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DECISION n° 253

of the Management Board of the European Union Agency for Railways on internal rules concerning restrictions of certain data-subject rights in relation to the processing of personal data in the framework of activities carried out by the European Union Agency for Railways

THE MANAGEMENT BOARD OF THE EUROPEAN UNION AGENCY FOR RAILWAYS

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/EC¹, and in particular Article 25 thereof,

Having regard to Regulation (EU) Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No. 881/2004² ;

Having consulted the European Data Protection Supervisor,

Whereas:

(1) *The Agency 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 ('Staff Regulations')³, and with the Agency Decision of 16*

¹ OJ L 295, 21.11.2018, p. 39.

² OJ L 138 26.5.2016, p. 1-43, hereinafter referred to as the "Agency Regulation".

³ 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).

December 2019 adopting implementing provisions regarding the conduct of administrative inquiries and disciplinary proceedings. If required, it also notifies cases to OLAF.

- (2) Agency 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 Agency Decision on internal rules concerning whistleblowing of 15 December 2018.*
- (3) The Agency 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 ERA-ED-69/2013 adopting implementing measures pursuant to the Staff Regulations. The Decision establishes an informal procedure whereby the alleged victim of the harassment can contact the Agency's 'confidential' counsellors.*
- (4) The Agency can also conduct investigations into potential breaches of security rules for European Union classified information ('EUCI'), based on its Information and IT Policy adopting security rules for protecting EUCI.*
- (5) The Agency is subject to both internal and external audits concerning its activities.*
- (6) In the context of such administrative inquiries, audits and investigations, the Agency cooperates with other Union institutions, bodies, offices and agencies.*
- (7) The Agency can cooperate with third countries' national authorities and international organisations, either at their request or on its own initiative.*
- (8) The Agency can also cooperate with EU Member States' public authorities, either at their request or on its own initiative.*
- (9) The Agency 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, the Agency might need to preserve the confidentiality of personal data contained in documents obtained by the parties or the interveners.*
- (10) To fulfil its tasks, the Agency 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. The Agency acts as data controller.*
- (11) Under the Regulation, the Agency is therefore obliged to provide information to data subjects on those processing activities and to respect their rights as data subjects.*
- (12) The Agency 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 ('the Regulation') gives the Agency the possibility to restrict, under strict conditions, the application of Articles 14 to 22, 35 and 36 of the Regulation, 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 the Agency is entitled to restrict those rights.*

- (13) *The Agency 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 the Agency'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. The Agency might also need to protect the rights and freedoms of witnesses as well as those of other persons involved.*
- (14) *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, the Agency might decide to restrict access to the identity, statements and other personal data of such persons, in order to protect their rights and freedoms.*
- (15) *It might be necessary to protect confidential information concerning a staff member who has contacted Agency confidential counsellors in the context of a harassment procedure. In such cases, the Agency 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.*
- (16) *The Agency 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. The Agency should give reasons explaining the justification for those restrictions.*
- (17) *In application of the principle of accountability, the Agency should keep a record of its application of restrictions.*
- (18) *When processing personal data exchanged with other organisations in the context of its tasks, the Agency 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 the Agency.*
- (19) *Article 25(6) of the Regulation 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.*
- (20) *Pursuant to Article 25(8) of the Regulation, the Agency 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. The Agency should assess on a case-by-case basis whether the communication of the restriction would cancel its effect.*
- (21) *The Agency should lift the restriction as soon as the conditions that justify the restriction no longer apply, and assess those conditions on a regular basis.*
- (22) *To guarantee utmost protection of the rights and freedoms of data subjects and in accordance with Article 44(1) of the Regulation, the DPO should be consulted in due time of any restrictions that may be applied and verify their compliance with this Decision.*
- (23) *Articles 16(5) and 17(4) of the Regulation provide for exceptions to data subjects' right to information and right of access. If these exceptions apply, the Agency does not need to apply a restriction under this Decision.*

HAS ADOPTED THIS DECISION:***Article 1 - Subject-matter and scope***

1. This Decision lays down rules relating to the conditions under which the Agency may restrict the application of Articles 4, 14 to 22, 35 and 36, pursuant to Article 25 of the Regulation.
2. The Agency, as controller, is represented by its Executive Director.

