

RULES OF PROCEDURE

DECISION No 2021-096 REV 1 OF THE MANAGEMENT BOARD OF THE EUROPEAN UNION AGENCY FOR THE OPERATIONAL MANAGEMENT OF LARGE-SCALE IT SYSTEMS IN THE AREA OF FREEDOM, SECURITY AND JUSTICE

of 16 April 2021

on internal rules concerning restrictions of certain rights of data subjects in relation to the processing of personal data in the framework of the functioning of the European Union Agency for the Operational Management of the Large-Scale IT Systems in the Area of Freedom, Security and Justice

THE MANAGEMENT BOARD OF THE EUROPEAN UNION AGENCY FOR THE OPERATIONAL MANAGEMENT OF LARGE-SCALE IT SYSTEMS IN THE AREA OF FREEDOM, SECURITY AND JUSTICE (EU-LISA), hereafter 'eu-LISA',

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

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 ⁽¹⁾, and in particular Article 25 thereof, (hereafter 'Regulation (EU) 2018/1725'),

Having regard to the Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011 ⁽²⁾, and in particular Article 35 thereof, (hereafter 'Regulation (EU) 2018/1726'),

Having regard to the opinion of the European Data Protection Supervisor (EDPS) of 11 March 2021 and to their 'Guidance on Article 25 of the Regulation (EU) 2018/1725 and internal rules restricting data subjects rights' ⁽³⁾,

After consulting the Staff Committee,

Whereas:

- (1) eu-LISA carries out its activities in accordance with Regulation (EU) No 2018/1726.
- (2) eu-LISA is empowered to conduct administrative inquiries, pre-disciplinary, disciplinary and suspension proceedings, in accordance with the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68 ⁽⁴⁾ ('Staff Regulations'), and with eu-LISA Decision No 2014-080 of 28 January 2015 of the Management Board of eu-LISA on the adoption of implementing rules to the Staff Regulations adopting implementing provisions regarding the conduct of administrative inquiries and disciplinary proceedings. If required, it also notifies cases to OLAF.

⁽¹⁾ OJ L 295, 21.11.2018, p. 39.

⁽²⁾ OJ L 295, 21.11.2018, p. 99.

⁽³⁾ EDPS Guidance on Article 25 of the Regulation (EU) 2018/1725 and internal rules restricting data subjects rights (update 24 June 2020) – https://edps.europa.eu/data-protection/our-work/publications/guidelines/guidance-art-25-regulation-20181725_en

⁽⁴⁾ Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ L 56, 4.3.1968, p. 1).

- (3) eu-LISA staff members are under an obligation to report potentially illegal activities, including fraud and corruption, which are detrimental to the interests of the Union. Staff members are also obliged to report conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Union. This is regulated by eu-LISA Decision on internal rules concerning whistleblowing of 26 June 2018.
- (4) eu-LISA has put in place a policy to prevent and deal effectively with actual or potential cases of psychological or sexual harassment in the workplace, as provided for in its Decision No 2018-174 of 6 December 2018 of the Management Board regarding eu-LISA's policy on protecting the dignity of the person and preventing psychological and sexual harassment adopting implementing measures pursuant to the Staff Regulations. The Decision establishes an informal procedure whereby the alleged victim of the harassment can contact eu-LISA's 'confidential' counsellors.
- (5) eu-LISA can also conduct investigations into potential breaches of security rules for European Union classified information ('EU CI'), based on its Decision No 2019-273 of 20 November 2019 amending its security rules for protecting EU CI.
- (6) eu-LISA is subject to both internal and external audits concerning its activities.
- (7) In the context of such administrative inquiries, audits and investigations, eu-LISA cooperates with other Union institutions, bodies, offices and agencies.
- (8) eu-LISA can cooperate with third countries' national authorities and international organisations, in accordance with the provisions laid down in Article 43 of the Regulation (EU) 2018/1726.
- (9) eu-LISA can also cooperate with EU Member States' public authorities, either at their request or on its own initiative.
- (10) eu-LISA is involved in cases before the Court of Justice of the European Union when it either refers a matter to the Court, defends a decision it has taken and which has been challenged before the Court, or intervenes in cases relevant to its tasks. In this context, eu-LISA might need to preserve the confidentiality of personal data contained in documents obtained by the parties or the interveners.
- (11) To fulfil its tasks, eu-LISA collects and processes information and several categories of personal data, including identification data of natural persons, contact information, professional roles and tasks, information on private and professional conduct and performance, and financial data. eu-LISA acts as data controller.
- (12) Under Regulation (EU) 2018/1725, eu-LISA is therefore obliged to provide information to data subjects on those processing activities and to respect their rights as data subjects.
- (13) eu-LISA might be required to reconcile those rights with the objectives of administrative inquiries, audits, investigations and court proceedings. It might also be required to balance a data subject's rights against the fundamental rights and freedoms of other data subjects. To that end, Article 25 of the Regulation (EU) 2018/1725 gives eu-LISA the possibility to restrict, under strict conditions, the application of Articles 14 to 22, 35 and 36 of the Regulation (EU) 2018/1725, as well as its Article 4 in so far as its provisions correspond to the rights and obligations provided for in Articles 14 to 20. Unless restrictions are provided for in a legal act adopted on the basis of the Treaties, it is necessary to adopt internal rules under which eu-LISA is entitled to restrict those rights.
- (14) eu-LISA might, for instance, need to restrict the information it provides to a data subject about the processing of his or her personal data during the preliminary assessment phase of an administrative inquiry or during the inquiry itself, prior to a possible dismissal of case or at the pre-disciplinary stage. In certain circumstances, providing such information might seriously affect eu-LISA's capacity to conduct the inquiry in an effective way, whenever, for example, there is a risk that the person concerned might destroy evidence or interfere with potential witnesses before they are interviewed. eu-LISA might also need to protect the rights and freedoms of witnesses as well as those of other persons involved.

