



Formal comments of the EDPS on the Proposal for a Regulation establishing a framework for screening of foreign direct investments into the European Union

1. Introduction

On 13 September 2017, the European Commission tabled a Proposal for a Regulation on the establishment of a framework for the screening of foreign direct investments into the European Union (hereinafter “FDI Proposal”).

The FDI Proposal aims to prevent strategic acquisitions of key European assets by foreign investors. However, the Member States are not required to adopt or maintain a screening mechanism for foreign direct investments, the FDI Proposal merely creates an enabling framework for Member States that already have or want to establish such a mechanism. In the same vein, the FDI Proposal empowers the Commission to screen foreign direct investments on security and public order grounds in cases where a foreign direct investment may effect projects or programmes of Union interest. In order to achieve a comprehensive approach the FDI Proposal establishes a notification mechanism between the Member States and the Commission.

The FDI Proposal was presented without an accompanying impact assessment. However, in the explanatory memorandum it is stated that the FDI Proposal would target the main issues in a proportionate manner and that other elements will be assessed in a study at a later stage. Nevertheless, the FDI Proposal is accompanied by a Staff working document providing a factual description of foreign takeovers in the EU based on the available data, as well as a brief analysis of the issue at stake.

One of the EDPS’ tasks is to advise the Commission services in the drafting of new legislative proposals with data protection implications. In this respect, we note that we were not consulted on the FDI Proposal, neither informally at the inter-service consultation stage, nor immediately after the adoption of the FDI Proposal. Nevertheless, we welcome the consultation by the Commission at the present stage of the legislative process.

We have limited the comments below to the provisions of the FDI Proposal that are particularly relevant from a data protection perspective.

2. EDPS Comments

Preliminary Remarks

The FDI Proposal defines in Article 2 the term “foreign direct investment” as “an investment of any kind by a foreign investor [...]” and the term “foreign investor” as “a natural person of a third country or an undertaking of a third country intending to make or having made a foreign direct investment” (emphasis added). To the extent that the screening of foreign direct investment provided for in the FDI Proposal implies sharing or exchanging information related to identified or identifiable natural persons, it clearly constitutes a processing of

personal data in the meaning of Article 2(b) of Directive 95/46/EC¹ and Regulation (EC) No 45/2001. In this respect, we recall that also the official title of a legal person constitutes personal data, when it identifies one or more natural persons.² Moreover, the ownership structure of a legal person, which the Member States should in accordance with Article 10 of the FDI Proposal make available to the Commission and the Member States, will necessarily contain data of natural persons. Therefore, the FDI Proposal clearly implies the processing of personal data within the meaning of Directive 95/46/EC and as of 25 May 2018, of Regulation (EU) 2016/679 (“GDPR”). To the extent processing will be performed by the Commission, Regulation (EC) No 45/2001 (currently under revision³) will apply.

We take note that the FDI Proposal does in several provisions include references to “confidential information”, “sensitive information” or “confidentiality” (e.g. recital 20 or Articles 6 and 11). However, there are no references to the processing of personal data, the protection of personal data or the rights of the data subjects. More specifically, we observe that the FDI Proposal does not clearly state that that Directive 95/46/EC (from 25 May 2018: the GDPR) applies to the processing of personal data by the competent authorities of the Member States or that Regulation (EC) No 45/2001 applies to the processing of personal data by the Commission. For the sake of clarity we therefore recommend to introduce a relevant recital in the FDI Regulation.

Controllership

We underline that the Member States and the Commission act in the context of the FDI Proposal as data controllers in accordance with Article 2(d) of Directive 95/46/EC⁴ and Article 2(d) of Regulation (EC) No 45/2001⁵, because they will be determining the purpose and means of the processing of personal data (cf. Articles 3 and 9 of the FDI Proposal). As controllers they will have to fulfil their assigned obligations under the data protection legislation, which include the implementation of appropriate technical and organisational measures, the information of data subjects about the processing of their data and to ensure that the data subjects can exercise their data protection rights (inter alia the right of access, the right of correction or the right of erasure).

In this respect, we want to recall that Article 26 of the GDPR as well as Article 28 of the Proposal for a new Regulation (EC) No 45/2001 introduce the concept of joint controllership. This means that where two or more controllers jointly determine the purposes and means of data processing they must in a transparent manner determine their respective responsibilities for compliance with the obligations under the relevant regulation, in particular as regards the exercising of the rights of the data subjects and their information. We consider that such a situation may arise in the context of the FDI Proposal with respect to the processing provided for in Articles 3 and 9 of the FDI Proposal. We therefore recommend to insert in the FDI Regulation a relevant provision, where the Member States and the Commission lay down in particular their respective roles and relationships vis-à-vis the data subjects or to adopt a relevant arrangement, which should then be made available to the data subjects.

¹ And as of 25 May 2018 Article 4 (2) of 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).

² See judgment of the CJEU in *Schecke* (C-92/09 and C-93/09), [2010] ECR I-11063, paras. 52-53.

³ COM (2017) 8: 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.

⁴ Article 4(7) of Regulation (EU) 2016/679.

⁵ Article 3(2) (b) of the Proposal for a new Regulation (EC) No 45/2001.

Processing of personal data

We recall that personal data should be processed lawfully and fairly for specified, explicit and legitimate purposes and should not be further processed in a manner that is incompatible with those purposes.⁶ In this respect Article 6 of Directive 95/46/EC⁷ and Article 5 of Regulation (EC) No 45/2001⁸ provide an exhaustive list of legal grounds for the processing of personal data. Therefore, a processing of personal data must always rely on one of these legal grounds for a processing to be allowed. Furthermore, personal data must be processed in a transparent manner in relation to the data subject⁹ and must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.¹⁰

For the FDI Regulation it appears that the processing is necessary for the performance of a task carried out in the public interest¹¹, i.e. the prevention of strategic acquisitions of key European assets by foreign investors. The FDI Regulation should therefore determine in a specific provision the purpose of the data processing and indicate the relevant categories of personal data which may be processed, while stressing that personal data should not be further processed in a manner that is incompatible with this purpose.

Retention period

We take note that the FDI Proposal does not provide for a determined retention period or an obligation for the Member States or the Commission to erase data after a certain period. In this respect, we recall that personal data shall be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed. We therefore recommend to provide a fixed and proportionate retention period in the FDI Regulation, following the expiry of which, personal data should be deleted by the Member States and the Commission.

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⁶ Article 6(1)(b) of Directive 95/46 and Article 5(1)(b) of the GDPR; Article 4(1)(b) of Regulation (EC) No 45/2001 and Article 4(1)(b) of the Proposal for a new Regulation (EC) No 45/2001.

⁷ Article 6 of the GDPR.

⁸ Article 5 of the Proposal for a new Regulation (EC) No 45/2001.

⁹ Article 6(1)(a) of Directive 95/46 and Article 5(1)(a) of the GDPR; Article 4(1)(a) of Regulation (EC) No 45/2001 and Article 4(1)(a) of the Proposal for a new Regulation (EC) No 45/2001.

¹⁰ Article 6(1)(e) of Directive 95/46 and Article 5(1)(c) of the GDPR; Article 4(1)(c) of Regulation (EC) No 45/2001 and Article 4(1)(c) of the Proposal for a new Regulation (EC) No 45/2001.

¹¹ Cf. Article 7(e) of Directive 95/46 and Article 6(1)(e) of the GDPR; Article 5(1)(a) of Regulation (EC) No 45/2001 and Article 5(1)(a) of the Proposal for a new Regulation (EC) No 45/2001.