



## **Opinion of the European Data Protection Supervisor**

### **on the Commission proposal for a Regulation amending Council Regulation (EC) No 1346/2000 on insolvency proceedings**

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Articles 7 and 8 thereof,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>1</sup>,

Having regard to 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<sup>2</sup>, and in particular Article 28(2) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

## **1. INTRODUCTION**

### **1.1. Consultation of the EDPS**

1. On 12 December 2012, the Commission adopted a proposal for a Regulation amending Council Regulation (EC) No 1346/2000 on insolvency proceedings ('the proposed Regulation')<sup>3</sup>. This Proposal was sent to the EDPS for consultation on 13 December 2012.
2. The EDPS welcomes the fact that he is consulted by the Commission and that a reference to this Opinion is included in the preambles of the proposed legal instrument.
3. Before the adoption of the proposed Regulation, the EDPS was given the opportunity to provide informal comments to the Commission.
4. The EDPS regrets that only a few of his comments have been taken into account in the proposed Regulation. Even though an article is now dedicated to data protection, safeguards have not been strengthened accordingly.

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<sup>1</sup> OJ L 281, 23.11.1995, p. 31.

<sup>2</sup> OJ L 8, 12.1.2001, p. 1.

<sup>3</sup> COM (2012) 744 final.

## **1.2. Objectives and scope of the proposed Regulation**

5. The proposed Regulation amends the Insolvency Regulation in order to cope with weaknesses revealed in its practical application<sup>4</sup>. It *inter alia* addresses issues relating to the scope of the Regulation, the determination of the Member State competent to open the proceedings, the opening of secondary proceedings and the rules on publicity of decisions opening and closing insolvency proceedings.
6. Amongst the measures proposed that will impact data protection, the Proposal provides for a mandatory publication of the decisions opening or closing a proceeding and encourages and organises cross-boarder exchanges of information between stakeholders.
7. Information thus published and/or exchanged may identify (either directly or indirectly) debtors, creditors, and liquidators involved in the proceeding. Therefore, EU data protection legislation applies. In particular, Directive 95/46/EC will apply to the processing of data by stakeholders in Member States and by national competent authorities, while Regulation (EC) 45/2001 will apply to the processing of data by the Commission through the e-Justice Portal.

## **1.3. Aim of the EDPS Opinion**

8. The proposed Regulation may affect the rights of individuals related to the processing of their personal data as, amongst other issues, it deals with the publication of personal data in a register accessible to the public on the Internet, free of charge, with the interconnection of existing national registers and with cross border exchange of information between stakeholders.
9. Although the EDPS welcomes the effort made by the Commission to guarantee the correct application of EU rules concerning the protection of personal data in the proposed Regulation, he has identified some shortcomings and inconsistencies in the way the proposed Regulation deals with issues related to/concerning personal data.

## **2. ANALYSIS OF THE PROPOSAL**

### **2.1. General reference to data protection legislation**

10. Both substantive provisions<sup>5</sup> and proposed Recitals<sup>6</sup> of the Regulation refer to the applicable data protection legislation, namely Directive 95/46/EC and Regulation (EC) No 45/2001. Also, a reference is made to Article 8 of the Charter of Fundamental Rights, thus emphasising the relevance of the protection of personal data in the context of the Proposal.
11. Considering that insolvency proceedings described in the Proposal necessarily involve processing of personal data (collection, storage, cross-border exchange of

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<sup>4</sup> Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) N°1346/2000 on insolvency proceedings (hereinafter: "the Proposal").

<sup>5</sup> Article 46a.

<sup>6</sup> Recitals 31b and 31c.

information including personal data between stakeholders, publication of data relating to proceedings), these references to data protection law are welcomed.

