

**DECISION No 1/2020 OF THE GOVERNING BOARD OF THE SHIFT2RAIL JOINT UNDERTAKING
of 26 March 2020**

**laying down internal rules concerning restrictions of certain rights of data subjects in relation to
processing of personal data in the framework of the functioning of the S2R JU**

THE GOVERNING BOARD OF THE SHIFT2RAIL JOINT UNDERTAKING (hereafter referred as 'the S2R JU'),

Having regard to the Treaty on the Functioning of the European Union ⁽¹⁾,

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 ⁽²⁾, and in particular Article 25 thereof,

Having regard to Council Regulation (EU) No 642/2014 of 16 June 2014 establishing the Shift2Rail Joint Undertaking ⁽³⁾, and in particular Article 8 of the Statutes annexed to that Regulation,

Having regard to the European Data Protection Supervisor Guidance on Article 25 of the new Regulation and internal rules,

After having consulted the EDPS on 12 November 2019, in accordance with Article 41(2) of Regulation (EU) 2018/1725,

Having regard to the recommendations of the European Data Protection Supervisor ('EDPS') of 18 December 2019,

After having consulted the S2R JU Staff Committee,

Whereas:

- (1) Only legal acts adopted on the basis of the Treaties provides for a restriction of data subject rights. Where these restrictions cannot be based on legal acts adopted on the basis of the Treaties, Regulation (EU) 2018/1725 provides that, in matters relating to the operations of S2R JU, restrictions may be provided for by internal rules, including its provisions on the assessment of the necessity and proportionality of a restriction.
- (2) In accordance with Article 25(1) of Regulation (EU) 2018/1725 restrictions of the application of Articles 14 to 22, 35 and 36, as well as Article 4 of that Regulation in so far as its provisions correspond to the rights and obligations provided for in Articles 14 to 22 should be based on internal rules to be adopted by the S2R JU.
- (3) Within the framework of its administrative functioning, the S2R JU may conduct administrative inquiries, disciplinary proceedings, carry out preliminary activities related to cases of potential irregularities reported to OLAF, process whistleblowing cases, process (formal and informal) procedures of harassment, process internal and external complaints, conduct internal audits, carry out investigations by the Data Protection Officer in line with Article 45(2) of Regulation (EU) 2018/1725 and internal (IT) security investigations.
- (4) The S2R JU processes several categories of personal data, such as identification data, contact data, professional data, administrative details, data received from specific sources, electronic communications and traffic data, and data related to the case (such as reasoning, behavioural data, appraisals, performance and conduct data and data related to or brought forward in connection with the subject matter of the procedure or activity) ⁽⁴⁾.
- (5) The S2R JU, represented by its Executive Director, acts as the data controller.

⁽¹⁾ OJ C 202, 7.6.2016, p. 47.

⁽²⁾ OJ L 295, 21.11.2018, p. 39.

⁽³⁾ OJ L 177, 17.6.2014, p. 9.

⁽⁴⁾ In cases of joint controllership data shall be processed in line with the means and purposes established in the relevant agreement among the joint controllers as defined in Article 28 of Regulation (EU) 2018/1725.

