



Formal comments of the EDPS on a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/884

I. Introduction and background

On 13 December 2016, the Commission tabled a Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/884¹ (hereinafter referred to as “the Proposal”).

The EDPS has previously issued recommendations on Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/884² (hereinafter referred to as “the implementing Regulation”) in his Opinion of 6 March 2007³. The EDPS had not given his opinion on Regulation (EC) No 883/2004 on the coordination of social security systems⁴ (hereinafter referred to as “the basic Regulation”) at the time since the Commission issued its proposal in 1999 before the entry into force of Regulation (EC) No 45/2001⁵ and the existence of the EDPS. Nonetheless, in his Opinion of 2007, the EDPS assessed the implementing Regulation in conjunction with the basic Regulation on which it is based.

In 2014, the EDPS also informally shared his views with the Commission on data protection aspects of a future proposal that was under consideration at the time and would amend the basic Regulation and the implementing Regulation. He welcomes that the Commission proactively approached the EDPS at an early stage to ask his advice and address the potential data protection implications of this file.

The Proposal seeks to continue the modernisation process of social security coordination and lays down rules in four areas of social security coordination where the Commission considers that improvements are still required: economically inactive citizen’s access to social benefits, long-term care benefits, unemployment benefits and family benefits. To this end, it brings modifications to the basic and implementing Regulations.

Among these modifications, the Commission’s intention is to provide for a legal basis that will facilitate the exchange of social security data across Member States with the aim of combatting fraud and errors in the application of social security coordination rules⁶. The Proposal thus envisions further processing of social security data.

II. Scope of EDPS’ comments

The EDPS aims at ensuring that the fundamental rights to privacy and data protection of EU citizens enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the EU (hereinafter referred to as “the Charter”) are fully respected and that data protection principles have been duly taken into account. The EDPS considers that it is all the more important in the context of social security coordination as the personal data processed and exchanged will be often health data, *i.e.* a special category of data of a sensitive nature that deserves a higher level of data protection.

The present formal comments will focus on the provisions⁷ of the basic and implementing Regulations related to data processing that would be modified or introduced by the Proposal.

The EDPS welcomes that some of these new provisions implement several of the recommendations that he made previously, which contributes to the quality of the Proposal.

III. EDPS' comments

1. Further processing of personal data for the detection of fraud and error

The Proposal introduces three new paragraphs in Article 2 of the implementing Regulation providing for further processing of personal data for the detection of fraud and error. The new Recital 25 of the implementing Regulation explains that: *"It is [...] in the interest of legal certainty that this Regulation contains a clear legal ground permitting competent institutions to exchange personal data with relevant authorities in the Member State of stay or residence relating to persons whose rights and obligations under Regulation (EC) No 883/2004 and this Regulation have already been established, in order to identify fraud and error as part of the ongoing proper implementation of these Regulations"*.

First of all, the EDPS recalls that, in accordance with the purpose limitation principle, a key principle of EU data protection law set out in Article 6(1)(b) of Directive 95/46 and Article 5(1)(b) of the General Data Protection Regulation⁸ ("GDPR"), personal data shall be collected for specified, explicit and legitimate purposes and not be further processed in a manner that is incompatible with these purposes.

In this case, the initial purpose of the collection of social security data is to *"guarantee that persons moving within the community and their dependents and survivors retain their rights and the advantages acquired and in the course of being acquired"* (Recital 13 of the basic Regulation). Thus, further processing of such data can only take place for purposes compatible with this purpose⁹.

The EDPS recognises that the purpose of detecting fraud and error is part of the proper implementation of the basic and implementing Regulations, and can be considered compatible with the original purpose for processing social security data. EU citizens seeking social security benefits should reasonably expect that the competent authorities will take measures to prevent fraud, without regard for the country in which they are staying.

Furthermore, the EDPS welcomes that Article 2(7) explicitly provides that requests for personal information and answers must comply with the requirements of the GDPR. However, the EDPS stresses that the existence of a clear legal basis providing for sufficient and appropriate safeguards in case of exchange of social security data between competent national authorities is one element of such compliance and should be provided for in the implementing Regulation. This is needed to guarantee that the further processing of social security data envisaged here will not disproportionately affect EU citizens' right to data protection.

The EDPS has formulated questions that need clarification and recommendations to improve **Article 2(5) and (6)** in order to ensure that it is the case:

- 1) *Further processing of social security data should be limited to what is strictly necessary for the purpose of detecting fraud and error.*

The EDPS welcomes that the Commission mention that any response to a request for personal information in this context should be *"necessary and proportionate"*. The EDPS suggests modifying Article 2(5) to emphasise that *"The request and any response shall [be limited to] information which enables the competent Member States to identify any accuracy"*.

The EDPS understands from the text that such requests for personal information would be made **on a case-by-case basis**, and not for all and every persons to whom the basic and implementing Regulations apply. However, the EDPS wonders how such a request for personal information could be necessary and proportionate in a particular case “*where there is no existing doubt about the validity or the accuracy of the information*”.

