



Brussels, 02/03/2020  
COMP/R1/ 2020/025141

**NOTE FOR THE ATTENTION OF ILZE JUHANSONE  
SECRETARY GENERAL**

**Subject: Interservice consultation on the draft Decision and Implementing Rules on Records Management and Archives – DG COMP comments**

**Ref: Your note of 14/02/2020 - Ares (2020) 961770**

1. DG COMP welcomes the current interservice consultation and is pleased to provide a favourable opinion subject to the taking into account of the comments expressed hereinafter. Drafting remarks are also provided in annex.
2. The vast majority of the data collected by DG COMP cannot be shared due to the constraints of the legal framework that imposes the **confidential treatment** of gathered information<sup>1</sup>. Only the members of staff who really need to have the information in order to carry out their duty have access to it (need to know principle). The access by third parties to our documents is protected through the exceptions laid down in Article 4 of Regulation 1049/2001 on access to documents and by a settled case law of the Court of Justice. Therefore, the current drafting of Article 10 of the draft Decision, which poses the principle of the availability and sharing of data and information, is a concern for DG COMP. This provision should be introduced with the words “Unless legal obligations (...) require a more limited and targeted access based on the need to know principle, data and information shall be made available and shared as widely as possible”<sup>2</sup>.
3. Concerning the structure of the document under consultation, DG COMP understands that the College will adopt both the draft Decision and its implementing rules. However, it is foreseen that the implementing rules will be regularly reviewed and updated to take into consideration possible technical evolutions in the field of document management (Art.20). It seems that these **technical adaptations could be best adopted by the Secretariat general** and a

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<sup>1</sup> E.g. Article 17 of Regulation 2004/139 (Mergers regulation), which reads, “information acquired as a result of the application of this Regulation shall be used only for the purposes of the relevant request, investigation or hearing”.

<sup>2</sup> The words “which shall be implemented in a uniform and rigorous manner”, aiming to limit the need to know principle, are unfortunate and must be deleted since this principle is a legal constraint and not a political objective.

delegation could be added in that sense at the end of the Decision. The draft Decision under consultation is also the opportunity to clarify the status of the common retention list, which is quoted in Article 13 as an “instrument with a regulatory value”. A provision could be added in the draft Decision to empower the Secretariat general to adopt the retention list after consultation of all DGs.

4. It is the view of DG COMP that a clearer **distinction** should be made throughout the document, and in particular in the implementing rules, between, on the one hand, the current **document management**, and, on the other hand, the data and information management in the sense of **knowledge management**.
5. The **definitions** of Article 3 are most welcome. Given the importance of the terminology for the understanding of the decision, the definitions could be best placed just after the provision dealing with the subject matter of the text, i.e. in a new Article 2. Some concepts seem to be missing in the definitions: “file”, “retention list”, “substitute retention principle” (Art.12 §1 a), “declassification” (Art.16 §5) and “historical archives” (in order to distinguish between the department of OIB and the Florence Institute). The definitions of “capture” and “registration” deserve more clarity: when reading § 6 (capture) and § 7 (registration) of the draft implementing rules the two concepts seem very similar and the added value of their distinction is not clear. The definition of the key concept of “record” should be clarified since the current one could be interpreted as covering also databases, which does not seem the purpose of the draft Decision.
6. Article 15 §3 and 4 of the draft Decision is actually a restriction decision under Article 25 of Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of **personal data** by the Union institutions. The European Data Protection Supervisor should be consulted (Art. 41 of Reg. 2018/1725) and Article 15 § 2 of the draft Decision should not repeat the exceptions already foreseen by Regulation 2018/1725.
7. Article 17 of the draft Decision should specify that each DG has to appoint a **Document management officer (DMO)** and to put in place an archive service. The DMO is quoted in Article 18 and in §16.2. of the draft implementing rules without a proper legal basis giving instruction to each DG to appoint a member of staff in charge with this function. The same remark can be made as to the archive service mentioned in § 11.6 of the draft implementing rules.

