



EDPS Formal comments on (i) a proposal for a Regulation establishing a European single access point (ESAP) providing centralised access to publicly available information of relevance to financial services, capital markets and sustainability, (ii) a proposal for a Directive amending certain Directives as regards the establishment and functioning of the European single access point and (iii) a proposal for a Regulation amending certain Regulations as regards the establishment and functioning of the European single access point

1. Introduction and background

- On 25 November 2021, the Commission adopted three proposals regarding the establishment of a European single access point providing centralised access to publicly available information of relevance to financial services, capital markets and sustainability.
- The three proposals under the legislative package are (i) a proposal for a Regulation establishing a European single access point (ESAP) providing centralised access to publicly available information of relevance to financial services, capital markets and sustainability ('the Proposal')¹, (ii) a proposal for a Directive amending certain Directives as regards the establishment and functioning of the European single access point (the 'Proposed Omnibus Directive')², and (iii) a proposal for a Regulation amending certain Regulations as regards the establishment and functioning of the European single access point (the 'Proposed Omnibus Regulation')³.
- The legislative package seeks to govern the establishment and functioning of a European single access point (ESAP) providing centralised access to publicly available information in the financial sector. This EU-wide platform is intended to provide investors with better access to financial and sustainability-related company information⁴. The European Securities and Markets Authority (ESMA) will be building and governing the platform⁵.
- The objective of the Proposal is to provide EU-wide access to information activities and products of the various categories of entities that are required to disclose such information, which the Proposal considers to be of relevance to capital markets, financial services and sustainable finance.

¹ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a European single access point providing centralised access to publicly available information of relevance to financial services, capital markets and sustainability, COM(2021) 723 final, 2021/0378 (COD).

² Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending certain Directives as regards the establishment and functioning of the European single access point, COM(2021) 724 final, 2021/0379 (COD).

³ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending certain Regulations as regards the establishment and functioning of the European single access point, COM(2021) 725 final, 2021/0380 (COD).

⁴ Recital (2) of the Proposal.

⁵ Explanatory Memorandum, p. 3. See also Article 1 of the Proposal.

- The objective of the Proposed Omnibus Directive is to amend certain directives enumerated in the Annex⁶ to the Proposal with a view to contribute to the integration of the single market, particularly as regards the collection of information to be made available to ESAP.
- The objective of the Proposed Omnibus Regulation is to amend certain regulations enumerated in the Annex⁷ to the Proposal with a view to contribute to the integration of the single market, particularly as regards the collection of information to be made available to ESAP.
- These formal comments are provided in reply to the formal request for consultation sent by the Commission on 25 November 2021 pursuant to Article 42(1) of Regulation (EU) 2018/1725 (the ‘EUDPR’)⁸. They 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 he identifies further issues or if new information becomes available. Furthermore, these formal comments are without prejudice to any future action that the EDPS may take in the exercise of his powers pursuant to Article 58 EUDPR.

2. Comments

2.1. General comments

- The Proposal requires ESMA to establish and operate a new access portal for the publication of certain information relevant to financial services, the ESAP. As specified in Article 7(1) of the Proposal, ESMA shall ensure that ESAP provides at least for the following functionalities: a web portal; an API enabling easy access to the information in ESAP; a search function in all the official languages of the Union; an information viewer; a machine translation service; a download service, including for the download of large quantities of data; a notification service informing users of any new information in ESAP.
- As a general matter, the EDPS wishes to underline that the creation of any new platform involving the public disclosure of personal data should take into account in particular the principles of data minimisation, accuracy and data protection-by-design and by default.
- The EDPS notes that, although in many cases the information to be shared does not constitute personal data, it is also clear that publication will concern personal data in a number of cases⁹. This may for example be the case for the publication of (i) administrative

⁶ ANNEX to the Proposal for a Regulation of the European Parliament and of the Council establishing a European single access point providing centralised access to publicly available information of relevance to financial services, capital markets and sustainability, COM(2021) 723 final.

⁷ ANNEX to the Proposal for a Regulation of the European Parliament and of the Council establishing a European single access point providing centralised access to publicly available information of relevance to financial services, capital markets and sustainability, COM(2021) 723 final.

⁸ 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, p. 39–98).

⁹ Explanatory Memorandum p. 5-6.

penalties and other measures, including in certain cases the identity of the natural persons responsible or of a legal person identifying a natural person¹⁰, (ii) the identity of the statutory auditor¹¹ or (iii) the ownership of physical collateral assets¹².