12. Moreover, the EDPS welcomes that Article 46a is dedicated to data protection and that a sensible distinction is made between the data processed at the Member States level for which the Directive 95/46/EC shall apply and the ones processed at the EU level by the Commission, to which Regulation (EC) No 45/2001 shall apply.
13. However, the EDPS recommends once again a necessary clarification of the reference to Directive 95/46/EC by specifying that the provisions will apply in accordance with the national rules which implement it. Besides, the EDPS wishes to remind that in various Member States national provisions implementing Directive 95/46/EC do not apply to processing operations in the framework of criminal proceedings eventually related to the insolvency proceedings referred to in the proposed Regulation, pursuant to Article 3 (2) of Directive 95/46/EC<sup>7</sup>. The reference to Directive 95/46/EC in Article 46a therefore shall be read as "subject to national legislation implementing Directive 95/46" and "provided that processing operations referred to in Article 3 (2) of Directive 95/46 are not concerned". Moreover, the processing of personal data by civil courts and individuals eventually acting on their behalf (i.e. liquidators) may require specific attention as well, due to the fragmented transposition of Directive 95/46 to the judicial activities of civil courts.
14. Furthermore, although the intent of these aforementioned references is welcome, the EDPS regrets that they are not further developed. Considering the extent to which the proposed Regulation interferes with debtors' right to protection of private life, general references to the applicable data protection legislation are indeed necessary but not sufficient to effectively guarantee the right to protection of personal data during insolvency proceedings.
15. Therefore, the general references need to be specified and translated into concrete safeguards that will apply for any situation in which personal data processing is envisaged. Such safeguards should be developed in the proposed Regulation. For instance, the retention period of the data processed and sometimes published for insolvency proceedings should be specified. Besides, it is not sufficiently clear who is responsible for the data published and, as a result, who should update the data and ensure it is secured enough. In other words, data controllers should be designated. In addition, substantive provisions are needed to further develop in a concrete manner the modalities according to which the existing rights of the data subject about whom data is collected and processed may be exercised against the various actors in such a specific area. Finally, to ensure harmonisation throughout the EU, the responsibility to set up those data protection safeguards should be

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<sup>7</sup> Article 3 (2) of Directive 95/46/EC states that : *"This directive shall not apply to the processing of personal data in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law [...]."*

taken on by the European legislator. Advice on how to formulate these safeguards will be developed below.

## **2.2. Public register of court decisions regarding insolvency proceedings accessible on the Internet free of charge**

16. One of the main objectives of the proposed Regulation is to improve the publicity given to courts decisions regarding insolvency proceedings.
17. The proposed Regulation deals *inter alia* with the issue of mandatory publication of court decisions regarding insolvency proceedings in public registers accessible on the Internet, free of charge.
18. Recital 6 of the Proposal considers the mandatory publication of relevant decisions in cross-borders insolvency cases in a publicly accessible electronic register necessary to improve the information of creditors and courts involved. It specifies that the Regulation should provide for the interconnection of insolvency registers by way of implementing act.
19. The new recitals 29 and 29a explain the aim of this publication, namely improving the information of creditors and courts involved and preventing the opening of parallel insolvency proceedings, assert the necessity of a mandatory publication and of the interconnection of insolvency registers.
20. Article 20a provides for the establishment of insolvency registers and lists data that should be subject to publication. The EDPS welcomes this article that leaves no margin of manoeuvre to Member States as to which data should or should not be published.
21. The EDPS acknowledges that the aims pursued by the Commission in the proposed Regulation are legitimate. He understands the importance of transparency regarding the opening and the closing of insolvency proceedings and the need for creditors and courts involved to be well informed and to avoid the parallel opening of insolvency proceedings.
22. Nevertheless, the systematic and mandatory publication of data has to comply with the principles of necessity and proportionality, also taking into account its potentially intrusive nature. In other words, measures proposed have to be limited to what is appropriate to achieve the objective pursued and should not go beyond what is necessary to achieve it.
23. The EDPS therefore welcomes that categories of data to be collected and published are specified and limited to what is strictly necessary and that the publication obligation will not apply to an individual not exercising an independent business or professional activity.
24. However, there is still no sufficient evidence that this publication on a register accessible to the public on the Internet and free of charge, as it is currently formulated, meets the requirements of data protection as clarified by the Court of Justice in the *Schecke* ruling, in which the Court of Justice underlined that the

institutions should explore different methods of publication to find the one which would be consistent with the objective of publication, while causing the least interference with the beneficiaries' rights to private life and to protection of personal data.<sup>8</sup> The EDPS takes the view that the necessity and proportionality of this particular measure are not sufficiently established and that, in any event, adequate safeguards should be provided.<sup>9</sup>

