EDPS comments on two draft EUROFOUND Decisions: 1. draft implementing rules concerning the DPO; 2. draft 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 Eurofound (pursuant to Article 25 of Regulation (EU) 2018/1725)

1. Introduction

These comments refer to two draft decisions submitted by EUROFOUND, regarding:
- Implementing rules concerning the DPO
- 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 Eurofound (pursuant to Article 25 of Regulation (EU) 2018/1725)

The EDPS' comments refer to the documents submitted on 04 November 2019. We provide these comments in accordance with Article 41(1) and (2) of Regulation (EU) 2018/1725 ('the Regulation')[1].

2. Implementing rules concerning the DPO

Please note that on 30 September 2018, the EDPS released a revised Position Paper[2] on the role of Data Protection Officers of the EU institutions and bodies under the Regulation.

The EDPS welcomes the fact that EUROFOUND is planning to adopt implementing rules regarding the DPO. Considering that EUROFOUND's draft internal rules are based on the EDPS Decision of 11 December 2018 adopting implementing rules concerning the DPO and only minor adaptations to reflect the EUROFOUND's specificity have been included, the EDPS does not have recommendations on the draft decision.

3. 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 EUROFOUND (pursuant to Article 25 of Regulation (EU) 2018/1725)

Similar to our previously mentioned position paper, we would like to highlight the EDPS Guidance on Article 25 of the Regulation 2018/1725[3], released on 20 December 2018. The EDPS is currently updating its guidance, providing more detail and reflecting on the practices of the EU institutions, bodies and agencies since the entry into force of the Regulation.

3.1 General comments

- We welcome that EUROFOUND will only restrict data subject's rights based on the proposed internal rules, which provide a clear legal basis thereto.

- The EDPS welcomes the fact that the draft internal rules provide for the obligation to document the application of restrictions.

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[1] OJ L 295, 21.11.2018, p. 39.
[2] Available on the EDPS website via: https://edps.europa.eu/sites/edp/files/publication/18-09-30_dpo_position_paper_en.pdf
[3] Available on the EDPS website via: https://edps.europa.eu/data-protection/our-work/publications/guidelines/guidance-art-25-regulation-20181725_en

- The EDPS also takes note of the fact that EUROFOUND will perform a necessity and proportionality test on the need for the restriction of data subjects' rights.

- In relation to this necessity principle, the EDPS has underlined that restrictions should be temporary and be lifted when their causes no longer apply. Therefore, the EDPS notes with satisfaction that restrictions will be reviewed every six months.

- Concerning the data subjects' right to information, we take note that EUROFOUND will publish data protection notices or records on its website and/or intranet containing information on the potential restriction of data subjects' rights.

3.2 EDPS recommendations

- **Recommendation 1**: In accordance with Article 25(2) (d) the safeguards to be put in place should be aimed to 'prevent abuse or unlawful access or transfer' rather than to 'avoid data breaches, leakages or unauthorised disclosure', as mentioned in Article 2(1) of the draft internal rules. The EDPS recommends that the terminology used in the draft internal rules, namely in Article 2(1), is aligned with the wording of the Regulation.

- **Recommendation 2**: The draft internal rules provide in its Article 2(1) that 'The safeguards in place to avoid data breaches, leakages or unauthorised disclosure are the following [...]'. The EDPS reminds that the adoption of appropriate safeguards is not a static exercise and different safeguards will have to be adopted over time. Therefore, the EDPS recommends rephrasing this sentence so as to make this provision prescriptive ('shall put in place') and not descriptive.

- **Recommendation 3**: The EDPS recommends clarifying the meaning of: 'Replacing users is strictly prohibited' (Article 2(1) of the draft internal rules.

- **Recommendation 4:** Regarding Article 3(2), the EDPS presumes that EUROFOUND's intention is to be able to restrict data subject rights in *one or more* of the scenarios that follow the chapeau, such that the list (a) to (c) are alternative, not cumulative conditions. If this is the case, we recommend clarifying this by removing the wording 'in relation to personal data exchanged with Commission services or other Union institutions, bodies, offices and agencies, competent authorities of Member States or third countries or international organisations' from the chapeau. Including this wording in the chapeau rather than in the list that follows it would allow EUROFOUND to, for example, restrict rights in respect of personal data obtained from a Union agency in circumstances where a Member State authority has a legal basis for restricting rights in respect of an entirely different set of personal data. This is presumably not the intention.