Furthermore, the EDPS considers that such exchange of personal data should be framed in a more precise manner. The Proposal should establish, or task the Administrative Commission to establish, not only the types of data requests and responses that could be made (as foreseen by the proposed Article 2(6)), but also which entities can make those requests, in which circumstances, in which way, and which safeguards they should be respecting.

- 2) *Personal data shall be stored for no longer than it is necessary for the purpose for which they are collected.*

Personal data are not stored in the Electronic Exchange of Social Security Information (‘EESSI’) system, but in repositories by Access Points of relevant national administrations, under their responsibility. Neither the basic Regulation, nor the implementing Regulation provide for a maximum data retention period of social security data exchanged through the EESSI.

However, fixing one common data retention period - or several depending on the type of data or the area of social security - would reinforce the harmonized level of data protection across Member States. **Thus, the EDPS recommends fixing maximum data retention period(s) for all personal data processed pursuant to the basic and implementing Regulations, including for data exchanged for the specific purpose of detecting fraud or error.**

- 3) *Possibility to refuse to answer information requests on data protection grounds*

The Proposal does not specify if a Member State that has received a request for information is obliged to respond to such request, nor does it indicate a timeframe for the response. The EDPS considers that **legal clarity could be improved by stating whether a Member States could refuse to respond.** For example, it is desirable that a Member State should refuse to respond on data protection grounds in case it considers that the data requested is disproportionate or unnecessary or in case it infringes the GDPR, which will be directly applicable in all Member States.

2. Further processing for labour, health and safety, immigration and tax purposes

The Proposal envisages a second type of further processing of social security for labour, health and safety, immigration and tax purposes. It introduces a new paragraph 4 in Article 19 of the implementing Regulation according to which “*Where necessary for the exercise of legislative powers at national or Union level, relevant information regarding the social security rights and obligations of the persons concerned shall be exchanged directly between the competent institutions and the labour inspectorates, immigration or tax authorities of the States concerned; this may include the processing of personal data for purposes other than the exercise or enforcement of rights and obligations under the basic Regulation and this Regulation in particular to ensure compliance with relevant legal obligations in the fields of labour, health and safety, immigration and taxation law. Further details shall be laid down by decision of the Administrative Commission*”.

In this regard, the new Recital 25 explains that *“It is also necessary to specify the circumstances in which personal data may be processed for a purpose other than social security including to monitor compliance with legal obligations at Union or national level in the fields of labour, health and safety, immigration and taxation law”*.

First, the EDPS doubts that such further processing could be considered compatible with the above-mentioned original purpose for processing social security data. There does not appear to be a direct link between the further purposes envisaged and the initial purpose. Such processing could potentially have detrimental effect for the individuals concerned, who might not reasonably expect that exchange of their data with such authorities would take place as a result of the initial processing. **Thus, the EDPS considers that the proposed Article 19(4) would most likely not comply with the purpose limitation principle and be in breach of EU data protection law. Therefore, the EDPS recommends carrying out a compatibility assessment between these purposes.**

Furthermore, the EDPS considers that the proposed Article 19(4) is not sufficiently clearly formulated. The further purposes envisaged for processing social security data are not clearly specified; Article 19(4) only mentions *“to ensure compliance with relevant legal obligations in the fields of labour, health and safety, immigration and taxation law”*, which potentially includes a very large number of further processing. Article 19(4) does not either define the circumstances in which such further processing could take place; it only says that exchange of personal data must be made *“where necessary for the exercise of legislative powers at national or Union level”*. Article 19(4) does not clearly identify the entities that will receive the social security data; it merely says that such exchange should take place *“directly between the competent institutions and the labour inspectorates, immigration or tax authorities of the States concerned”*.

The EDPS also considers that it is not sufficient to ask the Administrative Commission for the Coordination of Social Security Systems set up by Article 71 of the basic Regulation, to provide further details on this matter in future decisions. Indeed, such limitation to the right to the protection of personal data should be provided for by law and be necessary and proportionate in accordance with Article 52(1) of the Charter. Such limitation must be laid down by a law that is foreseeable as to its effects and accessible to the persons concerned.

For the reasons detailed above, the EDPS recommends redrafting Article 19(4) to define the specific (and compatible) purposes for processing social security data, determine the entities that will process such data as a result and under which circumstances.

3. References to the EU Charter and the GDPR

The EDPS welcomes the reference to the GDPR included in a new Recital 39a of the basic Regulation. To be consistent and for the sake of clarity, the same explicit reference to the GDPR could be as well included in Article 77 of the basic Regulation and in the proposed Recital 26 of the implementing Regulation, which now refers to *“the European Data Protection legislation”*.

The EDPS also points out that the GDPR will only be applicable as of 25 May 2018 and, in case the Proposal becomes legislation and is applicable before this date, the current Directive 95/46 will be applicable in the meantime.

