



## **EDPS Formal comments on the Commission Proposal for a Regulation of the European Parliament and of the Council establishing the Brexit Adjustment Reserve<sup>1</sup>**

### **1. Introduction and background**

The European Council conclusions, agreed at its special meeting of 17-21 July 2020, provide for the establishment of a new special Brexit Adjustment Reserve (the 'Reserve') of €5 billion within the special instruments outside of the EU budget ceilings of the multiannual financial framework 'to counter adverse consequences in Member States and sectors that are worst affected'<sup>2</sup>. The European Council invited the European Commission to present a proposal.

The European Commission submitted its proposal on 25 December 2020. It is proposed to activate the Reserve in two rounds of allocations: the first in 2021 in the form of substantial pre-financing worth approx. €4 billion, while the remaining approx. €1 billion would mainly be paid in 2024 to cover any eligible expenditure exceeding the amount paid in pre-financing. This €5 billion fund would be a solidarity tool which is intended to support those Member States, regions and sectors worst affected by the UK's withdrawal from the EU. According to the European Commission, '*[t]he proposed instrument draws inspiration from the long-standing experience of the European Union Solidarity Fund and cohesion policy, while adapting to the completely new circumstances and objective of countering the effects of the withdrawal of the United Kingdom from the European Union*'<sup>3</sup>. '*Due to the urgent nature of the proposal, no impact assessment was carried out. The proposal takes into account recent economic analyses, including the Commission's autumn 2020 economic forecast and the European Central Bank's research*'<sup>4</sup>.

According to Recital 8, the budget allocated to the Reserve would be implemented by the Commission under shared management with Member States within the meaning of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council<sup>5</sup> (the 'Financial Regulation'). Recital 14 states that '*[p]ursuant to paragraphs 22 and 23 of the Inter-institutional agreement for Better Law-Making of 13 April 2016<sup>6</sup>, there is a need to evaluate the Reserve on the basis of information collected through specific monitoring requirements, while avoiding overregulation and administrative burden, in particular on Member States. These requirements, where appropriate, should include measurable indicators, as a basis for the evaluation of the Reserve*'. In particular, Member States would have to set up a management and control system and designate bodies responsible for the management of the Reserve and an independent audit body<sup>7</sup>. Member States would also need to put in place systems that aim to prevent, detect and deal effectively with any irregularities, including fraud<sup>8</sup>. According to Article 13 (2), Member States may make use of existing designated bodies and systems set

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<sup>1</sup> COM(2020)854 final.

<sup>2</sup> European Council Conclusions, 17, 18, 19, 20 and 21 July 2020, EUCO 10/20, CO EUR 8 CONCL 4.

<sup>3</sup> Explanatory Memorandum, page 4.

<sup>4</sup> Explanatory Memorandum, page 4.

<sup>5</sup> Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union (OJ L 193, 30.7.2018, p. 1).

<sup>6</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (OJ L 123, 12.5.2016, p. 1).

<sup>7</sup> Explanatory Memorandum, page 7.

<sup>8</sup> Explanatory Memorandum, page 7.

up for the purpose of the management and control of cohesion policy funding or the European Union Solidarity Fund.

The legal basis for the Commission's proposal requires consultation with the European Court of Auditors (ECA); both the European Parliament and the Council therefore asked the ECA for its opinion. In its opinion No 1/2021 concerning the proposal, the ECA raises some concerns as, while the proposal provides flexibility for Member States, the design of the reserve creates a number of uncertainties and risks.

The Commission consulted the EDPS on 19 February 2021, in accordance with Article 42 of Regulation (EU) 2018/1725<sup>9</sup>.

## **2. Comments**

### **2.1. General comments**

The EDPS welcomes Recital 21 referring to this consultation. He regrets, however, the lack of an impact assessment accompanying the Proposal, and in particular on its impact on the protection of individuals' rights and freedoms with regard to the processing of personal data.

### **2.2. On the use of a single data mining tool ("Arachne")**

Point 32 of the Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources<sup>10</sup> provides that

*'[t]o enhance the protection of the Union budget, the Commission will make available an integrated and interoperable information and monitoring system, **including a single data-mining and risk-scoring tool, to access and analyse the data referred to in point 31 with a view to a generalised application by Member States.** That system would ensure efficient checks on conflicts of interests, irregularities, issues of double funding, and any misuse of the funds'* (emphasis added).

According to point 31 of this Interinstitutional Agreement, *'[t]o ensure effective controls and audits, it is necessary to collect **data on those ultimately benefitting, directly or indirectly,** from Union funding under shared management and from projects and reforms supported under Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility, **including data on beneficial owners of the recipients of the funding.** The rules related to the collection and processing of such data will have to comply with applicable data protection rules'* (emphasis added).

