

EDPS formal comments on the draft Commission Delegated Regulation supplementing Directive 2010/40/EU of the European Parliament and the Council with regard to the provision of EU-wide real-time traffic information services

1. Introduction and background

- Article 3 of Directive 2010/40/EU on the legal framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport ("the ITS Directive")¹ identifies six priority actions for the adoption of specifications by the Commission. Making use of the powers vested in it in Article 7 of the ITS Directive, the Commission adopted Delegated Regulation (EU) 2015/962 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of EU-wide real-time traffic information services². The EDPS was consulted and provided comments on 21 January 2015³ and 17 June 2015⁴.
- The draft Commission Delegated Regulation ('the draft Regulation') aims to repeal and replace the existing Delegated Regulation (EU) 2015/962, which sets out specifications to ensure the accessibility, exchange, re-use and update of road and traffic data by road authorities, road operators and service providers for the provision of EU-wide, real-time traffic information (RTTI) services⁵.
- According to the Explanatory Memorandum of the draft Regulation, the revision is included in the Sustainable and Smart Mobility Strategy⁶ as action 36 under flagship 6 ('Making connected and automated multimodal mobility a reality'). Moreover, the revision is part of the evolving landscape of legislation on data, which is supported by the European strategy for data⁷. One of the measures from this strategy, the Data Governance Act⁸, aims to ensure data is effectively re-used to provide reliable services to EU citizens and to avoid data monopolies⁹.

¹ Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport Text with EEA relevance, OJ L 207, 6.8.2010, p. 1–13.

² Commission Delegated Regulation (EU) 2015/962 of 18 December 2014 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of EU-wide real-time traffic information services, OJ L 157, 23.6.2015, p. 21–31. The provision of EU-wide real-time traffic information services is priority action (b) as defined in Article 3 of the ITS Directive.

³ https://edps.europa.eu/sites/edp/files/publication/15-01-21_real_time_traffic_information_services_en_1.pdf.

⁴ https://edps.europa.eu/sites/default/files/publication/15-06-17_its_comments_en.pdf.

⁵ See Article 1 of Commission Delegated Regulation 2015/962 and Article 1(1) of the draft Regulation.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Sustainable and Smart Mobility Strategy – putting European transport on track for the future, COM/2020/789 final.

⁷ <https://digital-strategy.ec.europa.eu/en/policies/strategy-data>.

⁸ Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act), COM/2020/767 final.

⁹ Explanatory Memorandum, p. 1-2.

- These comments are provided in reply to the formal request by the Commission of 24 November 2021 pursuant to Article 42(1) of Regulation (EU) 2018/1725 ('the EUDPR')¹⁰. We limited our comments below 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. 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.

2. Comments

2.1. General comments

- The draft Regulation aims to establish the specifications necessary in order to ensure the accessibility, exchange, re-use and update of data by data holders and data users for the provision of EU-wide real-time traffic information services, and to ensure that these services are accurate and available across borders to end-users.
- The EDPS welcomes Recital 12, which states that “*where measures provided for in this Regulation entail the processing of personal data, they should be carried out in accordance with Union law on the protection of personal data and privacy*” and includes references to the GDPR¹¹ and the ePrivacy Directive¹².
- The EDPS notes, however, that the draft Regulation omits references to a number of data protection principles which are particularly important with regard to the provision of EU-wide real-time traffic information services.
- Recital (9) of existing Delegated Regulation (EU) 2015/962 provides that personal data should, where possible, be irreversibly anonymised, which is in line with Article 10(3) of the ITS Directive. Explicit reference is also made to the principles of purpose limitation and data minimisation. Recital (10) of existing Delegated Regulation (EU)

¹⁰ 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 L 295, 21.11.2018.

¹¹ 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. 1–88.

¹² Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, p. 37–47.

2015/962 adds that if the information service is to rely on the collection of data, including geo-location, from the end-users themselves or through cooperative systems in the future, then end-users should be clearly informed about the collection of such data, the arrangements for data collection and potential tracking, and the periods for which such data are kept. It further specifies that appropriate technical measures should be deployed by public and private data collectors such as road operators, service providers and automotive industries to ensure anonymity of the data received from end-users or their vehicles.