- As regards the publication of information concerning administrative measures and other penalties, the EDPS notes that such information may, in certain circumstances, amount to information concerning criminal convictions and offences within the meaning of Article 10 of Regulation (EU) 2016/679 ('GDPR')¹³ and Article 11 EUDPR¹⁴. According to these Articles, the processing of such data may be carried out only under control of official authority or when the processing is authorised by Union law providing for appropriate safeguards for the rights and freedoms of data subjects.

2.2. Specific comments

2.2.1. Relationship to Union legislation on personal data protection

- The EDPS welcomes the inclusion of recital 13 in the Proposal, stipulating that for any processing of personal data in the context of providing information via ESAP, the collection bodies and ESMA should ensure that the GDPR and EUDPR are complied with.

2.2.2. Mandatory submission of information to collection bodies to be made accessible via ESAP

- Article 1(1) point (a) of the Proposal specifies that ESAP shall provide centralised electronic access to 'information to be made public' pursuant to the relevant provisions in the directives and regulations listed in the Annex¹⁵.
- The Explanatory Memorandum indicates that the Proposal does not create any new reporting obligations in terms of content, but rather builds on existing disclosure

¹⁰ See for example Article 62 (1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1–72); Article 69 of Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP) (OJ L 198, 25.7.2019, p. 1–63); Article 48 of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1-73).

¹¹ See Article 35 of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19-76).

¹² See Article 6 of Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bond public supervision and amending Directives 2009/65/EC and 2014/59/EU (OJ L 328, 18.12.2019, p. 29–57).

¹³ 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).

¹⁴ See also Court of Justice of the European Union, *Latvijas Republikas Saeima*, C-439/19, 22 June 2021, in particular at paragraphs 54-94.

¹⁵ Centralised electronic access to additional information may also result from any further legally binding Union act which provides for centralised electronic access to information through ESAP.

requirements set out in the EU legal acts identified in the Annex of the Proposal¹⁶. The EDPS notes that the Proposed Omnibus Regulation and Proposed Omnibus Directive provide references to the information to be provided.

- The Proposal does not clearly set out which information to be provided amounts to ‘personal data’ within the meaning of Article 4(1) GDPR, nor does it explicitly indicate where the information to be provided amounts to information concerning criminal convictions and offences within the meaning of Article 10 GDPR and Article 11 EUDPR.
- As the Proposal includes several references to the concept of ‘personal data’, the EDPS recommends referring to Article 4(1) GDPR in Article 2 of the Proposal (definitions). Moreover, the EDPS recommends explicitly identifying the safeguards that shall apply to the processing of any information concerning criminal convictions and offences within the meaning of Article 10 GDPR and Article 11 EUDPR. In this regard, the EDPS notes that existing disclosure requirements set out in the EU legal acts mentioned in the Annex may already provide for certain safeguards¹⁷.

2.2.3. Voluntary submission of information to collection bodies to be made accessible via ESAP

- According to Article 3(1) of the Proposal, any natural or legal person may submit to a collection body the information referred to in Article 1(1) point (b) of the Proposal in order to make that information accessible on ESAP.
- Article 3(1) point (d) of the Proposal provides that, when submitting information on a voluntary basis, the natural or legal person shall ‘ensure that no personal data are included, except where the personal data constitute a necessary element of the information about its economic activities’.
- The EDPS welcomes the additional clarification provided by recital (5) of the Proposal, stating that, pursuant to the principle of data minimisation, entities should ensure that no personal data are included, except where those data constitute a necessary element of the information about their economic activities.
- The EDPS notes that recital (5) only refers to one example of a situation where the disclosure of personal data might constitute a necessary element of the information, namely to the situation where the name of the entity coincides with the name of the owner.
- In the interest of ensuring data quality, the EDPS suggests specifying the types of entities that can submit information to collection bodies according to Article 1 point (b) of the Proposal as well as the types of information which can be submitted. We note that recital (5) provides an indication in this regard.
- In the interest of legal certainty, the EDPS recommends further clarifying the circumstances in which providing personal data might in fact be ‘a necessary element’, including the categories of personal data concerned. Moreover, in line with the principle of data minimisation, the EDPS recommends specifying that entities voluntarily sharing

¹⁶ Explanatory Memorandum to the Proposal, page 3.

¹⁷ See the references provided in footnote 10 above. See also section 2.2.6.

information should, whenever possible, render the information anonymous prior to submission to the collection bodies.

- The EDPS welcomes that the Proposal specifies in Article 3(3) that, where the information referred to in paragraph 1 of that article contains personal data, entities shall ensure that the processing relies on one of the lawful grounds for processing listed in Article 6(1) of the GDPR and that the Proposal does not create a legal basis for the processing of personal data for those entities¹⁸. In this regard, the EDPS observes that in case of a legal person voluntarily sharing personal data relating to one of its employees, that legal person, as a rule, cannot rely on consent as a legal basis¹⁹.