*Necessity and proportionality of the publication*

25. It should be borne in mind that for assessing the compliance with data protection requirements of a provision requiring public disclosure of personal information, it is of crucial importance to have a clear and well-defined purpose which the envisaged publication intends to serve. Only with a clear and well-defined purpose can it be assessed whether the publication of personal data involved is actually necessary and proportionate.<sup>10</sup>
26. After examining the proposal, the Explanatory memorandum and particularly the impact assessment, the EDPS takes the view that the proportionality of this measure is not clearly established. It is not explained how a publication on the Internet in a register easily accessible to the public will better serve the desired objective of transparency amongst stakeholders than any of other conceivable alternatives, such as: (i) a public register not accessible on the Internet (see also point 31 on external/internal search engines), or (ii) a public register only accessible to professionals. More balanced solutions would allow being more selective about the number of people having direct and justified access to the information and, therefore, would lower the risks linked to Internet publication. In that perspective, a reflection is also recommended on the proposed free of charge approach on access, since -for instance- a public register that would display a selection of information for free, but with a minimum fee charged for access to complete data may contribute to the recommended application of the principle of the need-to-know.
27. The impact assessment does not indicate whether less intrusive methods than an Internet publication might have led to the same results in terms of information while at the same time causing less interference with the privacy rights of the individuals concerned.
28. Today, not all Member States give access to insolvency registers on the Internet. Some favour less intrusive methods of publication. They publish the information "*in an electronic register or database, e.g a company register or an electronic version of the official bulletin*"<sup>11</sup>.

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<sup>8</sup> Joined Cases C-92/09 and C-93/09, *Schecke*, paras 56-64.

<sup>9</sup> See in this regard also EDPS Opinion of 9 October 2012 on the Amendment to the Commission proposal on the financing, management and monitoring of the common agricultural policy, available at <http://www.edps.europa.eu/EDPSWEB/edps/Consultation/Opinions>.

<sup>10</sup> See in this regard also EDPS Opinion of 15 April 2011 on the Financial rules applicable to the annual budget of the Union, OJ C 215, 21.7.2011, p. 13-18.

<sup>11</sup> See impact assessment page 29, first paragraph.

29. In the EDPS' view, this option is more proportionate and therefore preferred compared to a publication on the Internet. Moreover, it complies with the case law of the Court of Justice of the European Union.
30. The EDPS wishes on that to highlight once again the *Schecke* ruling<sup>12</sup>.
31. Moreover, the publication on Internet raises two specific issues: 1) how to ensure that the information is kept online for no longer than is necessary and that the data cannot be manipulated or altered; 2) the use of external search engines entails the risk that the information could be taken out of context and channelled through and outside the web in ways which cannot be easily controlled.
32. Therefore, the EDPS recommends that the proportionality of the proposed system be carefully assessed and that it is verified whether the publication on the Internet is actually necessary to achieve the public interest objective pursued or whether there are less intrusive measures to attain the same objective.

*The need for adequate safeguards*

33. The EDPS recommends introducing more detailed provisions on the modalities of establishment and management of the national registers in the proposed Regulation. Such provisions must comply with the requirements of Directive 95/46/EC.
34. The impact assessment states that the inclusion of data on natural persons and other debtors who are subject to insolvency proceedings within public electronic registers constitutes a data processing activity and affects the right to the protection of personal data. It draws the conclusion that "*for this impact to be considered necessary and proportionate with respect to the objectives of the policy, specific provisions will need to be introduced in the amending Regulation to justify the necessity and purpose of each category of data to be published by Member States. Further the right to access to data subjects encompassing the right to rectification and erasure will need to be highlighted. Finally, access to data in the register of another Member State, especially data on natural persons subject to insolvency proceedings, must be for legitimate reasons. The usage and processing of this data shall be regulated*".
35. The EDPS welcomes such a call for inserting requirements on data protection in the Regulation. However, he notes that none of these requirements have been taken into account when drafting the proposed Regulation.
36. Therefore, the EDPS would recommend supplementing the Regulation with the following elements.
37. Article 20 (a) of the Proposal provides the obligation for Member States to establish insolvency registers at the national level. Those registers, made available to the public on the internet free of charge will, *inter alia*, list the name and

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<sup>12</sup> Judgment in Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen.

address of the debtor and the name and address of the liquidator appointed in the proceedings, if any. Personal data will therefore be collected/processed in these registers. For this reason, the provision should include the following data protections safeguards: it must (i) identify the purpose of the processing operations and establish which are the compatible uses; (ii) identify which entities (judges and authorities responsible for the opening and the closing of insolvency procedures, competent authorities and potentially others) will have access to which data stored in the database and will have the possibility to modify the data; (iii) ensure the right of access and appropriate information for all the data subjects whose personal data may be stored and exchanged (iv) define and limit the retention period for the personal data to the minimum necessary for the performance of such purpose. These are essential elements that should be included in the Regulation itself. If needed, specific points could be further elaborated at least in delegated or in implementing acts.