- The EDPS considers these clarifications essential in the context of the provision of EU-wide real-time traffic information services. The clarifications are all the more important as the draft Delegated Regulation envisages use of new data types and new data sources (for example, in-vehicle generated data)¹³. For these reasons, the EDPS strongly recommends reinstating equivalent recitals to recitals (9) and (10) of existing Delegated Regulation (EU) 2015/962 in the draft Regulation.
- As a general remark, the EDPS notes that it is not clear from the text of the draft Regulation at which stages the provisioning of EU-wide real-time traffic information services will involve processing of personal data. The EDPS therefore recommends clarifying throughout the text of the draft Regulation which provisions, if any, seek to provide a legal basis for the processing personal data.

¹³ Explanatory Memorandum, p. 1.

2.2. In-vehicle generated data

- The Explanatory Memorandum of the draft Regulation indicates that “*in-vehicle generated data*” is a potential data source for a number of data types in the draft Regulation. This source can be used, for example, to determine speeds, travel times, poor road conditions, and accidents and incidents taking place on the road network. The Explanatory memorandum further indicates that “[t]o harness this data source, for specific public road operation tasks such as traffic management and asset management, public authorities may request holders of in-vehicle generated data and service providers to share relevant data types. If personal data are used, then their processing will require that the public authorities can point to a lawful basis in line with Article 6(1) GDPR”¹⁴.
- The EDPS observes that Articles 6 and 7 of the draft Regulation would impose an obligation on holders of in-vehicle generated data to provide data on the real-time use of the network they collect in a specific format and to make these data (and corresponding metadata) available for exchange and re-use by any data user in the Union. The relevant types of data, listed in the Annex to the draft Regulation, shall be made available for re-use via the national or common access points mentioned in Article 3. In line with Article 10(3) of the ITS Directive and recital (9) of existing Delegated Regulation (EU) 2015/962, the EDPS understands that the data made available for re-use shall not constitute personal data and that only data which have been irreversibly anonymised shall be made available. For the avoidance of doubt, the EDPS recommends including an explicit statement to this effect in the draft Regulation. In any event, the EDPS considers that the draft Regulation would not provide a sufficient legal basis to make data regarding identified or identifiable individuals available through the national access points¹⁵.
- The access to and sharing of personal data constitute processing of personal data pursuant to Article 4(2) of the GDPR. The processing of personal data shall be lawful if the data subject (the identified or identifiable natural person to whom personal data relate) has given consent to the processing of his or her personal data for one or more specific purposes or if another adequate legal basis under Article 6 GDPR can be validly applied. Should the Commission aim to provide through the draft Regulation a legal basis for the processing of personal data, a comprehensive legal basis must then be provided for each category of personal data involved. The EDPS notes that the issue of the legal basis is a fundamental issue which has to date not been addressed by the legal framework applicable in this field¹⁶.

¹⁴ Explanatory Memorandum, p. 6. See also Article 7(3) of the draft Regulation, which also refers to the provision of “appropriate information directly to end-users”.

¹⁵ Such a measure would constitute a significant interference with the right to data protection guaranteed by Article 8 of the Charter of Fundamental Rights, which would need to satisfy the criteria of Article 52(1) of the Charter as interpreted by the Court of Justice of the European Union. See e.g. Judgment of the Court of Justice of the European Union, *La Quadrature du Net* a.o., Joined Cases C-511/18, C-512/18 and C-520/18, 6 October 2020, ECLI:EU:C:2020:791, at paragraph 132.