(e-signed)  
Isabelle Bénoliel

c.c.: [REDACTED] (COMP)

# Annex

## *Draft decision*

- Article 1 §1 : the text after “in order to ensure” should be moved as a recital 4 since it concerns the objective and not subject matter of the draft Decision. Under the 3d indent “the other (than paper) analogue media” should be specified or replaced (“physical”?)
- Article 2, 2d indent: remove “may” or specify under which conditions the decision is applicable.
- Article 3 §3, specify “traditional medium”.
- Article 4 : add “and their metadata” at the end of the sentence.
- Article 5 §1: specify the “validity and admissibility criteria” for whom and for what purpose? Redraft to take into account the anonymous informants and whistle-blowers.
- Article 5 §1: in the last sentence, “integrity” is already mentioned in the previous sentence, and, therefore, is redundant (“in addition”).
- Article 5 §2 : the format of the digital document created following the digitisation should also offers the guarantees of integrity.
- Article 5 §2 last indent (“in all cases”): specify “not required”. If it is not required this sentence should also apply outside the Commission.
- Article 5 §3: the applicable law is not easy to determine (the law of the author of the document: auctor regit actum?) and the content of this law might also be difficult to know (same remark for Art. 5§2 “Member State or Third country concerned” and Art. 5§4 “applicable Union or national law”).
- Article 6 §4: it is understood that it is difficult to encompass all situations in a single provision but the words “protocol or practical reasons” are vague and undermine the principle of §3 (electronic records).
- Article 7 §1: the hypothesis of a database could be envisaged.
- Article 7 §2: it is understood that this provision is about versioning and should be drafted accordingly (at the very least replace “and” by “but”).
- Articles 10 and 11: should be introduced by a new chapter.
- Article 11: this provision deals with security rules and not data protection. Hence, the words “and protection of personal data” should be deleted. The 2d indent has also to be deleted: all information has to be processed in accordance with the rules on security.
- Article 12§1: after “required” specify “by the common retention list referred to by Article 13§1 of this Decision”.
- Article 12§1 c): the time of dispatch or receipt is, in our view, irrelevant and difficult to implement.
- Article 13 §1: what is meant here with “in certain cases, records” is unclear since retention list is only applicable to files.
- Article 13 §1: instead of mentioning an instrument with a regulatory value specify that the Secretariat general is delegated the task of adopting a common retention list after consultation of all DG’s and equivalent services”.

- Article 13§3: delete “intellectual”
- Article 14: specify that this a department of OIB.
- Article 16§1: replace “there” by the EUI.
- Article 16§2: delete on “analogue medium”.
- Article 16§5: specify the “private archives” and the “individuals or entities” entitled to deposit their archives at the EUI.

### ***Implementing rules***

- Scope: the list of the provisions of the decision requiring implementing rules should be best placed in the decision itself.
- § 2.1.: the concept of documentary resources should be specified in relation with the definitions. In the second sentence, the word replace should be specified (eliminated?, preserved according to §2.4.?).
- §2.2.: “integrity” should be added after “legibility over time”..
- §3.1 Delete the 2d indent (“in addition...”), which is unclear.
- §3.1.: replace “available” by “made available by DG DIGIT”.
- §6.4. (“only Document managers officers...”): this sentence seems applicable to the registration, not to the capture.
- §7.1.: specify the meaning of “official character”.
- §7.4. : the Secretariat General should define the adequate procedure, to be implemented by each Directorate-general or equivalent department.
- §9, 1st indent: also refer to the rules on security (markings), data protection and the sectoral rules on confidentiality (COMP, OLAF, TRADE...).
- §12.1.: specify the status of the common retention list (see above under Art .13 §1 of the draft decision).
- §15.3.: avoid the passive voice: “the Secgen shall review the CRL...”.
- §16.3.: replace “consult” by “inform”.