

Opinion of the Data Protection Officer pursuant to Article 43(2) DPR

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1. Introduction/Background

In its 134th session, the ILOAT issued Judgment No. 4551 on the use of mass e-mails within the Office. In essence, the judgment broadens the possibility to send mass emails.

Following the delivery of the above judgment, and with a view to facilitate its proper implementation in terms of data protection, the DPO has been asked by PD0.8 to submit a formal opinion on the use of mass emails from a data protection perspective, especially on the obligation of Staff Representatives to afford, when using all-Office emails¹, individual recipients the option to unsubscribe from the mailing list.²

2. Description of the subject

The DPO understands the facts as follows:

- a) Following Judgment No. 4551, the EPO Staff Representatives (and one of the EPO trade unions (SUEPO)) have requested to reinstate the possibility to send mass emails to the staff (Office-wide for the Central Staff Committee (CSC); site-wide for the respective Local Staff Committee (LSC)).
- b) Staff Representatives will recur to the Office's internal staff directory as a emailing list.
- c) The Tribunal held that Communiqué of 31 May 2013 governing the sending of mass emails was unlawful because;
 - (a) it sets out an indiscriminate limitation a priori,
 - (b) without providing specific reasons for this measure,
 - (c) irrespective of technical difficulties for the e-mails' dispatching and
 - (d) for an indefinite period of time.
- d) The Tribunal stressed that the freedom of communication, information and speech includes also the right to freely choose the means by which communications are sent, information is provided and speech is given. The Organisation is thus not allowed to impose certain means (e.g. a dedicated intranet webpage) rather than others (mass emails).

This opinion is drafted against the backdrop of the above jurisprudential framework set by the ILOAT.

¹ For the scope and differentiation of all-Office emails, please refer to Paragraph 2a).

² See Request for a formal opinion on ILOAT Judgment No. 4551 by PD0.8 of 08/09/2022.

3. Opinion of the DPO on the questions raised by PD0.8

Question a. Would a mass email sent to staff without any possibility for them to unsubscribe comply with the EPO data protection framework?

a) General principles and balancing of fundamental rights

While fully adhering to the Tribunal's case law and acknowledging its recognition of Staff Representatives' fundamental rights to free communication, information, and speech, in the following analysis and opinion, the DPO has endeavoured to weigh and reconcile the rights and freedoms of all stakeholders involved, including those of the recipients of mass emails.³

A fundamental aspect in the Human Rights Declaration is the right to freedom of expression as set out in Article 19 Universal Declaration of Human Rights (UDHR), adopted on 10 December 1948 by the General Assembly of the United Nations: *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"*.

The right to privacy, referred to in European law as the right to respect for private life, is equally identified as a fundamental human right already in the UDHR. The right to a private life and associated freedoms is contained in Article 12 of the Human Rights Declaration, which states that *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks"*.

The provisions in Article 19 UDHR may, at first glance, seem to be in conflict with the provisions of Article 12 UDHR, particularly where the exercise of Article 19 UDHR might result in the invasion of privacy contrary to Article 12 UDHR. This apparent conflict is, however, reconciled in Article 29(2) UDHR, which states that individual rights are not absolute and that there will be instances where a balance must be struck: *"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society"*.

Article 8(1) of the European Convention on Human Rights (ECHR) echoes Article 12 UDHR and provides that everyone has the right to respect for his or her private and family life, home and correspondence.

Whilst Article 8 ECHR deals with the right to privacy, Article 10 ECHR protects the right of freedom of expression and the right to share information and ideas across national boundaries.

Article 10(1) of the ECHR reads: *"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers"*.

³ The DPO notes that such a reconciliation is fully in line with the Tribunal's case law, see consideration 10 (and further below).

This right is also qualified so as to protect the privacy of individuals, as set forth in Article 10(2): *“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”*.

Both the UDHR and the ECHR inherently recognise a need for balance between the rights of individuals and the justifiable interference with these rights, which is a recurring theme within data protection law.

The right to personal data protection, equally recognised as a fundamental right, comes into play whenever personal data are processed; it is closely connected and forms part of the right to respect for private and family life, home and correspondence. Any processing of personal data is subject to appropriate protection. Data protection concerns all kinds of personal data and data processing, irrespective of the relationship and impact on privacy.

Processing of personal data may also infringe on the right to private life; however, it is not necessary to demonstrate an infringement on private life for data protection rules to be triggered. Both rights, although closely related, are thus distinct rights.

b) EPO Data Protection Legal Framework

The EPO recognises the importance of data protection and has included this principle in Article 1b of the Service Regulations. The processing of personal data at the Office is regulated by the new data protection framework of the EPO, including Data protection Rules (DPR) that replaced the previous Guidelines for the protection of the Personal Data at the EPO (Data Protection Guidelines).