- (6) The personal data are stored securely in an electronic environment or on paper preventing unlawful access or transfer of data to persons who do not have a need to know. The personal data processed are retained for no longer than necessary and appropriate for the purposes for which the data are processed for the period specified in the data protection notices, privacy statements or records of the S2R JU.
- (7) The internal rules should apply to all processing operations carried out by the S2R JU in the performance of administrative inquiries, disciplinary proceedings, preliminary activities related to cases of potential irregularities reported to OLAF, whistleblowing procedures, (formal and informal) procedures for cases of harassment, processing internal and external complaints, internal audits, the investigations carried out by the Data Protection Officer in line with Article 45(2) of Regulation (EU) 2018/1725, (IT) security investigations handled internally or with external involvement (e.g. CERT-EU).
- (8) They should apply to processing operations carried out prior to the opening of the procedures referred to above, during these procedures and during the monitoring of the follow-up to the outcome of these procedures. It should also include assistance and cooperation provided by the S2R JU to national authorities and international organisations outside of its administrative investigations.
- (9) In cases where these internal rules apply, the S2R JU must provide justifications explaining why the restrictions are strictly necessary and proportionate in a democratic society and respect the essence of the fundamental rights and freedoms.
- (10) Within this framework the S2R JU is bound to respect, to the maximum extent possible, the fundamental rights of the data subjects during the above procedures, in particular, those relating to the right of provision of information, access and rectification, right to erasure, restriction of processing, right of communication of a personal data breach to the data subject or confidentiality of communication as enshrined in Regulation (EU) 2018/1725.
- (11) However, the S2R JU may be obliged to restrict the information to data subject and other data subject's rights to protect, in particular, its own investigations, the investigations and proceedings of other public authorities, as well as the rights of other persons related to its investigations or other procedures.
- (12) Where the S2R JU considers to apply a restriction, the risk to the rights and freedoms of the data subject shall be weighed, in particular, against the risk to the rights and freedoms of other data subjects and the risk of cancelling the effect of the S2R JU's investigations or procedures for example by destroying evidence. The risks to the rights and freedoms of the data subject concern primarily, but are not limited to, reputational risks and risks to the right of defence and the right to be heard.
- (13) The S2R JU may thus restrict the information for the purposes of protecting the investigation, and the fundamental rights and freedoms of other data subjects.
- (14) The S2R JU should periodically monitor that the conditions justifying the restriction apply, and lift the restriction as far as they no longer apply.
- (15) The Controller should inform the Data Protection Officer at the moment of deferral and during the revisions,

HAS ADOPTED THIS DECISION:

Article 1

Subject matter and scope

1. This Decision lays down rules relating to the conditions under which the S2R JU in the framework of its procedures set out paragraph 2 may restrict the application of the rights enshrined in Articles 14 to 21, 35 and 36, as well as Article 4 thereof, following Article 25 of Regulation (EU) 2018/1725.

2. Within the framework of the administrative functioning of the S2R JU, this Decision applies to the processing operations on personal data by the Programme Office for the purposes of conducting administrative inquiries, disciplinary proceedings, preliminary activities related to cases of potential irregularities reported to OLAF, processing whistleblowing cases, (formal and informal) procedures of harassment, processing internal and external complaints, conducting internal audits, investigations carried out by the Data Protection Officer in line with Article 45(2) of Regulation (EU) 2018/1725 and (IT) security investigations handled internally or with external involvement (e.g. CERT-EU).

3. The categories of data concerned include identification data, contact data, professional data, administrative details, data received from specific sources, electronic communications and traffic data, and data related to the case, such as reasoning, behavioural data, appraisals, performance and conduct data and data related to or brought forward in connection with the subject matter of the procedure or activity.

4. Where the S2R JU performs its duties with respect to data subject's rights under Regulation (EU) 2018/1725, it shall consider whether any of the exemptions laid down in that Regulation apply.

Article 2

Specification of the controller

The controller of the processing operations is the S2R JU, represented by its Executive Director.

Article 3

Specification of safeguards

1. The S2R JU shall put in place the following safeguards aimed at preventing abuse or unlawful access or transfer of personal data:

- (a) Paper documents shall be kept in secured cupboards and only accessible to authorized staff;
- (b) All electronic data shall be stored in a secure IT application according to the S2R JU's security standards, as well as in specific electronic folders accessible only to authorised staff. Appropriate levels of access shall be granted individually;
- (c) The database shall be password-protected under a single sign-on system and connected automatically to the user's ID and password, including 'pseudonymisation' and/or 'encryption' when appropriate. Replacing users is strictly prohibited. E-records shall be held securely to safeguard the confidentiality and privacy of the data therein;
- (d) All persons having access to the data are bound by the obligation of confidentiality.

2. In accordance with Article 6(3), the safeguards referred to in paragraph 1 should be subject to a periodic review.

3. The retention period of the personal data referred to in Article 1(3) is indicated in its respective data protection notices, privacy statements or records referred to in Article 7(1). The retention period shall in any event not be longer than necessary and appropriate for the purposes for which the data are processed ⁽⁵⁾.

