

Formal comments of the EDPS on the proposal for a Council Regulation amending Council Regulation (EU) No 940/2010 on administrative cooperation and combating fraud in the field of VAT.

1. Introduction

On 30 November 2017, the European Commission tabled a Proposal for a Regulation of the European Parliament and of the Council entitled “*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*” (hereinafter “the Proposal”)¹.

The proposed measures follow up on the “cornerstones” for a new definitive single EU VAT area proposed in October 2017², and the VAT Action Plan towards a single EU VAT area presented in April 2016³. This Proposal also complements the VAT e-commerce package of December 2016⁴ envisaging deeper cooperation among Member States.

One of the EDPS` mission is to advise the Commission services in the drafting of new legislative proposals with data protection implications. The EDPS welcomes that he had already been consulted informally by the Commission on the draft Proposal and was given the opportunity to provide input on data protection aspects.

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

Unless otherwise specified, Articles mentioned in the EDPS formal comments refer to the Articles of Regulation No 904/2010, as amended by the Proposal.

2. Comments

2.1. Processing of personal data

2.1.1. Although the exchange and the processing of information, which is part of the administrative cooperation and the combating of VAT fraud, mainly involves information concerning legal persons, the EDPS notes that data relating to natural persons may also be involved, in which case data protection rules would become

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 http://europa.eu/rapid/press-release_IP-17-3443_en.htm

³ Communication from the Commission and the European Parliament, the Council and the European Economic and Social Committee of 7 April 2016 on an Action Plan for VAT - Towards a single EU VAT area - Time to decide, COM(2016)148 final

⁴ http://europa.eu/rapid/press-release_IP-16-4010_en.htm

applicable. Moreover, the Court of Justice of European Union in Joint Cases C-92/09 Volker und Markus Schecke Gbr v. Land Hessen, and C-93/09, Eifert v. Land Hessen and Bundesanstalt für Landwirtschaft und Ernährung ruled that the name of a legal person is to be considered personal data if the official title of the legal person identifies one or more natural person⁵.

- 2.1.2. We welcome that the Proposal includes (in Article 55(5) and Recital 19 of Regulation 904/2010 as amended by the Proposal) a reference to the purposes of the processing and replaces the reference to the Directive 95/46/EC by a reference to the General Data Protection Regulation (EU) 2016/679 (hereinafter “GDPR”).

Although the Commission will not be directly involved in data exchanges between the competent authorities, Article 55(2) provides that “Persons duly accredited by the Security Accreditation Authority of the Commission may have access to this information (i.e. communicated or collected pursuant to the amended Regulation) only in so far as it is necessary for care, maintenance and development of the electronic systems hosted by the Commission and used by the Member State to implement the Regulation”.

Consequently, the Commission will be processing personal data. The data protection rules applicable to EU institutions and bodies which are laid down in Regulation (EC) 45/2001 will thus be applicable, including supervision by the EDPS. For the sake of clarity and to prevent any doubt on the applicability of Regulation (EC) 45/2001, we recommend including a reference to it in the Proposal.

2.2. Restriction of data subjects rights and principles relating to processing of personal data

- 2.2.1. The EDPS notes that the Proposal appears to impose an obligation on Member States to introduce far-reaching restrictions on data subjects’ rights in national law. Indeed, Article 55(5) would include the following language: “[...] *Member States shall, for the purpose of the correct application of this Regulation, restrict the scope of the obligations and rights provided for in Articles 12 to 22 and Articles 5 and 34 of Regulation (EU) 2016/679 to the extent required in order to safeguard the interests referred to in Article 23(1)(e) of that Regulation.*” This would mean indiscriminate, general restrictions on most of - if not all - data subjects rights provided for under the GDPR (i.e. the right to information to be provided where personal data are collected from the data subject, the right to information to be provided where personal data have not been obtained from the data subject; right of access by the data subject, the right to rectification, erasure, restriction of processing, data portability, the right to object, right to automated individual decision-making, including profiling, right to be informed in case of personal data breach).

