



Formal comments of the EDPS on the Proposal for a Directive of the European Parliament and of the Council on facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences.

1. Introduction

On 17 April 2018, the Commission tabled a proposal for a Directive on facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences (“the Proposal”).

The Proposal aims to facilitate the access and use of financial information for designated competent authorities in order to prevent and combat serious crime more effectively. In particular, it seeks to provide the competent authorities with direct access to information contained in the centralised bank account registries or data retrieval systems as established by the 4th Anti Money Laundering Directive¹. In the same vein, the Proposal aims to facilitate the cooperation between Financial Information Units (FIUs) in order to enable them to prevent and combat money laundering, the associated predicate offences and terrorist financing.

One of the EDPS` tasks is to advise the Commission services in the drafting of new legislative proposals with data protection implications. The EDPS welcomes to have been already informally consulted by the Commission on the draft Proposal and that many of his comments have been taken into account.

The EDPS has limited the comments below to the provisions of the Proposal that are particularly relevant from a data protection perspective.

2. General comments

Preliminary Remarks

The EDPS takes note that the Regulatory Scrutiny Board has released two opinions² concerning the Proposal. In its second opinion, the Board has expressed its remaining concerns about the scope of the initiative, especially with regard to expanded cross border cooperation and the justification to operate without a judicial authorisation.

In particular, the Board expressed concerns about the potential risks associated with extending the exchange of information to the broader scope of serious crimes, and that expected impacts on fundamental rights such as the right to data protection, the respect of private life, the right to defence, and the right to effective remedy and fair trial have not been comprehensively examined.

¹ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance), OJ L 141, 5.6.2015, p. 73.

² <http://ec.europa.eu/transparency/regdoc/rep/2/2018/EN/SEC-2018-197-F1-EN-MAIN-PART-1.PDF>

The EDPS welcomes the fact that the Proposal has taken into account some of his comments, notably better references in the text to the goals pursued by the initiative, to the necessity principle, as well as the case-by-case basis principle. He also welcomes that Article 16 of the Proposal provides now that Member States have to implement a detailed programme for monitoring the outputs, results and impacts of the current Proposal.

3. Specific comments

On Chapter I of the Proposal

Scope of the Proposal

As mentioned in Article 1(1), the Proposal pursues two main objectives: to facilitate access by competent authorities to financial information and bank account information for the prevention, detection, investigation or prosecution of serious criminal offences, and moreover to facilitate access by FIUs to law enforcement information as well as to facilitate the cooperation between FIUs.

As regards the second objective, however, this Article would gain more clarity by stating clearly the exact purpose for which FIUs are allowed to request law enforcement information held by designated competent authorities. This could be worded as follows *“where such information is necessary, on a case-by-case basis, for the prevention and combating of money laundering, associate predicate offences and terrorist financing.”*

The EPDS welcomes that the Proposal pays specific attention to data protection and underlines its importance in various recitals. In particular, Recital 24 of the Proposal stresses that *“[i]t is essential to ensure that processing of personal data under this Directive fully respects the tight to protection of personal data”* and moreover, that *“[a]ny such processing is subject to Directive (EU) 2016/680³ [...] and Regulation (EU) 2016/679⁴ [...], in their respective scope of application”*.

However, the EDPS is of the opinion that the applicability of EU data protection law should be made more explicit in the Proposal.

He therefore recommends to insert in Article 1 of the Proposal the contents of Recital 24 and 25, so as to clearly state - with reinforced legal certainty - that:

- any personal data processing under the Proposal is subject to Directive (EU) 2016/680 and to Regulation (EU) 2016/679 in their respective scope of application, and that
- any personal data obtained under the Proposal should only be processed by designated competent authorities and FIUs where it is necessary and proportionate for the purposes pursued by the Proposal.

³ Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89.

⁴ 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 (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1.

Furthermore, the EDPS recommends to insert in Article 1 of the Proposal the content of Recital 9, which states that "*administrative investigations should not be covered under the present Directive*", as this would contribute to a clear definition of the Proposal's scope.

Definitions

The EDPS notes that although "*designated competent authorities*" are key in the Proposal, there is no definition of such authorities in the current text. As the EDPS is of the opinion that drawing precise legislation is in the interest of data subjects, in particular with regard to the conditions under which their personal data shall be collected and processed, he recommends to keep the definition of the former version of the Proposal, which referred to Article 3(7)a of Directive (EU) 2016/680.

He also notes that "*Tax authorities*", and "*Anti-corruption agencies*" are only mentioned in Recital 9 but are not further defined nor further mentioned in the text of the Proposal. Under this Recital, such authorities can be designated for the purposes of this Directive to the extent that they are competent for the prevention, detection, investigation or prosecution of criminal offences under national law.

However, as the Proposal aims to cover "*serious criminal offences*" as defined in Annex I to Regulation (EU) 2016/794 of the European Parliament and of the Council and as taxation crimes are not included in Annex I, it is not clear for the EDPS, when "*Tax authorities*" could be designated as competent authorities under the Proposal. Consequently, and taking into account their lack of definition in the Proposal, the EDPS would advise to delete any reference to "*Tax authorities*" from the Proposal, unless further explanations are provided.

As regards "*Anti-corruption agencies*" mentioned in the same Recital, it is necessary that such authorities be defined in the text of the Proposal, in a similar way as "*Asset recovery offices*" are defined under Article 2(b).

On Chapter II of the Proposal

Access logs monitoring and records of information requests

The EDPS welcomes the fact that the Proposal contains detailed provisions related to monitoring of access logs (Article 6) as well as to records of information requests (Article 14).

Access logs monitoring is a tool aimed at helping detecting data protection or security breaches, such as undue or unusual access or, more generally, any misuse of the system. The EDPS would like to recall that such tool can only be efficient if relevant automated or semi-automated alerts are designed, and that such alerts are investigated in due time.