Article 2 - Restrictions

1. The Agency 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, when conducting administrative inquiries, pre-disciplinary, disciplinary or suspension proceedings under Article 86 and Annex IX of the Staff Regulations and the Agency Management Board Decision n°220 of 16.12.2019⁴, and when notifying cases to OLAF;*
 - (b) pursuant to Article 25(1)(h) of the Regulation, when ensuring that Agency staff members may report facts confidentially where they believe there are serious irregularities, as set out in the Agency Management Board Decision n°183 on whistleblowing dated 15 November 2018⁵ and Decision n°8 on internal investigations dated 17 October 2006⁶;*
 - (c) pursuant to Article 25(1)(h) of the Regulation, when ensuring that Agency staff members are able to report to confidential counsellors in the context of a harassment procedure, as defined by the Agency Decision ERA-ED-69-2013⁷;*
 - (d) pursuant to Article 25(1)(c), (g) and (h) of the Regulation, when conducting internal audits in relation to activities or departments of the Agency;*
 - (e) pursuant to Article 25(1)(c), (d), (g) and (h) of the Regulation, 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, when providing or receiving assistance to or from third countries national authorities and international organisations or cooperating with such authorities and organisations, either at their request or on its own initiative;*

⁴ DECISION n°220 of the Management Board of the European Union Agency for Railways on the opt-out of Commission Decision C(2019) 4231 dd. 12.6.2019 laying down general implementing provisions on the conduct of administrative inquiries and disciplinary proceedings, dated 16.12.2019.

⁵ DECISION n°183 of the Management Board of the European Union Agency for Railways on the guidelines on whistleblowing dated 15.12.2018

⁶ DECISION n°08 of the Administrative Board of the European Railway Agency concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests

⁷⁷ DECISION N° 69012013 of the European Railway Agency on the policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment

(g) pursuant to Article 25(1)(c), (g) and (h) of the Regulation, 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, 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, the Agency 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. The Agency shall prepare periodic reports on the application of Article 25 of the Regulation.
5. When processing personal data received from other organisations in the context of its tasks, the Agency 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 the Agency.

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 the Agency 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.
2. Whenever the Agency 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. The Agency 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 Agency 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.

2. The reviews referred to in point (d) shall be conducted at least every six months.
3. Restrictions shall be lifted as soon as the circumstances that justify them no longer apply.
4. The personal data shall be retained in accordance with the applicable Agency retention rules, to be defined in the data protection records maintained under Article 31 of the Regulation. 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.

Article 5 - Involvement of the Data Protection Officer

1. The Agency DPO shall be informed without undue delay whenever data subject rights are 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. The Agency DPO may request a review of the application of a restriction. The Agency shall inform its DPO in writing of the outcome of the review.
3. The Agency shall document the involvement of the DPO in the application of restrictions, including what information is shared with him or her.

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

1. The Agency shall include a section in the data protection notices published on its website and/or 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. The Agency shall inform data subjects individually, in writing and without undue delay of ongoing or future restrictions of their rights. The Agency 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. The Agency 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, the Agency shall provide the information to the data subject.

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

1. Where the Agency is under an obligation to communicate a data breach under Article 35(1) of the Regulation, 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, the Agency 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, the Agency may restrict the right to confidentiality of electronic communications under Article 36 of the Regulation. Such restrictions shall comply with Directive 2002/58/EC of the European Parliament and of the Council.
2. Notwithstanding Article 6(3), where the Agency 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.

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.

For the Management Board,

The Chairwoman
Clio LIÉGEOIS