The EDPS wishes to recall that any restriction to the data subjects rights provided for in Articles 12 to 22 of the GDPR shall comply with the standard established under Article 23 of the GDPR. Pursuant to this Article, Union or Member State law to which the data controller or processor is subject may restrict by way of a

⁵ Judgment of the European Court of Justice of 9 November 2010 in Joint Cases C-92/09 Volker und Markus Schecke Gbr v. Land Hessen, and C-93/09, Eifert v. Land Hessen and Bundesanstalt für Landwirtschaft und Ernährung

legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 when such a restriction respects the essence of the fundamental rights and freedoms and is necessary and proportionate measure in a democratic society to safeguard one of the objective of public interests listed. In this particular case, a limitation to data subjects' rights may be justified by, amongst others, objectives of general interest (including investigation, detection and prosecution of criminal offences) or by an important economic or financial interest of a Member State or of the EU (including taxation matters).

The EDPS also points out that the rights of access and rectification are set out in Article 8(2) of the EU Charter of Fundamental Rights, and are generally considered as essential components of the right to the protection of personal data. Article 8(2) of the Charter specifically sets out that *“everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified”*. The right of access is of particular importance as it enables the data subjects to exercise the other rights provided for by data protection legislation⁶. Therefore, any derogation from these essential data subject rights must be subject to a particularly high level of scrutiny.

Any derogation to these rights must not go beyond what is strictly necessary to achieve its objective and must meet the high standards required by Article 52(1) of the Charter. This Article provides that *“any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”* (emphasis added).

- 2.2.2. As explained above, Union or Member States law may provide restrictions to these rights within the limits established under Article 23 of the GDPR. Article 23(2)(c) of the GDPR requires that such a legislative measure contain specific provisions regarding *“the scope of the restrictions introduced”*.

Consequently, **we recommend that the Proposal lays down, in a dedicated provision, the conditions (assessed on a case-by-case basis, in relation to the objective pursued) under which certain specific data subjects' rights may be restricted, as well as the necessary safeguards.**

To the extent mandatory derogations from specific data subjects' rights are considered justified and proportionate, **such derogations should be imposed directly in the Proposal, and not “delegated” to (or imposed on) Member States.** The Proposal would thus amount to an act of *“Union law”* as referred to in Article 23 GDPR.

Alternatively, the EU legislator may leave the Member States discretion to determine which derogations to data subjects' rights stemming from the GDPR are necessary and proportionate. In such a case, the imposition of specific derogations should remain an option (not an obligation) for Member States. Should this solution be preferred, **we recommend that the wording “Member**

⁶ Judgement of the European Court of Justice of 7 May 2009, in case C-553/07 *College van burgemeester en wethouders van Rotterdam v. M.E.E. Rijkeboer*, paragraphs 49 to 54.

States shall” is replaced by ***Member States may***” in Article 55(5) as amended by the Proposal.

- 2.2.3. Finally, we note that the Proposal also provides for possible restrictions in relation to Article 5 of the GDPR, which establishes the fundamental principles of data processing (lawfulness, fairness and transparency of data processing, purpose limitation, data minimization, accuracy and storage limitation, as well as integrity, confidentiality and accountability of the controller).

We would like to stress that, under Article 23 of the GDPR, it is possible to derogate from Article 5 of the GDPR only in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22 and Article 34. Consequently, the Proposal should specify to what extent Article 5 of the GDPR may be derogated from as regards the application of article 12 to 22 and Article 34 of the GDPR. **Therefore, we recommend including in Article 55(5) a complete reference to Article 5 of the GDPR containing “in so far as its provisions correspond to the rights and obligations provided for in Articles ...”.**

2.3. Data retention period

- 2.3.1. Personal data should be processed until they serve the purpose for which they were collected and when they are no longer necessary for that purpose, they should be deleted, unless subsequent processing is foreseen by law and is deemed relevant for a purpose, which is not incompatible with the original purpose for processing.

We welcome that Article 55(5) mentions that the storage of information shall be limited to the extent necessary to achieve the purposes referred to in Article 1(1) of the amended Regulation.

