



EDPS SUPERVISORY OPINION ON THE DRAFT DECISION ESTABLISHING THE HISTORICAL ARCHIVES OF THE EUROPEAN CENTRAL BANK (Case 2022-0812)

1. INTRODUCTION

1. This Supervisory Opinion relates to the draft decision establishing the historical archives of the European Central Bank (ECB) and amending Decision 2004/257/EC, as submitted on 03 August 2022.
2. The EDPS issues this Supervisory Opinion in accordance with Articles 41(2) and 58(3)(b) of Regulation (EU) 2018/1725¹, ('the Regulation').

2. FACTS

3. On 3 August 2022, the ECB formally consulted the EDPS on its draft decision establishing the historical archives of the European Central Bank (ECB) and amending Decision 2004/257/EC.
4. The draft decision introduces derogations from data subject rights in accordance with Article 25(4) of the Regulation, which regulates data processing for archiving purposes in the public interest. Additionally, it includes certain rules on the processing of "sensitive personal data" in the archiving context.

¹ Regulation (EU) 2018/1725 of the European Parliament and 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, OJ, L 295, 21.11.2018, pp. 39-98.



3. LEGAL ANALYSIS AND RECOMMENDATIONS

Controllership and definitions

5. The EDPS recommends that the ECB explicitly refer in the draft Decision to its role as a controller within the meaning of Article 3 of the Regulation. Additionally, the EDPS recommends that the ECB include a cross-reference to the definition of “controller”, as it is provided in Article 3 of the Regulation, as well as a definition of “sensitive personal data”, which appears to be broader than “special categories of data” under Article 10 of the Regulation. Specifically, concerning the notion of “sensitive personal data”, the EDPS recommends removing the reference to Article 8 of the Regulation, taking into consideration that this provision concerns the conditions applicable to a child’s consent in relation to information society services. The EDPS recommends that the ECB explicitly refer to children’s personal data instead, if this is the category of data subjects that the draft decision aims to address.
6. Such definitions could be added in Article 2 of the draft Decision.

Information provided to the data subjects

7. As a rule, Article 25(4) of the Regulation does not provide the possibility for the draft Decision to derogate from the right to information of Articles 15-16 of the Regulation. Nevertheless, the draft Decision provides that the right to information, in principle, does not apply in the particular context of the ECB historical archives in accordance with the exception of Article 16(5) of the Regulation, as “ECB would be required to make a disproportionate effort to provide information on processing once its historical archives have been made available to the public” (Recital 12 of the draft Decision).
8. As a preliminary remark and for the sake of accuracy, the EDPS recommends that the draft decision refer to Article 16(5)(b), instead of Article 16(5) of the Regulation. In terms of substance, the EDPS acknowledges that the reasoning provided to justify the application of Article 16(5)(b) is sufficient. Nonetheless, the ECB shall make sure that data subjects are informed about the transfer of their personal data to the historical archives **at the same time** they are informed about the processing operations for which their personal data have been initially collected in accordance with Articles 15 and 16 of the Regulation. In practice, such information may be included in the data protection notice communicated to data subjects when their personal data are initially collected.
9. Therefore, the EDPS recommends explicitly mentioning in the draft Decision that data subjects shall be informed about the fact that records containing their personal data may be transferred to the historical archives at the end of the retention period identified for those records.

Right to data portability

10. Article 8(1)(e) of the draft Decision provides for derogations from the right to data portability in so far as this involves disproportionate effort. In accordance with Article 22 of the Regulation, the right to data portability applies only when the processing is based on consent (Article 5(1)(d) of the Regulation) or the performance of a contract (Article 5(1)(c) of the Regulation) and when carried out by automated means. Since Article 5(1)(a) is the most common ground for lawfulness of processing by EU Institutions (EUIs), the right to data portability may apply in very limited cases. In the given context, it is unlikely that the right to data portability would be applicable when personal data are processed for archiving purposes. Consequently, the EDPS recommends removing from the draft Decision the possibility to apply derogations on the right to data portability.