- (15) It might be necessary to protect the anonymity of a witness or whistle-blower who has asked not to be identified. In such a case, eu-LISA might decide to restrict access to the identity, statements and other personal data of such persons, in order to protect their rights and freedoms.
- (16) It might be necessary to protect confidential information concerning a staff member who has contacted eu-LISA confidential counsellors in the context of a harassment procedure. In such cases, eu-LISA might need to restrict access to the identity, statements and other personal data of the alleged victim, the alleged harasser and other persons involved, in order to protect the rights and freedoms of all concerned.
- (17) eu-LISA should apply restrictions only when they respect the essence of fundamental rights and freedoms, are strictly necessary and are a proportionate measure in a democratic society. eu-LISA should give reasons explaining the justification for those restrictions.
- (18) In application of the principle of accountability, eu-LISA should keep a record of its application of restrictions.
- (19) When processing personal data exchanged with other organisations in the context of its tasks, eu-LISA and those organisations should consult each other on potential grounds for imposing restrictions and the necessity and proportionality of those restrictions, unless this would jeopardise the activities of eu-LISA.
- (20) Article 25(6) of the Regulation (EU) 2018/1725 obliges the controller to inform data subjects of the principal reasons on which the application of the restriction is based and of their right to lodge a complaint with the EDPS.
- (21) Pursuant to Article 25(8) of the Regulation (EU) 2018/1725, eu-LISA is entitled to defer, omit or deny the provision of information on the reasons for the application of a restriction to the data subject if this would in any way cancel the effect of the restriction. eu-LISA should assess on a case-by-case basis whether the communication of the restriction would cancel its effect.
- (22) eu-LISA should lift the restriction as soon as the conditions that justify the restriction no longer apply, and assess those conditions on a regular basis.
- (23) To guarantee utmost protection of the rights and freedoms of data subjects and in accordance with Article 44(1) of the Regulation (EU) 2018/1725, the Data Protection Officer (DPO) of eu-LISA should be consulted in due time of any restrictions that may be applied and verify their compliance with this Decision.
- (24) Articles 16(5) and 17(4) of the Regulation (EU) 2018/1725 provide for exceptions to data subjects' right to information and right of access. If these exceptions apply, eu-LISA does not need to apply a restriction under this Decision.
- (25) Pursuant to Article 35(2) of Regulation (EU) 2018/1726, the Management Board shall adopt measures for the application of Regulation (EU) 2018/1725 by the Agency including internal rules referred to in paragraphs 1, 3 and 4 of Article 25 of the Regulation 2018/1725, after consulting the EDPS.