However, considering that speed and swift replies are crucial in the context of investigations aiming to combat VAT fraud such as the *“carousel fraud”*, the data retention period for intelligence information related to such investigations should be defined more restrictively than in the current general provision provided in Article 55(5). **A determination about the correct data retention period should be made taking into account the period of time after which it is not possible anymore to prosecute due to legal limitation periods for VAT fraud offences.**

- 2.3.2. Moreover, **we strongly recommend reassessing the Article 18 of the Proposal**, which provides that: *“information shall be available for at least five years from the end of the first calendar year in which access to the information is to be granted”*. **A maximum data retention period for all personal data processed pursuant to the Proposal should be determined, with possible exceptions only in exceptional, duly justified circumstances.**

2.4. Joint processing and analysis of data within Eurofisc

- 2.4.1. The Proposal introduces provisions for the joint processing and analysis of data within Eurofisc. Eurofisc is a mechanism provided for Member States to enhance their administrative cooperation in combating organised VAT fraud and especially

carousel fraud. Eurofisc allows for quick and targeted sharing of information between all Member States on fraudulent activities⁷.

Under Article 33(2)(b), Member States shall, within the framework of Eurofisc, carry out and coordinate the joint processing and analysis of targeted information in the subject areas in which Eurofisc operates (“*Eurofisc working fields*”). Such processing and analysis are also referred to in Article 34(2) (on Member States participating in Eurofisc working fields) and in 36(2)(b) (on the Eurofisc working field coordinators). Neither “*targeted information*” nor “*working fields*” are defined.

We understand from Recital 13 of the Proposal that Eurofisc is focusing on the most serious cross-border fraud schemes. **We recommend further specifying targeted information and/or working fields in the proposal and linking them to the most serious VAT offences for instance, as referred to in Article 2(2) of Directive (EU) 2017/1371⁸**

- 2.4.2. Furthermore, under Article 36(3), Eurofisc working field coordinators may forward on their own initiative or on request “*some of the collated and processed information*” to Europol and OLAF. The wording “*some of the information*” is very vague and as such does not meet the data protection requirements. **We recommend referring in Article 36(3) to “*information on the most serious offences serious VAT offences as referred to in Article 2(2) of Directive (EU) 2017/1371 and falling within the mandate of Europol and OLAF respectively*”.**

2.5. Storage and exchange of specific information

- 2.5.1. Chapter V of the Proposal deals with the storage and exchange of information on taxable persons and transactions. Article 17 (1) point f of this Chapter determines a precise list of information to be stored (i.e. the VAT identification numbers referred to in point a) and b) of article 143(2) of Directive 2006/112/EC, the country of origin and of destination, the commodity code the currency, the total amount, the exchange rate, the prices of the individual items and the net weight).

Furthermore, Article 17(3) refers to implementing acts to be adopted by the Commission to determine the exact categories of information referred to in point (f) of Article 17(1).

In this regard, we consider that it is not clear why an implementing act would be necessary at all, since the Article 17(1)(f) already determines a precise list of information to be stored.

- 2.5.2. Similarly, we question the use of the phrase “*at least*” in Article 21(2a) as regards the information referred to in Article 17(1)(f) since the information in both articles is similar. If this wording was used in order to facilitate the possibility to process further information, it should be specifically provided for in the Proposal.

⁷ Eurofisc is decentralised network of national officials who are responsible for the detection and prosecution of the cross-border VAT frauds. It was established by a Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, OJ L 268, 12.10.2010, p. 1–18 and officially launched on 10 November 2010.

⁸ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, p. 29–41

The EDPS suggests deleting Article 17(3) and the wording “at least” in Article 21(2a).

2.6. Implementing acts

We note that there are several issues with possible data protection relevance (Articles 17(2), 17(3), 21(3), 21a(3), 37) which will be further elaborated following the examination procedure referred to in Article 58(2). **It is important to emphasize that any future implementing acts must comply with the data protection requirements laid down in the GDPR and Regulation 45/2001 (as revised). We expect that the EDPS will be consulted at an appropriate time prior to the adoption of such implementing acts, if any.**

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, 06 March 2018

(signed)

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