2.2.4. Roles and responsibilities

- Recital (13) indicates that for any processing of personal data in the context of providing information via ESAP, the collection bodies, and ESMA, in its capacity as ‘operator’ of ESAP, should ensure that the GDPR and EUDPR are complied with.
- While the EDPS welcomes the reference to the applicability of the GDPR and EUDPR, the EDPS recommends further clarifying the role and responsibilities of ESMA, including in relation to its close cooperation with the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA), as specified under Article 11 of the Proposal.
- This question is of particular relevance with regard to the question who bears responsibility and needs to take action if something goes wrong, legally, technically, or otherwise, with the processing of personal data that will take place in the context of the operation of ESAP.
- The Proposal designates ESMA as the ‘operator’ of ESAP.²⁰ The EDPS wishes to point out that this is not a term recognized by the GDPR, which refers to ‘controllers’ and ‘processors’ as entities responsible for ensuring compliance with data protection law. The EDPS stresses that it is important to have clarity regarding the roles and responsibilities of the parties involved, in particular with a view of ensuring transparency and to facilitate the exercise of data subject rights. The EDPS therefore recommends clearly designating the roles and responsibilities of ESMA, EBA, EIOPA and also with regard to the collection bodies.
- With regard to the collection bodies, the Proposal specifies in Article 5(2) that collection bodies shall reject information submitted by entities in each of the following cases: (a) where the automated validations referred to in paragraph 1, point (b) of the Proposal, reveal that the information does not comply with the requirements laid down in that point (b); (b) where the information is manifestly inappropriate, abusive, or clearly outside the scope of the information referred to in Article 1(1). The EDPS is of the opinion that the Proposal should clearly set out which entity is responsible for verifying that the conditions as set out in Articles 3 (1) point (d) and 3 (3) of the Proposal are met.

¹⁸ See also recitals (5) and (13) of the Proposal.

¹⁹ See recital (42) of the GDPR, stating that ‘consent should not be regarded as freely given if the data subject has no genuine or free choice (...)’. See also recital (43) of the GDPR, having regard to situations of imbalance of power between the controller and the data subject, in particular when the controller is a public authority.

²⁰ Recital (13) of the Proposal.

- While detailed arrangements to ensure compliance with data protection requirements may be further defined by way of an implementing act (e.g., as regards the accommodation of data subject rights), the EDPS is of the opinion that the Proposal should at least establish the role of ESMA and the other entities involved as controller, (joint) controller or processor, respectively.

2.2.5. Storage duration

- According to Article 5(1) point (f) of the Proposal, the collection bodies must ensure that information referred to in Article 1(1) remains available to ESAP for at least 10 years, unless it is stated otherwise in the relevant legal act that required the information to be made public. Insofar as personal data are concerned, the Proposal provides that the information submitted shall not be retained and made available for longer than 5 years, unless stated otherwise in the relevant legal act. Finally, the Proposal specifies that the collection bodies shall take appropriate technical and organisational measures to ensure that the information is not retained or made available for longer than provided for in that point (f).
- The EDPS welcomes the introduction of a clear maximum duration for the storage of personal data by the collection bodies. The EDPS regrets, however, that neither the Proposal nor the explanatory memorandum provide objective reasons for justifying the established duration.
- Furthermore, the wording in the Proposal according to which personal data ‘shall not be retained and made available for longer than 5 years, unless stated otherwise in the legal acts referred to in Article 1(1), point (a)’²¹, could benefit from further clarification in order to avoid legal uncertainty due to conflicting obligations under different acts.
- In this regard, and by way of example, the EDPS refers to Article 68 of the Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms which provides for personal data to ‘be retained on the official website of the competent authority *only for the period necessary in accordance with the applicable data protection rules.*’²² (emphasis added).²³
- In order to avoid interpreting the Proposal as defining by default ‘the period necessary’ under certain existing acts as 5 years and thus potentially leading to an extension of the maximum storage periods beyond the period necessary, the EDPS recommends specifying in Article 5(1), point (f) of the Proposal that the collection bodies must ensure that personal

²¹ Article 5 (1), point (f) of the Proposal.

²² Article 68 (3) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC: ‘Competent authorities shall ensure that information published under paragraphs 1 or 2 remains on their official website at least five years. Personal data shall be retained on the official website of the competent authority *only for the period necessary, in accordance with the applicable data protection rules*’ (emphasis added).