The purpose of the DPR is to support the implementation of Articles 1b and 32a Service Regulations by establishing the legal framework necessary to ensure that the fundamental rights of natural persons to privacy and to the protection of their personal data processed by the Office are observed and to provide for accountability in this regard. The DPR are the Office’s instrument to protect the fundamental rights to privacy and data protection of all data subjects, including staff.

Article 4 DPR sets forth that the personal data shall be:

- a. processed lawfully, fairly and in a manner transparent to the data subject ("lawfulness, fairness and transparency"); the data subject shall be informed of the existence of the processing operation and its purposes, and the controller shall provide the data subject with any further information necessary to ensure fair and transparent processing, taking into account the specific circumstances and context in which the personal data are processed;
- b. collected for specified, explicit and legitimate purposes and not further processed in a way that is incompatible with these purposes ("purpose limitation");

c. adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ("data minimisation");

d. accurate and, where necessary, kept up to date; every reasonable step shall be taken to ensure that personal data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified without delay ("accuracy");

e. kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data were collected or for which they are further processed ("storage limitation");

f. processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ("integrity and confidentiality").

Article 37(1) DPR provides that personal data contained in directories of users and access to such directories shall be limited to what is strictly necessary for the specific purposes of the directory.

c) Fair balancing of fundamental rights under the EPO legal framework

Any processing of personal data constitutes a limitation on the right to the protection of personal data and must comply with the DPR. This requires ensuring that the processing is both necessary and proportional. The objective and purpose of any processing as a measure must be defined. The option chosen to execute the measure to achieve the objective and fulfil the purpose must be genuinely effective and least intrusive for the rights of the data subjects at stake.

The Office authorising Staff Committees to make use of the staff directory with a view to sending e-mails to represent, promote and defend the interests of the staff *vis-à-vis* the EPO, can be classified as necessary for the performance of tasks within the Staff Representatives' competence. As a matter of fact, this use can be considered as an access "limited to what is strictly necessary for the specific purpose of the directory" (Article 37(1) DPR).

Staff Representatives, while sending emails to the staff in the framework of their main activities to represent, promote and defend the interests of the staff *vis-à-vis* the EPO, are performing a lawful task under Article 5(a) DPR. Staff Committees (represented by their Chairs) are defined as delegated controllers by the President's decision of 17 May 2022 identifying the operational units of the Office acting as delegated controllers within the meaning of the DPR.

On the other hand, the (intended) recipients of the mass emails (i.e. staff) retain, as data subjects, the **right to object** to that processing (i.e. the use of their email addresses for the purpose of sending mass emails) on grounds relating to their personal situation, at any time, under Article 23(1) of the DPR. There must always be a balancing exercise between the competing interests of the delegated controller, for this processing activity - the Staff Committees, and the basis for the data subjects' objections (which may be for personal, social or professional reasons). The burden of proof to show compelling legitimate grounds and demonstrate that the processing should continue lies with the delegated controller rather than the data subject.

Balancing the fundamental rights to privacy and data protection and the rights to free communication, information and speech is thus needed, also recognising that none of these rights are absolute rights.⁴

Such an exercise requires a “fair balance” evaluation of the measure, in terms of its scope, extent and intensity of the interference. In the case of the processing in question, i.e. sending emails to all-Office by the Staff Committees and others, the purpose and objective to inform the data subjects, can be effectively accomplished using another less intrusive option (a different channel to inform), namely by publishing the communications on a dedicated page on intranet.

c) Considerations and recommendations

In light of the above, the DPO recommends that Staff Committees

- (1) include a (link to a) data protection statement in each and every e-mail sent to the staff,
- (2) ensure that each email contains and provides an easy possibility to recipients to unsubscribe (and their data being erased) from the staff committees’ mailing list.⁵ This allows the Staff Representatives to fulfil their obligation under the DPR complying with any request by staff to unsubscribe from the mailing list in a timely manner, thus allowing the staff members as data subjects to maintain control over the use of their data and effectively exercise their right to object.⁶

The DPO acknowledges that the Tribunal held that Communiqué No. 10 and the Announcement of December 2011 should apply. While it is noted that these do not contain any requirements for the Staff Representatives to ensure that staff can unsubscribe from the official mailing list, it should be recalled that the DPR did not exist at the time of the adoption of the said Communiqué and announcement. As outlined above, with the adoption of the DPR and the inclusion of Article 1b in the Service Regulations, the EPO has recognised and given a prominent place to the fundamental rights to privacy and data protection in its legal system. Already from this perspective, the above balancing exercise between the fundamental right to free communication and speech (as recognised by the Tribunal) *versus* that to privacy and data protection granted to all individuals as data subjects needs to be carried out.

