



Formal comments of the EDPS on the Proposal for a Regulation of the European Parliament and of the Council establishing European Labour Authority.

1. Introduction

On 13 March 2018, the European Commission adopted a Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority (hereinafter “the Proposal”)¹.

The Commission's intention to set up a European Labour Authority was announced by President Juncker in his State of the Union Address on 13 September 2017². The European Labour Authority will complement and facilitate the implementation of ongoing initiatives to ensure fair mobility, including the reform of the Posting of Workers Directive³, the *lex specialis* in the international road transport sector⁴ and the modernisation of EU rules for the coordination of social security systems⁵.

The European Labour Authority will contribute to fostering fairness and mutual trust in the Internal Market by ensuring that EU rules are enforced in a fair, simple and effective way. To this end, the Authority will support Member States in matters relating to cross-border labour mobility, including rules on the free movement of workers, the posting of workers and the coordination of social security systems. It will also enhance cooperation between Member States in tackling undeclared work.

One of the EDPS` mission is to advise the Commission services in the drafting of new legislative proposals with data protection implications. The EDPS has limited the comments below to the provisions of the Proposal that are particularly relevant from a data protection perspective.

2. Comments

2.1. General comments

EDPS welcomes the references to data protection law in the Proposal. In particular, we welcome that these references are set forth not only in a recital (Recital 25 of the Proposal) but also in substantive articles in the main body of the Proposal (Article 7 and Article 37 of the Proposal).

¹ Proposal for a Regulation of the European Parliament and of the Council of 30 November 2017 Towards a single EU VAT area - Time to act, Amended Proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in the field of value added tax, COM(2017)0706 final, SWD(2017) 428 final

² https://ec.europa.eu/commission/state-union-2017_en

³ http://europa.eu/rapid/press-release_STATEMENT-18-1405_en.htm

⁴ https://ec.europa.eu/transport/modes/road/news/2017-05-31-europe-on-the-move_en

⁵ http://europa.eu/rapid/press-release_IP-16-4301_en.htm

2.2. Division of tasks and responsibilities and identification of the controller

For purposes of compliance with EU data protection rules, it is essential to answer two questions: who is the “controller” of personal data (i.e. decides on the purposes and means of the processing) and who merely processes personal data on behalf of a “controller”?

The primary reason why the clear and unambiguous identification of the controller is so crucial is that it determines who shall be responsible for compliance with data protection rules.

On 16 February 2010, the Article 29 Working Party (WP) adopted an opinion (Opinion 1/2010)⁶ that states: *"if it is not sufficiently clear what is required from whom - e.g. no one is responsible or a multitude of possible controllers - there is an obvious risk that too little, if anything, will happen and that the legal provisions will remain ineffective"*.

Clarity is especially needed in situations where multiple actors are involved in a cooperative relationship. This is often the case with EU information systems used for public purposes where the purpose of processing is defined in EU law.

Furthermore, the Article 29 Working Party in the above mentioned Opinion has provided guidance on the notions of controller, joint controllers and processor. Accordingly, the concept of controller is an autonomous notion of EU data protection law and functional, in the sense that it is intended to allocate responsibilities on the basis of the factual influence rather than on a basis of a formal analysis⁷.

2.2.1. Division of tasks and responsibilities between the Commission and the European Coordination Office

We regret that the Proposal does not state clearly what are the tasks and responsibilities of the European Labour Authority and other parties involved in the data processing in the context of the EURES portal.

Article 7(1)(b) states that *“Authority shall:... (b) enable the cross-border matching of job, traineeship, and apprenticeship vacancies with CVs and applications for the benefit of individuals and employers, particularly via EURES;”*

Furthermore, according to Article 7(2) of the Proposal *“The Authority shall manage the EURES European Coordination Office and ensure that it fulfils its responsibilities in accordance with Article 8 of Regulation (EU) 2016/589, except for the technical operation and development of the EURES portal and related IT services, which shall continue to be managed by the Commission. The Authority, (...), shall ensure that this activity fully complies with requirements of the applicable data protection legislation, including the requirement to appoint a Data Protection Officer...”*.