Article 4

Grounds for restrictions

1. Any restriction shall only be applied by the S2R JU to safeguard:

- (a) the national security, public security or defence of the Member States;
- (b) the prevention, investigation, detection and prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;

⁽⁵⁾ S2R retention policy is based in retention of files in the Commission regulated by the Common retention list, a regulatory document (the last version is SEC(2019)900) in the form of a retention schedule that establishes the retention periods for the different types of Commission files.

- (c) other important objectives of general public interest of the Union or of a Member State, in particular the objectives of the common foreign and security policy of the Union or an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters, public health and social security;
- (d) the internal security of Union institutions and bodies, including of their electronic communications networks;
- (e) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;
- (f) a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority in the cases referred to in points (a) to (c);
- (g) the protection of the data subject or the rights and freedoms of others;
- (h) the enforcement of civil law claims.

2. As a specific application of the purposes described in paragraph 1 above, the S2R JU may apply restrictions in the following circumstances:

- (a) in relation to personal data exchanged with Commission services or other Union institutions, bodies, agencies and offices;
 - where such Commission service, Union institution, body or agency, is entitled to restrict the exercise of the listed rights on the basis of other acts provided for in Article 25 of Regulation (EU) 2018/1725 or in accordance with Chapter IX of that Regulation or with the founding acts of other Union institutions, bodies, agencies and offices,
 - where the purpose of such a restriction by that Commission service, Union institution, body or agency would be jeopardised were the S2R JU not to apply an equivalent restriction in respect of the same personal data;
- (b) in relation to personal data exchanged with competent authorities of Member States;
 - where such competent authorities of Member States are entitled to restrict the exercise of the listed rights on the basis of acts referred to in Article 23 of Regulation (EU) 2016/679 of the European Parliament and of the Council ⁽⁶⁾, or under national measures transposing Articles 13(3), 15(3) or 16(3) of Directive (EU) 2016/680 of the European Parliament and of the Council ⁽⁷⁾,
 - where the purpose of such a restriction by that competent authority would be jeopardised were the S2R JU not to apply an equivalent restriction in respect of the same personal data;
- (c) in relation to personal data exchanged with third countries or international organisations, where there is clear evidence that the exercise of those rights and obligations is likely to jeopardise the S2R JU's cooperation with third countries or international organisations in the conduct of its tasks.

Before applying restrictions in the circumstances referred to in points (a) and (b) of the first subparagraph, the S2R JU shall consult the relevant Commission services, Union institutions, bodies, agencies, offices or the competent authorities of Member States unless it is clear to the S2R JU that the application of a restriction is provided for by one of the acts referred to in those points.

Article 5

Restrictions and rights of data subjects

1. In duly justified cases and under the conditions stipulated in this decision, the following rights may be restricted by the controller in the context of the processing operations listed in Article 1(2) and paragraph 2 below where necessary and proportionate:

- (a) The right to information;
- (b) The right of access;

⁽⁶⁾ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

⁽⁷⁾ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89).

- (c) The right of rectification, erasure and restriction of processing;
 - (d) The right to communication of a personal data breach to the data subject;
 - (e) The right to confidentiality of electronic communications.
2. In duly justified cases and in order to safeguard the purposes mentioned in article 4(1), restrictions may be applied by the controller in the context of the following processing operations referred to in Article 1(2):
- (a) the performance of administrative inquiries and disciplinary proceedings;
 - (b) preliminary activities related to cases of potential irregularities reported to OLAF;
 - (c) whistleblowing procedures;
 - (d) (formal and informal) procedures for cases of harassment;
 - (e) processing internal and external complaints;
 - (f) internal audits;
 - (g) the investigations carried out by the Data Protection Officer in line with Article 45(2) of Regulation (EU) 2018/1725;
 - (h) (IT) security investigations handled internally or with external involvement (e.g. CERT-EU);
 - (i) within the frame of the grant management or procurement procedure, after the closing date of the submission of the calls for proposals or the application of tenders.
3. In the context of procedure for cases of harassment, the rights referred to in paragraph 1 may be limited under the same conditions, with the exception of the right to communication of a personal data breach to the data subject referred to in point (d) of paragraph 1.
4. In the context of grant management or procurement procedure, the rights referred to in paragraph 1 may be limited under the same conditions, with the exception of the right of rectification, erasure and restriction of processing referred to in point (c) of paragraph 1.
5. In duly justified cases and under the conditions stipulated in this decision, the right of rectification, erasure and restriction of processing may be restricted by the controller, with the exceptions provided for in paragraph 3 and 4.
6. Where the S2R JU restricts, wholly or partly, the application of the rights referred to in paragraphs 1, 3, 4 and 5, it shall take the steps set out in Articles 6 and 7 of this Decision.
7. Where data subjects request access to their personal data processed in the context of one or more specific cases or to a particular processing operation, in accordance with Article 17 of Regulation (EU) 2018/1725, the S2R JU shall limit its assessment of the request to such personal data only.