38. The proposal should also ensure that the rights of the data subjects are respected in a proactive manner. It should be ensured that the persons have sufficient information about the publication of their data before the publication is made and that the security of their data is guaranteed. The EDPS therefore recommends that the circumstances and the conditions for making effective data subjects access rights to information processed about them are clearly defined in a substantive provision. Currently, the proposed Regulation does not indicate the particular procedure to be followed by Member States to concretely grant data subjects with information on their rights in the context of insolvency proceedings. Nor does it provide for important procedural guarantees or safeguards against the unlimited retention of information published, the absence of update of data once published or for requirements to prevent any security breach.
39. Furthermore, the EDPS recommends the introduction in the Proposal of a provision specifying:
  - the obligation to provide timely information about the publication and processing of personal data to the natural persons representing the legal persons in debt (debtors);
  - the obligation to timely inform data subjects before the publication of the decision opening or closing the proceedings;
40. The management rights in relation to the processing operations are not explicitly clarified either. In this respect, the EDPS finds it necessary to suggest that a new provision is included in the proposed Regulation requiring Member States to specify the allocation of responsibilities of authorities dealing with the proceedings. Namely, authorities responsible for the publication shall be made responsible for ensuring that personal data of the persons concerned are kept online only for a reasonable period of time, after which they are systematically deleted. They should also guarantee that these data are updated on a regular basis. Moreover, Member States should be required to ensure that adequate security measures and safeguards are put in place when setting up the registers, especially to protect against the risks related to the use of external search engines. These measures and safeguards may consist for instance in the exclusion of the data indexation by means of external search engines.

### 2.3. Interconnection of national public registers

41. Article 20b provides for the interconnection of insolvency registers and leaves it to the Commission to establish a decentralised system for the interconnection of insolvency registers by means of implementing acts. It is specified that the system shall be composed of the insolvency registers and the European e-Justice Portal. The technical measures ensuring the minimum information technology security standards for communication and distribution of information within the system of interconnection of insolvency registers shall be detailed by the Commission by way of implementing acts.
42. The EDPS welcomes that interconnection of insolvency registers is addressed in a substantive provision of the proposed Regulation. He however notes that this interconnection will involve processing of personal data at EU level and therefore requires for more details regarding the functioning of the e-Justice portal in this context.
43. Besides, since the interconnection of registers and the use of e-mails will facilitate interaction between stakeholders to the proceedings they will, as a result, necessarily imply exchange of personal data. As a consequence, it is important that at least the principles of necessity (need-to-know) and proportionality are clearly established in the Regulation and complied with by any future implementing measure. In addition, the EDPS recalls that the Commission is due to issue a legislative proposal for the e-Justice portal later this year which should *inter alia* provide a clear legal basis and specific data protection safeguards for the processing operations which will be facilitated by the portal.
44. The EDPS also insists on the crucial need for clarifying the modalities of establishment and management of this decentralised system (Article 20b) by introducing more detailed provisions in the proposed Regulation. Those provisions should provide for specifications regarding the concrete functioning of the e-Justice portal, for which currently no legal basis exists. They should also help in designating the controller of the personal data thus processed. Such provisions must comply with the requirements of Regulation (EC) No 45/2001.
45. Besides, considering that personal data of all the stakeholders will be processed throughout the system, it would have been useful to detail in the Proposal (possibly, in an annex) the expected minimum security requirements. From the way the Proposal is drafted, it is not clear whether data will be stored in the e-Justice portal after the user has carried out a search. More specifically, will the results of the search and the logs be stored in the decentralised system? This should be clarified. Security and data protection requirements will partly depend on the answer to this issue. Some data protection safeguards should be implemented in any case, including those provided for in Art. 22 of Regulation 45/2001: secure logging of access to personal data, in a way that logs can be subsequently checked; security of communications, data protection requirements in setting up the system management organisation.
46. In the hypothesis of a central storage, complementary safeguards should be implemented such as an access policy preventing unauthorised access and



accidental or deliberate disclosure or modification. The retention period of the data stored in the portal should also be defined and managed. It should also be explained how update and deletion of information is organised.

47. Finally, the EDPS notes that the explanatory memorandum of the Proposal, in the "Budgetary implications" section, reports that the *"The IT application for the interconnection of the insolvency registers has already been developed and will be hosted on the e-Justice Portal"*. The EDPS recommends that all functional, technical and security specifications, including data protection safeguards, as directly specified in the Proposal or in implementing acts be taken into account and that by no means the existence of an IT application already developed could justify possible inconsistencies with the requirements.