²³ See for further examples Article 62 (2) of REGULATION (EU) No 909/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1–72) or Article 83 (3) of Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 (OJ L 22, 22.1.2021, p. 1–102).

data submitted to them ‘shall not be retained and made available *for longer than necessary* and in any event *not* for longer than 5 years, unless stated otherwise in the legal acts referred to in Article 1(1), point (a)’ of the Proposal.

- The EDPS notes that Article 5 of the Proposal only explicitly defines the maximum storage period in relation to the collection bodies. As far as ESMA is concerned, Article 11(3) provides that ESMA shall not store information containing personal data except for automatic, intermediate and transient processing, including storage of that information insofar as strictly necessary for the purpose of giving access to information provided by the collection bodies. In the interest of legal certainty, the EDPS recommends explicitly stating that ESMA shall also take appropriate technical and organisational measures to ensure that the information is not retained or made available for longer than provided for in point (f) of Article 5(1) of the Proposal.

2.2.6. Access to and functionalities of ESAP

- Article 8 of the Proposal provides that ESMA shall ensure that anyone has direct and immediate access free of charge to the information available on ESAP. However, ESMA may charge fees for specific services that involve searches for a very large volume of information or for frequently updated information. Those fees shall not exceed the cost incurred by ESMA for the provision of the service.²⁴
- ESMA shall also allow a closed list of entities to have direct and immediate access to ESAP free of charge to the extent necessary for those entities to fulfil their respective responsibilities, mandates and obligations.²⁵
- The EDPS considers that the Proposal does not clearly define the purpose(s) for which anyone shall have direct and immediate access free of charge to personal data made available on ESAP.
- Recital (13) of the Proposal states that ESAP should improve access to information that include personal data ‘[t]o promote data-driven innovation in finance, help integrate capital markets in the European Union, channel investments into sustainable activities, and bring efficiencies for consumers and businesses’. While the EDPS does not dispute the importance of these goals, he considers that none of these goals amounts to a ‘specified, explicit and legitimate purpose’ within the meaning of Article 5(1) point (b) GDPR and Article 4(1) point (b) EUDPR. The EDPS stresses the importance of explicitly defining the purposes of the processing, also with a view of enabling the assessment of compatibility of further re-use in accordance with Article 6(4) GDPR (see further section 2.2.7.). The EDPS therefore recommends introducing in the Proposal the specific purposes for the direct and immediate access by the general public to the personal data made available on ESAP.

²⁴ Article 8 (2) of the Proposal.

²⁵ Article 8 (3) of the Proposal. The listed entities are: (a) any Union institution, agency or other Union body; (b) any national competent authority designated by a Member State pursuant to the legal acts referred to in Article 1(1), point (a); (c) any member of the European Statistical System as defined in Article 4 of Regulation (EC) No 223/2009 of the European Parliament and of the Council³⁴; (d) any member of the European System of Central Banks; (e) the resolution authorities designated under Article 3 of Directive 2014/59/EU of the European Parliament and the Council.

- Article 7 of the Proposal establishes as one of the mandatory functionalities of ESAP a download service, including for the download of large quantities of data, as well as an Application Programming Interface (API), enabling easy access to the information in ESAP²⁶. The EDPS understands that certain information including personal data (including the existence of certain administrative measures or other penalties) may be relevant to potential investors. It is not evident, however, why such information, even if already public today, should be available ‘to be downloaded in large quantities’ or made accessible via an Application Programming Interface, as such functionalities may enable the extraction and duplication of large sets of personal data. The EDPS therefore recommends requiring ESMA to introduce appropriate technical and organisational measures to avoid excessive disclosure of personal data via the download service and the API. Additional limitations are warranted where it concerns personal data of a particularly sensitive nature, such as information concerning administrative measures and other penalties regarding natural persons. Such safeguards may also be further specified by way of an implementing act.

2.2.7. Use and re-use of information accessible on ESAP

- According to Article 9 of the Proposal, ESMA shall ensure the use and re-use of the information provided to ESAP by the collection bodies is not subject to any conditions, unless those conditions are objective and non-discriminatory, justified on a ground of a public interest objective and correspond to open standard licences allowing free use, modification and sharing of that information by anyone and for any purpose.
- In this context, the EDPS would like to recall that the re-use of personal data shall occur in full compliance with Union legislation on data protection, and thus be accompanied by appropriate data protection safeguards. This means that the re-use of personal data should always respect the principles of lawfulness, fairness and transparency as well as purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality in line with Article 5 of the GDPR.²⁷ Moreover, any processing of personal data for a purpose other than that for which the personal data have been collected may only take place in accordance with the requirements of Article 6(4) GDPR.

Brussels, 19 January 2022

(e-signed)
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²⁶ See Article 7(1) points (b) and (f) of the Proposal.

²⁷ 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), para 73.