Article 6

Necessity and proportionality of restrictions

1. Any restriction based on Article 4 shall be necessary and proportionate taking into account the risks to the rights and freedoms of data subjects and respect the essence of the fundamental rights and freedoms in a democratic society.
2. If the application of restriction is considered, a necessity and proportionality test shall be carried out based on the present rules. The test shall also be conducted within the framework of the periodic review, following assessment of whether the factual and legal reasons for a restriction still apply. It shall be documented through an internal assessment note for accountability purposes on a case-by-case basis.
3. Restrictions shall be temporary. They shall continue to apply as long as the reasons justifying them remain applicable. In particular, where it is considered that the exercise of the restricted right would no longer cancel the effect of the restriction imposed or adversely affect the rights or freedoms of other data subjects.

The S2R JU shall review the application of the restriction every six months from its adoption and at the closure of the relevant inquiry, procedure or investigation. Thereafter, the controller shall monitor the need to maintain any restriction every six months.

4. Where the S2R JU applies, wholly or partly, the restrictions based on Article 4 of this Decision, it shall record the reasons for the restriction, the legal ground in accordance with paragraph 1 above, including an assessment of the necessity and proportionality of the restriction.

The record and, where applicable, the documents containing underlying factual and legal elements shall be registered. They shall be made available to the European Data Protection Supervisor on request.

Article 7

Obligation to inform

1. The S2R JU shall include in the data protection notices, privacy statements or records in the sense of Article 31 of Regulation (EU) 2018/1725, published on its website and/or on the intranet informing data subjects of their rights in the framework of a given procedure, information relating to the potential restriction of these rights. The information shall cover which rights may be restricted, the reasons and the potential duration.

Without prejudice to the provisions of Article 6(4), the S2R JU, where proportionate, shall also inform individually all data subjects, which are considered persons concerned in the specific processing operation, of their rights concerning present or future restrictions without undue delay and in a written form.

2. Where the S2R JU restricts, wholly or partly, the rights laid out in Article 5, it shall inform the data subject concerned of the restriction applied and of the principal reasons thereof, and of the possibility of lodging a complaint with the European Data Protection Supervisor or of seeking a judicial remedy in the Court of Justice of the European Union;

The provision of information referred to in paragraph 2 above may be deferred, omitted or denied if it would cancel the effect of the restriction in accordance with Article 25(8) of Regulation (EU) 2018/1725.

Article 8

Review by the Data Protection Officer

1. The S2R JU shall, without undue delay, inform the Data Protection Officer of the S2R JU ('the DPO') whenever the controller restricts the application of data subjects' rights, or extends the restriction, in accordance with this Decision. The controller shall provide the DPO access to the record containing the assessment of the necessity and proportionality of the restriction and document the date of informing the DPO in the record.

2. The DPO may request the controller in writing to review the application of the restrictions. The controller shall inform the DPO in writing about the outcome of the requested review.

3. The DPO shall be involved throughout the procedure. The controller shall inform the DPO when the restriction has been lifted.

Article 9

Entry into force

This Decision shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

Done at Brussels, 26 March 2020.

For the Governing Board of the S2R JU

Henrik HOLOLEI

The Chairperson