For this reason, the EDPS would like to make the following recommendations:

- All types of access should be monitored:

The traceability of access logs should apply not only to designated competent authorities and their staff, but also to Member States entities and their staff in charge of running the national bank accounts registers. More generally, logs of all access by any user or administrator having access to the information contained in the bank account registers should be kept;

- The principle of data minimisation should be applied:

For reasons linked to efficiency of the functioning of the access logs monitoring tools, but also for data protection reasons, it would be preferable not to include the results of the query or search within the logs database. Indeed, such inclusion of results in the logs might lead to the recording of a considerably big volume of data. Therefore, in accordance with the data minimisation principle, we would recommend to modify the wording of Article 6(d) of the Proposal as to deleted the reference to “*results of the query or search*” and replace it by “*the unique identifiers of the results*”.

Data protection training programmes

In order to highlight the need for employees dealing with personal information on money laundering to respect data protection principles and confidentiality, the EPDS would like to suggest to require Member States to ensure that centralised bank account registers take appropriate measures so that employees are aware of the provisions in force, including the relevant data protection requirements. Such measures should include special training programmes.

Member States should also ensure that staff of the national designated competent authorities maintains high professional standards of confidentiality and data protection.

On Chapter III of the Proposal

The EDPS notes that pursuant to Article 7(2) of the Proposal the competent authorities of the Member States may process the received financial information or financial analysis from the FIUs for the specific purposes of preventing, detecting, investigating or prosecuting serious criminal offences “*other than the purposes for which personal data are collected in accordance with Article 4(2) of Directive (EU) 2016/680*”. Even though Article 4(2) of Directive (EU) 2016/680 does apply to Article 7 of the Proposal, the EDPS recommends to delete the indicated clause for the sake of clarity.

Furthermore, the EDPS observes that while Recital 27 of the Proposal provides that the transfer of financial data to third countries and international partners should only be allowed under the conditions laid down in this Directive and under the conditions of Chapter V of Directive (EU) 2016/680 and Chapter V of Regulation (EU) 2016/679, the Proposal contains no relevant provision in this respect.

On Chapter V of the Proposal

Processing of sensitive data

In a previously released Opinion⁵, the EDPS underlined that the collection and processing of sensitive personal data does not seem necessary for the purpose of anti-money laundering (even though, however, sensitive data such as data related to criminal offences might be processed during the Customer Due Diligence procedure). He also stressed the risk that the processing of sensitive data might lead to discrimination.

⁵ See Opinion of the European Data Protection Supervisor of 4 July 2013 on a proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, and a proposal for a Regulation of the European Parliament and of the Council on information on the payer accompanying transfers of funds.

https://edps.europa.eu/sites/edp/files/publication/13-07-04_money_laundering_en.pdf

The EDPS welcomes that Article 13(2) of the Proposal provides that access and processing of such data can only be carried out under the instruction of the data protection officer.

However, he would advise to complete the wording of Article 13(1) by adding to this sentence the following words “*and subject to appropriate safeguards for the rights and freedoms of the data subject*”, as to ensure consistency with the safeguards provided by Article 10 of Directive (EU) 2016/680.

Restrictions to data subjects rights

The EDPS observes that the proposal contains no provisions ensuring the rights of data subjects to be informed about access to their personal data contained in centralised bank account registers taking place under Chapter II of the Proposal, nor about exchanges of their personal data occurring under Chapters III and IV.

Moreover, the EDPS notes that Article 15 of the Proposal provides that “*Member States shall adopt legislative measures restricting, in whole or in part, the data subject’s rights of access*” in order to enable the FIUs and the competent authorities to fulfil their tasks properly or to avoid the obstruction of an ongoing investigation.

The EDPS understands that in the context of the Proposal, it may under certain circumstances be justified to restrict the data subject’s rights, given that this is necessary and proportionate. However, taking into account the sensitivity of the processed data, these rights should not be completely denied.

The EDPS recalls that the right of access, which is set out in Article 8(2) of the Charter, is an essential component of the right to the protection of personal data. In particular, since the right of access enables a data subject to exercise other rights provided for by data protection legislation, such as the right to rectification, erasure, restriction and objection. Therefore, any derogation from this essential data subject right must be subject to a particularly high level of scrutiny.⁶

In addition, as stated in the abovementioned opinion on the Anti-Money-Laundering Directive Proposal, the potentially highly intrusive nature of anti-money laundering obligations, requires data subjects to be informed about such measures, whereas the modalities of possible restrictions to data subjects' rights should be clearly elaborated in the Proposal.

In this respect, the EDPS wants to draw attention to Article 23 of Regulation (EU) 2016/679 and Articles 13 and 15 of Directive (EU) 2016/680, which lay down the specific conditions under which the right to be informed and the right of access may be restricted. In any case, a restriction of these rights has to be laid down by law, respect the essence of the fundamental rights and freedoms, and moreover, must constitute a necessary and proportionate measure in a democratic society. Article 15 of Directive (EU) 2016/680 explicitly stresses that the right of access can only be restricted to the extent that, and for as long as such a partial or complete restriction constitutes a necessary and proportionate measure in a democratic society with due regard for the fundamental rights and legitimate interests of the natural person concerned.

⁶ Cf. Opinion EDPS Opinion on safeguards and derogations under Article 89 GDPR in the context of a proposal for a Regulation on integrated farm statistics, https://edps.europa.eu/sites/edp/files/publication/17-11-20_opinion_farm_statistics_en.pdf

For these reasons, the EDPS strongly recommends to redraft Article 15 of the Proposal and align in with Article 23 of Regulation (EU) 2016/679 and Article 15 of Directive (EU) 2016/680.

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