Furthermore, the EDPS welcomes the new Recital 47 of the basic Regulation that explicitly refers to the respect of the fundamental rights enshrined in the Charter of Fundamental Rights

of the European Union (hereinafter referred to as “the Charter”) in the implementation of this Regulation and lists the relevant rights to be taken into account in this context. However, the EDPS notes that the right to the respect of private and family life of Article 7 of the Charter does not appear among those rights **and recommends adding this right in the above-mentioned list of Recital 47.**

4. Information to data subjects

The EDPS welcomes the new paragraph 5 of Article 19 according to which “*Competent authorities shall be obligated to provide specific and adequate information to concerned person concerning the processing of their personal data pursuant to the [GDPR]*”, as suggested in his Opinion of 2007¹⁰. The Commission explicitly stated in Recital 14 to the Proposal its intention “*to clarify the obligations of Member States to provide specific and adequate information to data subjects*”. In this regards, the EDPS recalls the judgment of the Court of Justice of the European Union (hereinafter “the CJEU”) in the *Bara Case C-201/14*¹¹, in which the Court ruled on similar circumstances - although at national level - to those envisaged in the Proposal and found that national measures allowing a public administrative body in a Member State to transfer personal data to another public administrative body and their subsequent processing, without the data subjects being informed of that transfer and processing, were in infringement of Directive 95/46/EC.

Therefore, and in line with the *Bara* ruling, **the EDPS recommends that Article 19(4) provides on the one hand for a legal obligation for the social security authority responsible for the data to inform data subjects of the transfer of those data to another public administrative body and of the purpose(s) of the further processing, in accordance with the principle of fair processing set in Article 6 of Directive 95/46 (and Article 5(1)(a) of the GDPR). On the other hand, Article 19(4) should also provide for an obligation for the entity to which the social security data are transferred to inform the data subjects of its identity, the purpose(s) of the processing and the categories of data processed in accordance with Article 11(1) (a) to (c) of Directive 95/46 (and Article 14(1) of the GDPR).**

Furthermore, the EDPS welcomes the new paragraph 3 in Article 3 of the implementing Regulation that introduces the obligation for Member States to ensure that data subjects “*are fully informed of the safeguards concerning automated individual decisions*”. **However, the EDPS recommends providing for such safeguards in Article 3 of the implementing Regulation in accordance with the requirement of Article 22(2)(b) of the GDPR.**

Finally, given the complexity of the subject matter, the EDPS considers that it would be in the interest of citizens to **specify that such information should be provided for in a clear and accessible manner.**

5. Data subject’s rights

In the context of social security coordination, data subjects are workers - and their family members - having worked in more than one Member State and claiming social security benefits, non-active persons who have links with more than one Member State or nationals of third countries legally resident in the EU. In this trans-border context, data subject’s rights are particularly important and relevant to allow the persons concerned to have control over their data and ensure their accuracy.



The EDPS welcomes the introduction of a new paragraph 3 in Article 3 of the implementing Regulation that obliges Member States to ensure that data subjects can exercise their right of access, right to rectification and right to object to the processing of their personal data. **For the sake of clarity, the EDPS recommends adding an explicit reference to the relevant articles of GDPR.**

Furthermore, the EDPS welcomes the new Recital 26 of the implementing Regulation according to which *“there should be no automatic removal of benefit entitlement resulting from the data exchange”*, as the EDPS had suggested in his Opinion of 2007¹².

Finally, the Proposal provides in Article 3(3) that the competent institutions of the Member State where an EU citizen reside should act as a “one-stop shop” for the exercise of his or her data protection rights, which was one suggestion that the EDPS made in his 2007 Opinion¹³. The EDPS considers this as a significant improvement that will facilitate the exercise of data subjects’ rights. However, the Proposal establishes such a mechanism but limits it to the right of access. The EDPS would like to stress that EU citizens should be able to exercise their rights to their full extent in such “one-stop shop” and therefore **he recommends expanding this possibility to other data protection rights, namely the right to rectification, the right to erasure and the right to object, and providing for a cooperation mechanism between the authorities involved to carry out data subjects’ requests to exercise their rights.**

Brussels, 8 May 2017

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke, positioned above the name of the signatory.

Wojciech Rafał WIEWIÓROWSKI



Notes

¹ COM(2016) 815 final.

² Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, p. 1

³ EDPS Opinion of 6 March 2007 on the Proposal for a Regulation of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, available at:

https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2007/07-03-06_social_security_EN.pdf

⁴ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1.

⁵ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1.

⁶ See Recital 13 of the Proposal.

⁷ Namely in the basic Regulation: Recital 39, Recital 47; and in the implementing Regulation: Recital 25, Recital 26, Article 2(5), (6) and (7), Article 3(3), Article 19(4) and (5), Article 75(4), Article 77(2) and Article 79(2).

⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC, O.J. L 119, 04.05.2016, p. 1.

⁹ See the Working Party 29 Opinion 03/2013 of 2 April 2013 on purpose limitation for more guidance on this principle, available at: http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf

¹⁰ EDPS Opinion of 6 March 2007, point 35.

¹¹ CJEU, Judgment of 1st October 2015 in Case C-201/14, Smaranda Bara and Others v Președintele Casei Naționale de Asigurări de Sănătate and Others, ECLI:EU:C:2015:638.

¹² EDPS Opinion of 6 March 2007, point 37.

¹³ EDPS Opinion of 6 March 2007, point 38.