HAS ADOPTED THIS DECISION:

Article 1

Subject-matter and scope

1. This Decision lays down rules relating to the conditions under which eu-LISA may restrict the application of Articles 4, 14 to 22, 35 and 36, pursuant to Article 25 of the Regulation (EU) 2018/1725 in the context of the procedures set out in paragraph 2 in accordance with Article 25 of that Regulation.
2. eu-LISA, as the controller, is represented by its Executive Director.

*Article 2***Restrictions**

1. eu-LISA may restrict the application of Articles 14 to 22, 35 and 36, and Article 4 thereof in so far as its provisions correspond to the rights and obligations provided for in Articles 14 to 20:
 - (a) pursuant to Article 25(1) (b), (c), (f), (g) and (h) of the Regulation (EU) 2018/1725, when conducting administrative inquiries, pre-disciplinary, disciplinary or suspension proceedings under Article 86 and Annex IX of the Staff Regulations and eu-LISA Decision No 2014-080 of 28 January 2015 and when notifying cases to OLAF;
 - (b) pursuant to Article 25(1)(h) of the Regulation (EU) 2018/1725, when ensuring that eu-LISA staff members may report facts confidentially where they believe there are serious irregularities, as set out in eu-LISA Decision No 2018-122 on internal rules concerning whistleblowing of 26 June 2018;
 - (c) pursuant to Article 25(1)(h) of the Regulation (EU) 2018/1725, when ensuring that eu-LISA staff members are able to report to confidential counsellors in the context of a harassment procedure, as defined by eu-LISA Decision No 2018-174 of December 2018;
 - (d) pursuant to Article 25(1)(c), (g) and (h) of the Regulation (EU) 2018/1725, when conducting internal audits in relation to activities or departments of eu-LISA;
 - (e) pursuant to Article 25(1)(c), (d), (g) and (h) of the Regulation (EU) 2018/1725, when providing or receiving assistance to or from other Union institutions, bodies, offices and agencies or cooperating with them in the context of activities under points (a) to (d) of this paragraph and pursuant to relevant service level agreements, memoranda of understanding and cooperation agreements;
 - (f) pursuant to Article 25(1)(c), (g) and (h) of the Regulation (EU) 2018/1725, when providing or receiving assistance to or from third countries national authorities and international organisations or cooperating with such authorities and organisations, without prejudice to the provisions laid down in Article 43 of the Regulation (EU) 2018/1726;
 - (g) pursuant to Article 25(1)(c), (g) and (h) of the Regulation (EU) 2018/1725, when providing or receiving assistance and cooperation to and from EU Member States' public authorities, either at their request or on its own initiative;
 - (h) pursuant to Article 25(1)(e) of the Regulation (EU) 2018/1725, when processing personal data in documents obtained by the parties or interveners in the context of proceedings before the Court of Justice of the European Union.
2. Any restriction shall respect the essence of fundamental rights and freedoms and be necessary and proportionate in a democratic society.
3. A necessity and proportionality test shall be carried out on a case-by-case basis before restrictions are applied. Restrictions shall be limited to what is strictly necessary to achieve their objective.
4. For accountability purposes, eu-LISA shall draw up a record describing the reasons for restrictions that are applied, which grounds among those listed in paragraph 1 apply and the outcome of the necessity and proportionality test. Those records shall be part of a register, which shall be made available on request to the EDPS. eu-LISA shall prepare periodic reports on the application of Article 25 of the Regulation (EU) 2018/1725.
5. When processing personal data received from other organisations in the context of its tasks, eu-LISA shall consult those organisations on potential grounds for imposing restrictions and the necessity and proportionality of the restrictions concerned, unless this would jeopardise the activities of eu-LISA.

*Article 3***Risks to the rights and freedoms of data subjects**

1. Assessments of the risks to the rights and freedoms of data subjects of imposing restrictions and details of the period of application of those restrictions shall be registered in the record of processing activities maintained by eu-LISA under Article 31 of the Regulation. They shall also be recorded in any data protection impact assessments regarding those restrictions conducted under Article 39 of the Regulation (EU) 2018/1725.
2. Whenever eu-LISA assesses the necessity and proportionality of a restriction it shall consider the potential risks to the rights and freedoms of the data subject.