The recommended way of balancing the fundamental rights of data subjects to privacy and data protection and not to receive mass emails (which may be perceived as intrusive) with the fundamental right of freedom of speech of Staff Representatives would be to foresee an opt-out⁷ alternative for the all-Office communications (mass emails) sent by the Staff Representatives: The possibility to opt-out would constitute, in accordance with the DPR, a specific, immediately and easily effectuated mean of exercising the right to object, also preserving the right of individuals not to

⁴ See also ILOAT consideration 9.

⁵ In addition, the DPO reiterates the need to adopt specific guidelines to *inter alia* include that the authorisation for the Staff Representatives to send mass emails does not cover direct marketing in the sense that e.g. the emails should not be used for the promotion of the trade unions (e.g. SUEPO) or as an indirect way for them to gain more supporters/members, in compliance with Article 37(2) DPR.

⁶ Those type of mass emails are to be differentiated from communications containing information - including instructions - essential to the services and operations of the Office (e.g. general IT outage or unavailability of EPO systems, the necessity to perform maintenance operations at a certain site, New Ways of Working), or staff’s vital interests (e.g. fire escape drills), in line with the Office’s duty of care, which do not leave room for an opt-out.

⁷ The opt-out option is for the data subjects to be able to express and exercise their right to object to the processing of their personal data for the specific purpose and to stop the processing without undue delay. In other words: the opt-out feature is a technicality to facilitate the data subjects’ right to object in that it ensures and guarantees that the right to object is effectuated by an opt-out. In the present case, the opt-out option would be implemented via the unsubscribe from receiving emails function.

receive communications and statements that may be perceived as intrusive⁸. Under these very specific circumstances, the organisation is entitled to issue reasonable guidelines on the opt-out options to also safeguard the fundamental right of staff to the protection of their personal data.

The suggested opt-out possibility would guarantee that staff are in control of their personal data and remain able to effectively execute their right to object without limiting the right to free communication and speech of the statutory bodies of the Office, including, but not limited to the Staff Committees, thus maintaining the established rights of Staff Representatives and other bodies in their full essence: Staff Representatives will be able to send their messages (and continue to use other means of communication, such as the dedicated page on the intranet that will equally still be available and can be easily consulted at any time). At the same time, employees will be given the possibility to not have their email address used for this purpose if they do not wish so and object on the basis of personal, social or professional reasons. *In conclusio*, the unsubscription option would satisfy the requirement of a 'fair balance' analysis and implementation of the measure.

In sum, if mass emails were to be sent by the statutory bodies of the Office, including the Staff Committees, without offering the possibility to unsubscribe, individual data subjects may argue that this infringes their right to object to that processing. An easy-to-effectuate opt-out option should on the other hand, as demonstrated above, comply with ILOAT's jurisprudential landscape and guarantee by default the respect of the right to object.

These considerations are aligned with and follow the reasoning of the Tribunal that held⁹: "*An organisation is entitled to issue reasonable guidelines in order to govern the use of the office emails by staff members and Staff Representatives, and to establish authorised and non-authorised uses. Insofar as the criteria on the use of mass emails are underpinned by general interests, such as those listed in Communiqué No. 10 of 29 March 2006, they shall be considered lawful, as they ensure a reasonable balance between the interests of the organisation and the fundamental rights to free communication, information, and speech, vested in the staff members and their staff unions and representatives.*"

d) Extension of proposed measure onto other bodies, including bodies under Article 2 ServRegs and Amicale for reasons of equal treatment

Having said all the above, the fundamental principle of equal treatment may call for an extension of the approach suggested above to other bodies, including statutory bodies under Article 2 ServRegs and Amicale, to avoid from the onset that the requirements imposed onto Staff Representatives (i.e. providing the opt-out option as an adjusted, specific application of the right to object) may be deemed an unjustified different treatment towards the bodies of the EPO. In conclusion, the possibility to unsubscribe should be foreseen not only for the Staff Committees' communications, but also for communications coming from other bodies of the Office.

⁸ See also ILOAT consideration 9.

⁹ ILOAT consideration 10.

Question b. Would a mass email sent to staff with an unsubscription option made available to them comply with the EPO data protection framework?

In light of the considerations elaborated under question a), an unsubscription option would facilitate the exercise of the addressees' right to object to receiving such mass emails, while at the same time safeguarding the interests, rights and freedoms of all parties and stakeholders.