¹⁶ See also Article 29 Working Party recommendation that states that the Commission “*should implement sector-specific Regulations for collecting and processing data in the field of Intelligent Transport Systems*” and “*should*

- This is relevant also having regard to the possible applicability of the e-Privacy Directive in case of processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks.
- Articles 6(5) and 7(3) of the draft Regulation refer to the possibility for road authorities and road operators to request holders of in-vehicle generated data and service providers to provide the data types on the real-time use of the network they collect and update for the purpose of providing appropriate information directly to the end-users and optimising road maintenance and road safety. In light of the clarifications provided Explanatory Memorandum, the EDPS understand that Articles 6(5) and 7(3) do not seek provide a legal basis for the processing of personal data. For the avoidance of doubt, the EDPS recommends also clarifying in the draft Regulation that the data requested pursuant to Article 6(5) and 7(3) of the Regulation may not relate to an identified or identifiable individual in the absence of an appropriate legal basis within the meaning of Article 6 of the GDPR.
- The EDPS recalls that in line with the requirement of data protection by design and by default, controllers must implement appropriate technical and organisational measures for ensuring that, by default, only personal data which are necessary for each specific purpose of the processing are processed. Such measures shall ensure in particular that personal data are not made accessible without the individual's intervention to an indefinite number of natural persons¹⁷. The EDPS recommends including in the draft Regulation an appropriate provision in this regard that would reflect these requirements in relation to in-vehicle generated data.
- If personal data must leave the vehicle, consideration should be given to anonymise them before being transmitted. As indicated above, the draft Regulation should also explicitly confirm the obligation to use anonymised data when personal data are not necessary for real-time traffic services.

2.3. **“Data holder” and “holder of in-vehicle generated data”**

- Concerning the definitions contained in the draft Regulation, the EDPS notes that the definition of ‘holder of in-vehicle generated data’¹⁸ is not clear and could raise questions such as whether e.g. a car manufacturer could be also considered as a holder

identify a roadmap for lawful processing of location data of EU citizens in the context of C-ITS applications where the enactment of an EU wide legal instrument is the final goal (art 6(1)c of the GDPR)”. (Article 29 Working Party, Opinion 03/2017 on Processing personal data in the context of Cooperative Intelligent Transport Systems (C-ITS), available at <https://ec.europa.eu/newsroom/article29/items/610171>.

¹⁷ See Article 25(2) GDPR.

¹⁸ Article 2 (31) of the draft Regulation defines a ‘holder of in-vehicle generated data’ as “any entity engaged in in-vehicle generated data collection, aggregation or other types of processing to fulfil privacy requirements and has the right to grant access to or to share data under its control”.

of the in-vehicle generated data. This is an important aspect as location data relating to an identified or identifiable person is personal data and can be shared with a third party only with a valid lawful basis. Furthermore, it should be pointed out that fulfilling ‘privacy requirements’ cannot be considered as a purpose in itself, but a legal requirement to be met by ‘controllers’ and ‘processors’ within the meaning of the GDPR.

- Concerning the definition of ‘data holder’¹⁹, the EDPS considers that legal uncertainties may arise from the fact that the GDPR does not mention the data subject’s right to grant access or to share his/her personal data with third parties and even less so an equivalent right for the legal person. Rather, the GDPR guarantees to every individual the right to the protection of personal data concerning him or her, which refers to a comprehensive set of rules for the processing of personal data that are binding for each entity processing the data (data controller/joint controller) or processing the data on behalf of the data controller (processor). In this regard, the EDPS believes that rather than stating that a legal person has the right to grant access to or share personal data, it would be more appropriate referring to whether and under which conditions a certain processing of personal data can be performed or not.²⁰
- Finally, the EDPS also suggests to further clarify the relationship between ‘the holder of in-vehicle generated data’ and ‘the data holder’.

* * *

Brussels, 8 December 2021

(e-signed)
Wojciech Rafał WIEWIÓROWSKI

¹⁹ Article 2(14) of the draft Regulation defines a ‘data holder’ as “a legal person, data subject or (public or private) entity who has the right to grant access to or to share the data types listed in the Annex under its control. The conditions for access to or sharing of data shall not contradict applicable Union or national law”.

²⁰ See also EDPB-EDPS Joint Opinion 03/2021 on the Proposal for a regulation of the European Parliament and of the Council on European data governance (Data Governance Act), 10 March 2021, at paragraph 30, available at https://edps.europa.eu/system/files/2021-03/edpb-edps_joint_opinion_dga_en.pdf.