*Article 4***Safeguards and storage periods**

1. eu-LISA shall implement safeguards to prevent abuse and unlawful access or transfer of the personal data in respect of which restrictions apply or could be applied. Such safeguards shall include technical and organisational measures and be detailed as necessary in eu-LISA internal decisions, procedures and implementing rules. The safeguards shall include:
 - (a) a clear definition of roles, responsibilities and procedural steps;
 - (b) if appropriate, a secure electronic environment which prevents unlawful and accidental access or transfer of electronic data to unauthorised persons;
 - (c) if appropriate, secure storage and processing of paper-based documents;
 - (d) due monitoring of restrictions and a periodic review of their application.

The reviews referred to in point (d) shall be conducted at least every six months.

2. Restrictions shall be lifted as soon as the circumstances that justify them no longer apply.
3. The personal data shall be retained in accordance with the applicable eu-LISA retention rules, to be defined in the data protection records maintained under Article 31 of the Regulation (EU) 2018/1725. At the end of the retention period, the personal data shall be deleted, anonymised or transferred to archives in accordance with Article 13 of the Regulation (EU) 2018/1725.

*Article 5***Involvement of the Data Protection Officer**

1. eu-LISA DPO shall be informed without undue delay whenever data subject rights are restricted or intended to be restricted in accordance with this Decision. He or she shall be given access to the associated records and any documents concerning the factual or legal context.
2. eu-LISA DPO may request a review of the application of a restriction. eu-LISA shall inform its DPO in writing of the outcome of the review.
3. eu-LISA shall document the involvement of the DPO in the application of restrictions, including what information is shared with him or her.
4. In practice, the person responsible on behalf of the controller ('controller in practice') ^(?) shall inform eu-LISA DPO when the restriction has been lifted.

^(?) EDPS Guidance on documenting processing operations for EU institutions, bodies and agencies (EUIs) – Accountability on the ground Part I – 'top management is accountable for compliance with the rules, but responsibility is usually assumed at a lower level ("person responsible on behalf of the controller"/"controller in practice")'.

*Article 6***Information to data subjects on restrictions of their rights**

1. eu-LISA shall include a section in the data protection notices published on its website/intranet providing general information to data subjects on the potential for restriction of data subjects' rights pursuant to Article 2(1). The information shall cover which rights may be restricted, the grounds on which restrictions may be applied and their potential duration.
2. eu-LISA shall inform data subjects individually, in writing and without undue delay of ongoing or future restrictions of their rights. eu-LISA shall inform the data subject of the principal reasons on which the application of the restriction is based, of their right to consult the DPO with a view to challenging the restriction and of their rights to lodge a complaint with the EDPS.
3. eu-LISA may defer, omit or deny the provision of information concerning the reasons for a restriction and the right to lodge a complaint with the EDPS for as long as it would cancel the effect of the restriction. Assessment of whether this would be justified shall take place on a case-by-case basis. As soon as it would no longer cancel the effect of the restriction, eu-LISA shall provide the information to the data subject.

*Article 7***Communication of a personal data breach to the data subject**

1. Where eu-LISA is under an obligation to communicate a data breach under Article 35(1) of the Regulation (EU) 2018/1725, it may, in exceptional circumstances, restrict such communication wholly or partly. It shall document in a note the reasons for the restriction, the legal ground for it under Article 2 and an assessment of its necessity and proportionality. The note shall be communicated to the EDPS at the time of the notification of the personal data breach.
2. Where the reasons for the restriction no longer apply, eu-LISA shall communicate the personal data breach to the data subject concerned and inform him or her of the principal reasons for the restriction and of his or her right to lodge a complaint with the EDPS.

*Article 8***Confidentiality of electronic communications**

1. In exceptional circumstances, eu-LISA may restrict the right to confidentiality of electronic communications under Article 36 of the Regulation (EU) 2018/1725. Such restrictions shall comply with Directive 2002/58/EC of the European Parliament and of the Council ⁽⁶⁾.
2. Where eu-LISA restricts the right to confidentiality of electronic communications, it shall inform the data subject concerned, in its reply to any request from the data subject, of the principal reasons on which the application of the restriction is based and of his or her right to lodge a complaint with the EDPS.
3. eu-LISA may defer, omit or deny the provision of information concerning the reasons for a restriction and the right to lodge a complaint with the EDPS for as long as it would cancel the effect of the restriction. Assessment of whether this would be justified shall take place on a case-by-case basis.

⁽⁶⁾ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

*Article 9***Entry into force**

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

Done at Tallinn, 16 April 2021.

For the Management Board
Zsolt SZOLNOKI
Chairperson of the Management Board
