EDPS SUPERVISORY OPINION ON DRAFT INTERNAL RULES CONCERNING RESTRICTIONS OF CERTAIN RIGHTS OF DATA SUBJECTS IN RELATION TO PROCESSING OF PERSONAL DATA IN THE CONTEXT OF THE ACTIVITIES OF THE MEDIATION SERVICE OF THE EUROPEAN COMMISSION

(Case 2024-0234)

1. INTRODUCTION

1. This Supervisory Opinion relates to the draft internal rules concerning restrictions of certain rights of data subjects in relation to processing of personal data in the context of the activities of the Mediation Service of the European Commission (EC) of 1 March 2024.

2. The EDPS issues this Supervisory Opinion in accordance with Article 41(2) of Regulation (EU) 2018/1725[1], ('the Regulation').

2. FACTS

3. The EC formally consulted the EDPS on draft internal rules on restrictions of data subject's rights in relation to processing of personal data in the context of the activities of the Mediation Service of the EC ('draft internal rules') on 1 March 2024.

4. This consultation was submitted together with an information of the EDPS under Article 41(1) of the Regulation on the draft Commission Decision on the Mediation Service, repealing Commission Decision C(2002)601 ('draft Commission Decision'), of which the EDPS took good note.

[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.

3. LEGAL ANALYSIS

3.1. General comments

5. The EDPS welcomes that the EC has made broad use of the draft internal rules provided as Annex II to the EDPS Guidance on Article 25 of the Regulation 2018/1725 and internal rules restricting data subjects rights ('EDPS draft internal rules'), albeit restructuring the Articles extensively.

6. The EDPS also welcomes that the EC will only restrict data subject's rights under Article 25 of the Regulation in relation to processing of personal data in the context of the activities of the Mediation Service of the EC based on the proposed draft internal rules, which provide a legal basis to that. As these restrictions seek to temporarily render unavailable certain rights that lie at the heart of the right to data protection, their legal basis should be well defined. In this regard, its appears to the EDPS that the draft internal rules are duly limited to the types of processing operations the EC's Mediation Service performs or expects to perform and that this type of processing operation is linked to its specific ground for restriction, under Article 25(1), point (h) of the Regulation, to safeguard the protection of the data subject or the rights and freedoms of others.

7. The EDPS further welcomes that EC will perform a necessity and proportionality test on a case-by-case basis before restrictions are applied, under Article 6 of the draft internal rules, and that Articles 6(1) and (3) of the draft internal rules provide for the obligation to document the application of restrictions. The EDPS is confident that Article 6(3), 2nd sentence is going to be applied without prejudice to Article 5, last sentence, according to which the EC shall communicate the record to the EDPS at the time of the notification of the personal data breach, and not just upon request by the EDPS.

8. As noted in the Report on the EDPS Remote Audit of Internal Rules Restricting Data Subjects´ Rights under Article 25 of the Regulation, regarding the timing of the DPO's involvement, Article 5 of the EDPS draft internal rules entitled "Involvement of the Data Protection Officer" contained in the EDPS Guidance is not particularly explicit on involving the DPO *before* the controller actually takes the decision to restrict data subject rights in a particular case. However, Recommendation R6 of the EDPS Guidance clearly states the following: "Consult the DPO *before* and during the restriction" (emphasis added). The EDPS is confident that the EC is going to (a) implement Article 9(1) and (2) of the draft internal rules and (b) interpret recital (24) ("*...the Commission should involve ... the relevant data protection coordinator(s) should be consulted...*" - emphasis added) with this in mind.

3.2. EDPS Recommendations

9. Regarding the references to the *exception* on having to inform data subjects under Article 16(5), point (b) of the Regulation in recitals (8) and (23) of the draft internal rules (and Article 5(1) of the draft Commission Decision), the EDPS would like to

highlight that, as pointed out in his Opinion in case 2021-0786[2], §20, the EDPS is favourable towards EUIs applying a restriction under Article 25 of the Regulation irrespective of an exception such as Article 16(5), point (b) of the Regulation being potentially available, as this is more protective for data subjects (i.e. limited in time, subject to review, scrutinised by the DPO). The EDPS would therefore find it ***necessary*** that the EC omit all references to Article 16(5), point (b) of the Regulation in recitals (8) and (23) of the draft internal rules (and Article 5(1) of the draft Commission Decision (in particular recital (23), second sentence stating that "*If these exceptions apply, the Commission does not need to apply a restriction under this Decision*") from the draft internal rules.

10. The EDPS further ***recommends*** additionally including in the "Having regard to..." section, after "Having regard to the Treaty on the Functioning of the European Union" the following (comprehensive) reference to the Regulation and the present consultation of the EDPS (the latter should replace the reference in recital (26)):

> "Having regard to 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, and in particular Article 25 thereof,
>
> Having consulted the European Data Protection Supervisor ..."

4. CONCLUSION

The EDPS has made several comments and recommendations to ensure compliance of the processing with
the Regulation.

In light of the accountability principle, the EDPS expects the EC to implement the above recommendations accordingly and has decided to close the case.

Done at Brussels on 13 March 2024

[e-signed]

Thomas ZERDICK, LL.M.

[2] *See https://www.edps.europa.eu/system/files/2022-01/21-12-17_edps_opinion_article_313_en.pdf.*