Involvement of the data protection officer

11. In accordance with Article 44(1) of the Regulation, EUIs shall ensure that the data protection officer (DPO) is involved, properly and in a timely manner, in all issues which relate to the protection of personal data. Therefore, the EDPS recommends introducing an obligation to consult the DPO **before** the controller takes any decision to derogate from data subject rights in a particular case. The controller should involve the DPO throughout the procedure and document this consultation.

Documentation requirements

12. In line with the accountability principle, as it is enshrined in Article 4(2) of the Regulation, EUIs should be able to demonstrate compliance with the Regulation. Therefore, the EDPS recommends including an obligation to record any derogations applied pursuant to the draft Decision, as well as the reasoning that justifies the derogation. In other words, the controller should document why it is necessary to derogate from data subject rights in a particular case. Additionally, the EDPS recommends introducing a provision to clarify that any documents containing underlying factual and legal elements shall be made available to the EDPS upon request.

Appropriate safeguards

13. The EDPS welcomes the introduction of appropriate safeguards (for instance, pseudonymisation and anonymisation measures) to ensure compliance with Article 13 of the Regulation (Article 8(2) of the draft Decision). One of the safeguards listed in the draft Decision concerns the establishment of “controlled procedures to enable access to personal data that is not universally identified”. The EDPS recommends reviewing this sentence to clarify the concept of “personal data that is not universally identified”.

Provisions applicable to “sensitive personal data”

14. Article 9(2) of the draft Decision provides that “the protection of sensitive personal data, under Articles 8, 10 and 11 of Regulation (EU) 2018/1725, or of data relating to the privacy and the integrity of the individual, under Article 4 of Decision ECB/2004/3, that is contained in ECB historical archives documents, shall expire 70 years after the date of creation of a document.” Recital 14 complements this provision by explaining that the Regulation should not apply to the processing of personal data of deceased persons² and that in most cases the ECB cannot establish whether the data subject is deceased. For this reason, the draft Decision sets the expiry of the “protection for sensitive personal data” to 70 years.
15. The EDPS understands that the “protection of sensitive personal data” in essence refers to the introduction of additional appropriate safeguards for special categories of personal data (Article 10 of the Regulation), personal data relating to criminal convictions and offences (Article 11 of the Regulation), as well as personal data of children. Such appropriate safeguards entail the non-disclosure of the above mentioned personal data to the public historical archives for a specified period of time and are introduced in accordance with Articles 10(2)(j), 11 and 13 of the Regulation. In this vein, the EDPS recommends modifying the wording to refer to additional appropriate safeguards applicable to “sensitive personal data”, instead of referring to “protection of sensitive personal data”.
16. Concerning the duration of the above mentioned safeguards, the EDPS acknowledges the difficulty of verifying whether a data subject is deceased in the context of disclosing personal data included in documents preserved in the historical archives. However, the EDPS urges the ECB to abstain from disclosing any “sensitive personal data” when such disclosure would undermine the privacy and integrity of the individual concerned, in accordance with Article 4(1)(c) of Decision ECB/2004/3. The EDPS’ assessment is that the 70-year time limit does not guarantee that the data subject concerned is deceased. The EDPS recommends that ECB err on the safe side and disclose such personal data only when there is absolute certainty that the data subject is deceased and hence, the Regulation is no longer applicable. Against this background, the EDPS recommends that ECB review the relevant provisions in the draft Decision and extend the time limit for the non-disclosure of sensitive personal data to the public historical archives (e.g. to 100 years from the date of creation).

² Recital 6 of the Regulation.

4. CONCLUSION

The EDPS has made several recommendations to ensure compliance of the processing with the Regulation. In light of the accountability principle, the EDPS expects ECB to implement the above recommendations accordingly and has decided to **close the case**.

Done at Brussels on 5 October 2022

[e-signed]

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