  In respect to point (a), the EDPS recommends specifying that EUROFOUND may restrict where both of the following conditions apply:

  o where another Union institution, body, office or agency, *is entitled to* restrict the exercise of the listed rights (rather than simply 'could');

    ○ the purpose of such a restriction by that Union institution, body office or agency would be jeopardised were EUROFOUND not to apply an equivalent restriction in respect of the same personal data.

In respect to point (b), the EDPS recommends introducing a similar dual condition linking the entitlement of a competent authority of Member States to restrict and the application of an equivalent restriction by EUROFOUND in respect of the same personal data.

Furthermore, in respect to Article 3(2) (c), the EDPS recommends clarifying that EUROFOUND may restrict where there is clear evidence that cooperation is likely to be jeopardised, rather than where this is simply possible. Therefore, the EDPS recommends specifying that EUROFOUND may restrict where the exercise of rights *would* rather than 'could' jeopardise cooperation.

- **Recommendation 5**: The EDPS welcomes the link made regarding the processing operations in which restrictions may be imposed and the legal grounds for restrictions (Article 3(1) of the draft internal rules). The draft internal rules refer to Article 25(1) (b), (c), (f), (g) and (h) of the Regulation as possible grounds for restrictions concerning point (a) - administrative inquiries and disciplinary proceedings. EUROFOUND is invited to assess whether Article 25(1) (c), (g) (h) of the Regulation would be the more appropriate legal grounds in this case.

- **Recommendation 6**: Article 5 of the draft internal rules contain on the one hand provisions concerning the information to be provided to the data subject and, on the other hand, provisions referring to the restrictions applicable to the data subject's right to be informed (in accordance with Article 15 and 16 of the Regulation). Given that the second paragraph of Article 5(1) and Article 5(2)) contain information generally applicable to all restrictions applied, the EDPS recommends moving the references concerning the information to be provided to data subjects in Article 3. Subsequently, the title of Article 5 should be adapted accordingly to reflect the fact that it refers to restrictions to the right to be informed.

- **Recommendation 7**: The EDPS notes with appreciation the fact that EUROFOUND will perform a necessity and proportionality test on the need for any restriction of data subjects' rights, under Article 3(4) of the draft internal rules. The EDPS recommends that this test will also be conducted in the framework of the periodic review, following an assessment of whether the factual and legal reasons for a restriction still apply. The internal rules should be adapted accordingly.

- **Recommendation 8**: The EDPS welcomes the fact that, in accordance with recital 15 and Article 4, the Data Protection Officer (DPO) will be informed about restrictions. Under these provisions, the DPO will be informed 'at the moment when the restriction is applied and during subsequent reviews' (Recital 15) and 'whenever the controller restricts the application of data subjects' rights, or extends the restriction' (Article 4(1)). The EDPS recommends that the internal rules also provide for involvement of the DPO throughout the entire procedure.

- **Recommendation 9**: Article 8 of the draft internal rules allows EUROFOUND to restrict the communication of personal data breaches to the data subject in the

framework of harassment procedures. However, in this context it is unclear which of the grounds in Article 25(1) of the Regulation would require restricting communication of personal data breaches. Therefore, the EDPS recommends adapting Article 8 so as to remove the possibility to restrict the communication of personal data breaches to the data subject in the framework of its anti-harassment procedures.

- **Recommendation 10**: Article 9 provides for entry into force of the decision on the day of its publication in the Official Journal of the EU. In this sense, we would like to remind EUROFOUND that these internal rules would allow for the restriction of fundamental aspects of the right to data protection. Therefore, it should consider if it would not be more appropriate for the decision to enter into force on the twentieth day after publication into the Official Journal, as is standard practice for legislative texts. If urgent entry into force is necessary, we recommend inserting an explanatory recital.

Brussels,   **1 2 DEC 2019**