Article 13 of the proposal provides that when executing tasks relating to the implementation of the Reserve, Member States shall take all the necessary measures, including legislative, regulatory and administrative measures, to protect the financial interests of the Union, namely by preventing, detecting and correcting irregularities and fraud, and avoiding conflict

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<sup>9</sup> 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 (Text with EEA relevance.) (OJ L 295, 21.11.2018, p. 39).

<sup>10</sup> (OJ L 433I, 22.12.2020, p. 28).

of interest including **through the use of a single data mining tool provided by the Commission** (emphasis added).

Paragraph 3 of Article 13 of the proposal states that the body responsible for managing the financial contribution from the Reserve shall inter alia:

*'(f) use an accounting system to record and store in an electronic form data on the expenditure incurred to be covered by the financial contribution from the Reserve that provides accurate, complete and reliable information in a timely manner;*

*(g) keep available all supporting documents regarding expenditure to be covered by the financial contribution from the Reserve for a period of five years following the deadline for submission of the application for a financial contribution, and transpose this obligation in agreements with other entities involved in the implementation of the Reserve;*

*(h) **for the purposes of preventing, detecting and correcting irregularities and fraud, and avoiding conflict of interest including through the use of a single data mining tool provided by the Commission**, collect information in an electronic standardised format to allow for the identification of recipients of a financial contribution from the Reserve and their beneficial owners **in accordance with Annex III**'* (emphasis added).

At a meeting on 19 March 2021, the Commission services informed the EDPS that the concerned data mining tool would be an existing data mining tool named "Arachne"<sup>11</sup>. The EDPS welcomes that the proposal seeks to provide a **clear legal basis** for the use of a data mining tool for the purposes of this Regulation. Even if the processing of personal data will take place in the framework of an existing data mining tool, the EDPS considers it useful to provide for the use of such a tool in the legislative act itself.

The EDPS additionally recommends including in the legislative act itself a high level description of the tool, including data protection responsibilities and relevant applicable safeguards, possibly to be further defined in implementing acts as the case may be. In particular, to the extent the Commission or another EU institution, body, agency or office is implicated in the operation of the tool, the EDPS recommends **clearly identifying the roles and responsibilities** of the actors involved as (joint) controller or processor, as the case may be.

The EDPS notes that Annex III of the proposal identifies the following **categories of personal data**:

- *'the name of the recipient and amount of the financial contribution from the Reserve;*
- *the name of the contractor and sub-contractor, where the recipient is a contracting authority in accordance with the Union or national provision on public procurement, and value of the contract;*
- *the first name, last name and date of birth of beneficial owner, as defined by Article 3(6) of Directive (EU) 2015/849 of the European Parliament and of the Council, of the recipient, contractor or sub-contractor referred to in the first and second indent of this point;*
- *where appropriate, data on individual participants'.*

On 9 April 2021, the Commission services informed the EDPS that data of beneficiaries of BAR funds will be aggregated with data already processed by Arachne. To the extent the relevant personal data would not fall within the categories of data listed under Annex III, the EDPS recommends further identifying the categories of personal data in the proposal. In

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<sup>11</sup> See also [EDPS Opinion](#) of 17 February 2014 on a notification for Prior Checking received from the Data Protection Officer of the European Commission regarding the "Risk analysis for fraud prevention and detection in the management of ESF and ERDF" - ARACHNE (2013-0340).

addition, the EDPS considers that the category “data on individual participants” mentioned in Annex III should be further specified.

### **2.3. On the EU institutions and bodies having access to personal data processed by the data mining tool (Arachne)**

According to paragraph 1 of Article 13 of the proposal, the use of and access to the data processed by the data mining tool shall be limited to:

- the body designated by each Member State as the responsible body for the management of the financial contribution from the Reserve and the independent audit body designated by each member State in accordance with Article 63(3) of the Financial Regulation, and supervising such bodies;
- the Commission, OLAF, the Court of Auditors and, for those Member States participating in enhanced cooperation pursuant to Regulation (EU) 2017/1939<sup>12</sup>, with the EPPO.

Article 13 also states under paragraph 1, 3rd indent, that the Member States and the Commission shall be allowed to process personal data only where necessary for the purpose of carrying out their respective obligations under this Regulation, and process personal data in accordance with Regulation (EU) 2016/679 or Regulation (EU) 2018/1725, whichever is applicable.

It stems from Article 13 that not only the Commission and the relevant bodies of the Member States would be processing personal data in the context of this future Regulation. **Hence, the EDPS recommends clarifying that OLAF and the Court of auditors shall also process personal data in accordance with Regulation (EU) 2018/1725 and that the EPPO shall process operational personal data in accordance with Regulation (EU) 2017/1939.**

Brussels, 14 April 2021

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(e-signed)

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<sup>12</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (“the EPPO”) (OJ L 283, 31.10.2017, p. 1).