

To:
Cc:

Subject:

FW: ISC/2020/00857 - Records management and archives

Dear [REDACTED],

Several DPCs of other Commission departments have informed me that your unit had launched the inter-service consultation concerning the draft Commission Decision and Implementing Rules on Records Management and Archives. In the meantime, [REDACTED] has provided us with the feedback received by the EDPS in this consultation.

As a complement to the EDPS's feedback, I would like to draw your attention to the following issues:

1. Limitations on the exercise of data protection as a fundamental right

In Article 8, the Charter of Fundamental Rights of the European Union defines the protection of personal data as one of the fundamental EU rights. Article 52 of the Charter indicates the principles that have to be taken into account as regards the scope and interpretation of fundamental rights. It clarifies that *[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*

Furthermore, it is standing case-law of the EU Court of Justice that any exceptions to the fundamental rights must be narrowly construed and applied.

In light of this, I consider that any limitations on the (exercise of the) data subject rights laid down in Regulation (EU) 2018/1725 (be it exceptions, restrictions or derogations) can only be applied **on a case-by case basis**, after the controller has assessed the necessity and proportionality of a limitation in a specific case. In my view, any exception or derogation, applied in a specific case on the basis of the Commission Decision on Records Management and Archives, should be necessary and proportionate taking into account the risks to the rights and freedoms of data subjects. I recommend that this be reflected in your draft Decision (and implementing rules, if applicable).

2. Principle of accountability

One of the main principles of data protection is the principle of accountability, as the responsibility of the controller for compliance with data protection rules and its ability to *demonstrate* compliance with those rules.

As regards the restrictions of application of data subject rights, several Commission Decisions lay down internal rules for recording and registering such restrictions as means for the demonstration of compliance. All Commission services that wish to apply restrictions in line with

those Commission Decisions have to establish internal procedures for application, recording and registering of restrictions on a case-by case basis.

I consider that, in order to demonstrate compliance with Regulation (EU) 2018/1725, the Commission should **record and register the reasons for any exception or derogation**, applied on a case-by-case basis pursuant to the Decision on Records Management and Archives. This should include an assessment of the necessity and proportionality in each case. I recommend that this be reflected in your draft Decision (and implementing rules, if applicable).

3. Role of the DPO

One of my main tasks as the DPO of the Commission is to ensure that the rights and freedoms of data subjects are not adversely affected by Commission's processing operations. This includes also the processing operation(s) referred to in the draft Commission Decision on Records Management and Archives.

As regards the restrictions of application of data subject rights, the Commission Decisions laying down internal rules on restrictions ensure that the DPO can carry out an independent review of the application of restrictions. This is necessary for ensuring (and demonstrating) compliance with Commission Decisions laying down internal rules on restrictions. For this purpose, the DPO has to be informed, without undue delay, of all restrictions applied by the Commission services and may request a review of those restrictions.

In my view, the DPO should also **be informed, without undue delay, of all exceptions and derogations applied** under the Commission Decision on Records Management and Archives in order to be able to carry out the **independent review thereof**. This is necessary for ensuring (and demonstrating) compliance with that Decision. I recommend that this be reflected in your draft Decision (and implementing rules, if applicable).

For your convenience, I provide below the overview of Commission Decisions laying down internal rules on restrictions:

	EC DEPARTMENT	ADOPTION	VISTA	OFFICIAL JOURNAL
1	COMP	05.12.2018	C(2018)8109	<u>Decision (EU) 2018/1927</u>
2	IAS	11.12.2018	C(2018)8587	<u>Decision (EU) 2018/1961</u>
3	OLAF	11.12.2018	C(2018)8654	<u>Decision (EU) 2018/1962</u>
4	TRADE	14.12.2018	C(2018) 8811	<u>Decision (EU) 2018/1996</u>
5	HR.MS	30.01.2019	C(2019) 627	<u>Decision (EU) 2019/154</u>
6	HR.IDOC	01.02.2019	C(2019) 688	<u>Decision (EU) 2019/165</u>
7	HR.DS	07.02.2019	C(2019)761	<u>Decision (EU) 2019/236</u>
8	MARE	06.11.2019	C(2019)7894	<u>Decision (EU) 2019/1862</u>

In light of the above considerations, I would like to request that you keep me informed about the developments in this file in due time before the formal adoption process will be launched.

Kind regards,

[REDACTED]

[REDACTED]



[REDACTED]

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