#### **2.4. Exchange of information between stakeholders: the question of data protection should be addressed**

48. The Proposal encourages cooperation and communication between liquidators (article 31), between courts (Article 31 a), between liquidators and courts (Article 31b) in the context of main and secondary proceedings, and cooperation and communication of information between liquidators (Article 42a), between courts (42b), and between liquidators and courts (42c) in the context of insolvency of members of a group of companies. These forms of cooperation necessarily involve exchanges of information and therefore of relevant personal data of debtors and creditors.
49. In the EDPS' view, Directive 95/46/EC applies to such exchanges of information in so far they do not concern criminal matters excluded from its scope by virtue of Article 3(2) of that Directive<sup>13</sup>. The EDPS recommends that the rights of the data subject to be informed of such cooperation and of the processing of his personal data by a liquidator located in a different Member State are better specified. The data subject should be given concrete modalities to contact this person with a view to effectively exercise his or her rights. This issue should be addressed in a specific provision relating to data protection whenever information is exchanged between stakeholders. The EDPS also recommends that the retention period, the update of data, and the way to ensure security of data processed are specified (as explained below).

#### **2.5 Data protection requirements common to exchange and publication of personal data**

50. Several provisions of the Proposal imply that more personal data will be processed than under the current Regulation. Considering that the scope of the Regulation is being enlarged and will include more data relating to natural persons, including representatives of legal persons, the EDPS recommends that a specific provision of the Regulation is dedicated to the information of the data subjects regarding their rights as far as their data is processed.

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<sup>13</sup> See also paragraph 13 and footnote 7 above.

51. In addition, the EDPS recommends that the Regulation requires that information shall be provided in writing in an intelligible form, using clear and plain language, adapted to the data subject. Translations of this information should also be available in the language spoken by the data subject<sup>14</sup>.
52. Under data protection law data should only be kept for the time necessary to achieve the purposes for which they were collected.<sup>15</sup> The EDPS therefore proposes adding a specific provision which would state that personal data should be kept in the register or by the stakeholders only for the time necessary to achieve the purposes for which they were collected and to ensure that data subjects are able to access their personal data in order to exercise their rights, and that they should be automatically deleted after a period following the closure of the proceeding. This period of time should be justified and motivated. This justification should be included in the Recitals. This retention period should also apply to personal data kept in national registers and files, except if specific provisions of national law provide for a different maximum retention period.
53. The EDPS recommends specifying who will be responsible for the update of data for instance when an enterprise is rescued and the insolvency proceedings are accordingly closed or when proceedings are opened in two embers states and personal data is exchanged accordingly.

### 3. CONCLUSIONS

54. The EDPS welcomes the attention paid specifically to data protection in the proposed Regulation, but identified some scope for further improvement.
55. The EDPS recommends that:
- references to this Opinion are included in the preambles of all proposals;
  - Article 46 (a) of the proposed Regulation clarifies the reference to Directive 95/46/EC by specifying that the provisions will apply in accordance with the national rules which implement Directive 95/46/EC;
  - concrete and effective data protection safeguards are put in place for any situation in which personal data processing is envisaged;
  - the necessity and the proportionality of the proposed system for the Internet publication of decisions opening and closing insolvency proceedings is assessed and it is verified whether the publication obligation does not go beyond what is necessary to achieve the public interest objective pursued and whether there are not less restrictive measures to attain the same objective. Subject to the outcome of this proportionality test, the publication obligation should in any event be supported by adequate safeguards to ensure full respect of the rights of the persons concerned, the security/accuracy of the data and their deletion after an adequate period of time;

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<sup>14</sup> Similar to Article 14 and following of the proposed regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data issued by the Commission on 25 January 2012, COM/2012/09 final.

<sup>15</sup> See Article 6(d) of Directive 95/46/EC.

56. The EDPS furthermore recommends that:

- the modalities of the functioning of national databases and the EU database with regard to data protection issues are clarified by introducing more detailed provisions in the proposed Regulations, in compliance with Directive 95/46/EC and Regulation (EC) No 45/2001. In particular, the provision establishing the database(s) must (i) identify the purpose of the processing operations and establish which are the compatible uses; (ii) identify which entities (competent authorities, Commission) will have access to which data stored in the database and will have the possibility to modify the data; (iii) ensure the right of access and appropriate information for all the data subjects whose personal data may be stored and exchanged (iv) define and limit the retention period for the personal data to the minimum necessary for the performance of such purpose;
- at least core principles of the decentralised system for the interconnection of insolvency registers such as necessity and proportionality are established in the present Proposal (while further safeguards are expected to be provided in the forthcoming Commission's legislative proposal for the e-Justice portal.
- it is specified whether any data will be stored in the e-Justice portal. If this is the case, specific safeguards should be added.

Done in Brussels, 27 March 2013

**(signed)**

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor