



Formal comments of the EDPS on the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market

1. Introduction and background

- The Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market ('the Proposal')¹ aims at complementing Union State aid rules in order to effectively address distortions in the internal market caused by foreign subsidies².
- The assessment of foreign subsidies, whose existence and distortion effect on the internal market shall be determined by the Commission according to the procedures established in the Proposal, comes into play having regard to: a) concentrations (Chapter 3); public procurement procedures (Chapter 4). To perform its tasks, the Commission may on its own initiative perform the review of foreign subsidies pursuant to Chapter 2 of the Proposal, including by way of preliminary reviews (Article 8); in-depth investigations (Article 9); information requests (Article 11); inspections within the Union (Article 12); inspections outside the Union (Article 13); market investigations (Article 34).
- These formal comments are provided in reply to the request for legislative consultation on the proposal by the Commission of 6 May 2021 pursuant to Article 42(1) of Regulation (EU) 2018/1725 ('the EUDPR')³. The comments below are limited to the provisions of the Proposal that are relevant from a data protection perspective.
- These formal comments do not preclude any future additional comments by the EDPS, in particular if further issues are identified or new information becomes available, for example as a result of the adoption of implementing acts pursuant to Article 42 of the Proposal. Furthermore, these formal comments are without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Article 58 of the EUDPR.

¹ COM(2021) 223 final, 5.5.2021.

² See recital (4) of the Proposal: “No existing Union instruments address distortions caused by foreign subsidies. Trade defence instruments enable the Commission to act when subsidised goods are imported into the Union, but not when foreign subsidies take the form of subsidised investments, or when services and financial flows are concerned. [...]”

³ 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. 39–98.

2. Comments

- As a preliminary matter, the EDPS notes that the Proposal is likely to result in the processing of personal data. The review of foreign subsidies pursuant to Chapter 2 of the Proposal will imply the collection and processing of information and related data, notably on beneficiaries of foreign subsidies. As already pointed out in a previous EDPS Opinion⁴ “*An economic operator might therefore be a natural or legal person. [...] Thus, the information on some economic operator might be considered as ‘personal data’ as defined in Articles 2(a) of Regulation (EC) No 45/2001 [replaced by Article 3(1) of Regulation (EU) 2018/1725] and Directive 95/46/EC [replaced by Regulation (EU) 2016/679, hereinafter ‘the GDPR’]⁵, at least the information of those economic operators who are natural persons. Even the information on economic operators that are legal persons might in some cases be considered as personal data. In these cases, the determining factor is whether the information ‘relates to’ an ‘identifiable’ natural person⁶. As a consequence, there is no doubt that personal data might be exchanged in the context of the proposal in question.”.*
- Therefore, the EDPS recommends explicitly stating that the Union’s legislation for the protection of personal data, in particular Regulation (EU) 2018/1725 and Regulation (EU) 2016/679, shall apply to the processing of personal data falling within the scope of the Proposal, both in the substantive part of the Proposal and in a recital.
- Recital (40) clarifies that “*The Commission, when publishing its decisions, should respect the rules on professional secrecy, including the protection of all confidential information, business secrets and personal data, in accordance with Article 339 of the Treaty.*”, referring to the publication of decisions by the Commission at the end of its investigations. A possible, more complete, wording in this respect, also taking into account the possible involvement of national competent authorities in the inspections conducted by the Commission⁷, is: “*The processing of personal data for the purposes of this Regulation should be carried out in accordance with Regulation (EU) No 2018/1725 and Regulation (EU) 2016/679*”.

⁴ See, among others, the Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on a Union position within the EU-Japan Joint Customs Cooperation Committee concerning the mutual recognition of Authorised Economic Operator programmes in the European Union and in Japan.

⁵ 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), L119, 4.5.2016.

⁶ The Court of Justice of European Union in Joint Cases C92/09, *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 person.

⁷ See Article 12(5) of the Proposal: “*Officials of the Commission as well as officials authorised or appointed by the Member State in whose territory the inspection is to be conducted shall, at the request of the Member State or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission.*”

- As regards the processing of personal data collected in the context of investigations, the EDPS stresses the importance of compliance with data protection principles of purpose limitation and storage limitation (in accordance, respectively, with Article 4(1)(b) of the EUDPR and Article 5(1)(b) of the GDPR; and Article 4(1)(e) of the EUDPR and Article 5(1)(e) of the GDPR.
- The EDPS recommends clarifying in the Proposal that personal data processed for purposes of this Regulation shall be limited to what is necessary and proportionate for the sole purpose of preventing and countering distortions of the internal market by foreign subsidies. Having regard also to the limitation periods set out in the Proposal, the EDPS further recommends to clarify that the personal data shall not be kept in form which permits identification for a period longer than is necessary, taking into account the limitation periods established under Article 35.

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(*e-signed*)