of Regulation (EU) 2018/1727.10
- 1.2. These Rules also apply, by analogy, to proceedings under Article 66 of Regulation (EU) 2018/1725.

## 2. Purpose

- 2.1. In proceedings referred to in Rules 1.1 and 1.2, the EDPS issues a preliminary assessment and makes it available to entities concerned to present them with the EDPS' preliminary findings of fact, an initial legal assessment of those findings, including any alleged infringements of the Regulation, and envisaged corrective measures.
- 2.2. The purpose of a hearing in proceedings referred to in Rules 1.1 and 1.2 is to allow the entities concerned to exercise fully their right of the defence before any individual measures which would adversely affect them is taken by the EDPS. In particular, the entities concerned may exercise their right to be heard by developing orally their observations on the EDPS' preliminary assessment.

## 3. Exclusion of the public

3.1. The hearing shall not be public.

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Regulation (EU) 2018/1725 of the European Parliament and of 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 (UL L 295, 21.11.2018, p. 39).

<sup>&</sup>lt;sup>7</sup> Entities concerned are also referred to as "invited entities" and "attending entities", as applicable in the given context.

Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ L 135, 24.5.2016, p. 53).

Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the EPPO) (OJ L 283, 31.10.2017, p. 1).

Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA (OJ L 295, 21.11.2018, p. 138).

# 4. Request for a hearing

- 4.1. The EDPS shall hold a hearing at the request of an entity concerned or on his own initiative. Any such request shall be reasoned and submitted together with the written observations on the preliminary assessment.
- 4.2. The EDPS shall only refuse a request for a hearing where he deems, after careful consideration, that the views of the entity concerned may be made known effectively in writing. Such consideration shall, in particular, take into account the complexity of the investigation, any previous opportunity by the entity concerned to submit observations orally, as well as any other relevant reasons provided in the request.
- 4.3. Where only one entity concerned requests a hearing, other entities concerned shall be made aware of the hearing in due time before it takes place, allowing them to indicate to the EDPS whether they wish to attend it. The time limit for other entities concerned to provide such indication shall be at least one week. Any entity concerned that indicates within the set time limit that it wishes to attend shall be entitled to attend the hearing. All invited entities shall be informed of the other invited entities.
- 4.4. The EDPS shall communicate to the invited entities a provisional agenda on which they may provide comments.

# 5. Language

5.1. In principle, the hearing shall be held in English. An entity concerned may request to be heard in another official language of the EU. Any such request shall be reasoned and made together with a request for a hearing or, where Rule 4.3 applies, when the entity concerned expresses its wish to attend the hearing. The EDPS shall provide interpretation and bear its costs.

# 6. Scope

6.1. Unless specified otherwise by the EDPS, the scope of the hearing shall correspond to the scope of the preliminary assessment. The EDPS may indicate the main focal areas of the hearing, taking due account of the request for a hearing.

#### 7. Location

7.1. In principle, the EDPS shall hold the hearing at the EDPS' premises or any other premises designated by the EDPS. The EDPS may also hold the hearing fully or partially online.

<sup>&</sup>lt;sup>11</sup> In hybrid mode.

# 8. Timing

8.1. The hearing may only be held after the EDPS has issued his preliminary assessment. The EDPS determines the date and duration of the hearing.

#### 9. Announcement

- 9.1. The EDPS shall invite the entities concerned to the hearing at least four weeks before the hearing takes place.
- 9.2. The EDPS may ask the invited entities to submit, the essential elements of the intended oral submission in writing. Such a written submission shall be made at least one week before the hearing.
- 9.3. The invited entities shall submit any slide presentations to the EDPS at least two working days before the hearing.

## 10. Representation

- 10.1. Each invited entity shall be represented by persons officially entrusted with the power to represent it, including by duly authorised agents appointed from among their permanent staff. Those persons should have appropriate factual, legal and technical expertise related to the scope of the hearing, in particular on the processing of personal data at stake, e.g. because they are responsible for the processing or have direct knowledge of it.
- 10.2. Each invited entity shall provide, at least two weeks before the hearing, a list of persons who will attend the hearing on its behalf in accordance with Rule 10.1, with an indication of their function and, where applicable, an enclosed power of attorney. Only persons named on the list may attend the hearing. The EDPS may limit the number of such persons, in particular taking account of any logistical constraints.

#### 11. Chair

- 11.1. The hearing shall be chaired by an EDPS staff member duly authorised by the Supervisor. The Chair shall ensure that the hearing is conducted properly and impartially, allowing the attending entities to exercise effectively their right to be heard.
- 11.2. The Chair shall open and close the hearing, and may decide to recess.
- 11.3. The Chair shall ensure order, in particular by deciding who has the floor, intervening when attending entities address an issue which is not relevant to the investigation, and reminding them of the allotted time.

## 12. Recording

12.1. The hearing shall be audio-recorded. In case of an online hearing, the hearing shall be audio- and, where applicable, video-recorded. The invited entities shall be

informed of any recording prior to the hearing. A copy of the recording shall be made available to the attending entities.

### 13. Questions

- 13.1. In order for the EDPS to understand better the arguments of the invited entities, the EDPS may provide the invited entities, prior to the hearing, with a list of questions on which they are invited to make known their views at the hearing. They may also be invited to do so in writing before the hearing.
- 13.2. The Chair may allow the EDPS' staff members to pose additional questions to attending entities at the hearing.
- 13.3. Attending entities may pose questions to other attending entities upon explicit authorisation by the Chair.
- 13.4. Exceptionally and on reasoned request, the Chair may allow the attending entities to provide a reply in writing, within a set time limit, to a question that cannot be answered, in whole or in part, at the hearing.

#### 14. Further comments

14.1. Exceptionally and on reasoned request, the Chair may allow the attending entities to submit further written comments after the hearing within a set time limit.

# 15. Confidentiality

- 15.1. Where an invited entity wishes to make observations at the hearing which are covered by business secrecy or other confidentiality, it may request that it be heard, with regard to those observations, without the presence of other invited entities. Any such request shall be reasoned and made in writing at least three weeks before the hearing. It shall also contain reasons why the confidentiality claims giving rise to the request apply vis-à-vis other invited entities.
- 15.2. The EDPS shall decide on the request before the hearing takes place and inform the requesting entity of the decision. Where the request is granted, the EDPS shall also inform other invited entities. The hearing agenda shall take account of any such decision.
- 15.3. The attending entities shall respect the confidentiality of information received during the hearing, in particular by only using it for the purposes of the investigation proceedings or any subsequent related proceedings.