⁶ Article 29 Working Party Opinion 1/2010 on the concepts of “controller” and “processor” adopted on 16 February 2010, WP 169

⁷ Article 29 Working Party Opinion 1/2010 on the concepts of “controller” and “processor” adopted on 16 February 2010, WP 169, page 8 and 32

At present, the European Commission acts as European Coordination Office, which operates the EURES portal and related IT services.

Article 7(2) of the Proposal introduces a new division of the roles and responsibilities and states that the European Labour Authority will now manage the EURES European Coordination Office and the European Commission will continue to manage the technical operation and development of the EURES portal and related IT services

In this context, it cannot be ruled out that the Commission will contribute to the determination of the purposes and especially of the means of processing of personal data via the EURES portal. Thus, it seems that the wording of the 7(2) of the Proposal refers to the concept of “*joint controller*”⁸.

On the other hand, Article 49 (5) of the Proposal (Amendments of Regulation (EU) 2016/589) describes the European Coordination Office as “*the system owner of the EURES portal, and related IT services*”. Taking into account that the European Labour Authority will now manage the European Coordination Office it seems that according to Article 49 of the Proposal, European Labour Authority will be the sole “*controller*” as regards the EURES portal and related IT services.

EDPS would like to emphasise that in any situation where personal data are processed, it is crucial to identify who the controller is. Therefore, a clear allocation of responsibility between the European Coordination Office, which is going to be managed by the European Labour Authority and the European Commission is necessary.

EDPS considers that the Article 7(2) and Article 49 of the Proposal are contradictory and should be amended in order to reflect the clear division of tasks and responsibilities of each party involved in the data processing in the context of the EURES portal (i.e. the European Labour Authority, the European Coordination Office, and the Commission). In this context it is worth to mention that the Proposal for a Regulation⁹ that will replace Regulation 45/2001 (currently in the final stages of the legislative process) defines in Article 3(2)(b) the notion of the controller and in Article 28 clarifies the responsibilities of joint controllers. Where thus two or more entities “*jointly determine the purposes and means of processing*” they are considered joint controllers. It appears that the concept of “*joint controllers*” could apply as regards the division of tasks and responsibilities between the Commission and the European Coordination Office in the Proposal.

⁸ Article 26 of the GDPR includes a clear definition of the concept of joint controller. Furthermore, this concept will also exist in the forthcoming new Regulation replacing 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. 1–22.

⁹ Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals 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

2.2.2. Lack of amendments of the implementing acts

EDPS would like to make a remark regarding the Implementing Decision¹⁰ that still reflects the current legal framework, where the European Coordination Office is established in the Commission and managed by the Commission.

According to Article 3(6) of the Implementing Decision states that *“The European Coordination Office, shall be the ‘controller’ within the meaning of Regulation (EC) No 45/2001 in relation to personal data stored on the EURES portal “.*

We note that the abovementioned Implementing Decision will not be amended by the Proposal for a Regulation (most likely for formal reasons). We consider that a revision of the Implementing Decision will be necessary in the future in order to reflect the new legal framework, which will be established by the Proposal.

2.3. Cooperation and exchange of information between Member States

Article 8(1) of the Proposal states that: *“The Authority shall facilitate cooperation between Member States and support their effective compliance with cooperation obligations, including on information exchange, as defined in Union law within the scope of the Authority’s competences....”*

Regarding the exchange of information between Member States and assuming that personal data will be processed in this context, **we would suggest that the Proposal should indicate a clear definition of the tasks and responsibilities of the different authorities involved.**

3. Conclusion

EDPS welcomes the opportunity to consult the Proposal and is available to provide further input on all aspects related to data protection in this field.

Brussels,

Giovanni BUTTARELLI

¹⁰ Commission Implementing Decision (EU) 2017/1256 of 11 July 2017 on templates and procedures for the exchange of information on the EURES network national work programs at Union level, C/2017/4676