



EDPS formal comments on the draft Commission Delegated Regulation supplementing Directive (EU) 2010/31 of the European Parliament and of the Council by establishing an optional common European Union scheme for rating the smart readiness of buildings and the Commission Implementing Regulation detailing the technical modalities for the effective implementation of an optional common Union scheme for rating of smart readiness of buildings.

1. Introduction and background

- These formal comments on the draft Commission Delegated Regulation supplementing Directive (EU) 2010/31 of the European Parliament and of the Council by establishing an optional common European Union scheme for rating the smart readiness of buildings (hereinafter, ‘the draft Delegated Regulation’) and the Commission Implementing Regulation detailing the technical modalities for the effective implementation of an optional common Union scheme for rating of smart readiness of buildings (hereinafter, ‘the draft Implementing Regulation’) are provided in reply to the request for consultation by the Commission, Directorate-General for Energy (DG ENER) to the EDPS dated 2 July 2020. Both draft Regulations are accompanied by Annexes.
- The draft Delegated Regulation establishes the definition and the methodology for the “smart readiness indicator” (SRI) that will allow to rate the smart readiness of buildings, defined as “*the capability of buildings (or building units) to adapt their operation to the needs of the occupant, to optimise energy efficiency and overall performance, and to adapt to signals from the grid (energy flexibility).*”¹ The draft Implementing Regulation details the technical modalities for implementing the scheme.
- A revised version of the draft Delegated Regulation and its Annex was submitted to the EDPS on 24 July 2020. These formal comments take into account the latest version received.

2. Comments

- The present formal comments of the EDPS are issued in response to the legislative consultation by the European Commission of 2 July 2020, in line with Article 42(1) of Regulation (EU) 2018/1725².

¹ Draft Delegated Regulation, Explanatory Memorandum, page 1.

² Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons 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, OJ, 21.11.2018, L.295, p. 39.

In this regard, the EDPS regrets the fact that there is no reference to this consultation in the preambles of the draft Delegated Regulation. We therefore ask for a reference to the aforesaid consultation pursuant to Article 42(1) of Regulation (EU) 2018/1725 to be added in the recitals of the aforementioned legal act.

- The EDPS observes that the data protection risks are increased by the reference to ‘built-in home appliances’ that will raise the energy performance level and adapt it to the needs of the occupant. The new framework indeed brings the data processing ecosystem underpinning the smart readiness of buildings to a higher level of complexity under an Internet of Things (home automation, ‘domotics’) scenario³.
- Consequently, the EDPS recalls the need to ensure a high level of protection of personal data, referring to the ‘privacy and data protection sustainability’ of the smart building/home. In particular, we highlight the importance of including, among the criteria for ‘smart readiness’, the information to the occupants (of the smart home) on the data processing.
- The EDPS also notes that Directive (EU) 2018/844⁴, amending Directive 2010/31/EU on the energy performance of buildings (the Energy Performance of Buildings Directive or ‘EPBD’)⁵, introduced the new Annex 1A “Common general framework for rating of the smart readiness of buildings”, specifying that “*The methodology shall [take] into account the principle of occupant ownership, data protection, privacy and security, in compliance with relevant Union data protection and privacy law as well as best available techniques for cyber security.*”
- In the light of all of the above, the EDPS welcomes:
 - the reference in Recital 16 of the draft Delegated Regulation to “*cybersecurity risks and data protection risks*” and to possible vulnerabilities due to “*to cyber threats and misuse of personal data*”; risks and vulnerabilities about which users should be informed via the smart readiness indicator⁶;
 - the reference in Article 3(4)⁷ of the draft Delegated Regulation to additional information on data protection as part of the smart readiness indicator, corresponding, as operative part, to the aforementioned Recital 16;
 - the reference to information on data protection in Annex IX of the draft Delegated Regulation (content of the smart readiness indicator certificate), letter (I)⁸.

³ See, in this regard, the EDPS Opinion of the European Data Protection Supervisor on the Commission Recommendation on preparations for the roll-out of smart metering systems, 8 June 2012. The Opinion is available at: https://edps.europa.eu/sites/edp/files/publication/12-06-08_smart_metering_en.pdf.

See also EDPS TechDispatch #2: Smart Meters in Smart Homes, available at: https://edps.europa.eu/data-protection/our-work/publications/techdispatch/techdispatch-2-smart-meters-smart-homes_fr

⁴ Directive (EU) 2018/844 of the European Parliament and of the Council of 30 May 2018 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency (Text with EEA relevance), OJ L 156, 19.6.2018, p. 75–91.

⁵ Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, OJ L 153, 18.6.2010, p. 13–35.

⁶ “Increased digitisation and connectivity in buildings increases cybersecurity and data protection risks and makes buildings and their systems more vulnerable to cyber threats and misuse of personal data. The smart readiness indicator should help to inform building owners and users of those risks.”

⁷ “The smart readiness indicator shall include, where possible, additional information on inclusiveness and connectivity of the building, on interoperability and cybersecurity of systems, and on data protection.”

⁸ “[W]here possible, available information on interoperability, cybersecurity of systems and data protection, including where relevant on conformity to commonly agreed standards, and information on related risks”.

- Article 3(4) of the draft Delegated Regulation stipulates that, when possible, the smart readiness indicator shall include information on cybersecurity and data protection. In this regard, the EDPS understands that the information on data protection to be taken into account for the purpose of establishing the smart readiness indicator aims at reinforcing (i.e. does not replace) the data protection requirements applicable to controllers and processors under Regulation (EU) 2016/679 (General Data Protection Regulation).⁹
The EDPS considers the provision of such information, which requires a prior assessment of cybersecurity and privacy threats, allows, in line with the principle of privacy by design and by default, to identify, address and inform users about the relevant risks at an early stage, before any use of the ‘smart-ready technology’ or ‘smart-ready services’¹⁰. We would therefore like to stress that this information requirement is a welcome addition, fostering data protection already at the engineering and manufacturing stage.

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⁹ 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) OJ L 119, 4.5.2016, p. 1.

¹⁰ ‘Smart-ready technology’ and ‘smart-ready service’ are defined, respectively, in Article 2(13) and Article 2(14) of the Commission Delegated Regulation.