

**EDPS Formal Comments on the draft Commission Implementing Decision on the establishment of the technical architecture, technical specifications for entering and storing information and the procedures for controlling and verifying information contained in the European Border and Coast Guard False and Authentic Documents Online system ('EBCG FADO')**

**THE EUROPEAN DATA PROTECTION SUPERVISOR,**

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data ('EUDPR')<sup>1</sup>, and in particular Article 42(1) thereof,

**HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:**

**1. Introduction and background**

1. On 5 December 2022, the European Commission issued the draft Commission Implementing Decision on the establishment of the technical architecture, technical specifications for entering and storing information and the procedures for controlling and verifying information contained in the European Border and Coast Guard False and Authentic Documents Online system ('EBCG FADO') ('the draft Proposal').
2. The objective of the draft Proposal is to adopt measures for the technical architecture and specifications of the new FADO system, which will be taken over from the Council by the European Border and Coast Guard Agency, following the entry into force of Regulation (EU) 2020/493<sup>2</sup> ('the Regulation 2020/493'). The measures should enable the Agency to ensure a proper and reliable functioning of the system and enter the information obtained in a timely and efficient manner, guaranteeing the uniformity and quality of that information according to high standards.
3. The draft Proposal is adopted pursuant to Article 6(1)(a)-(c) of Regulation (EU) 2020/493.
4. The present formal comments of the EDPS are issued in response to a consultation by the European Commission of 5 December 2022, pursuant to Article 42(1) of Regulation

---

<sup>1</sup> OJ L 295, 21.11.2018, p. 39.

<sup>2</sup> Regulation (EU) 2020/493 of the European Parliament and of the Council of 30 March 2020 on the False and Authentic Documents Online (FADO) system and repealing Council Joint Action 98/700/JHA, OJ L 107, 6.4.2020, p. 1–8

2018/1725<sup>3</sup> ('EUDPR'). In this regard, the EDPS welcomes the reference to this consultation in Recital 4 of the Proposal.

5. These formal comments do not preclude any additional comments by the EDPS in the future, in particular if further issues are identified or new information becomes available, for example as a result of the adoption of other related implementing or delegated acts<sup>4</sup>.
6. 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 and are limited to the provisions of the draft Proposal that are relevant from a data protection perspective.

## 2. Comments

### 2.1. General comments

7. The EDPS notes with regret that he has not been consulted on Regulation 2020/493 as the basic act to this draft Proposal, after the decision was taken by the co-legislators during the legislative process on the Regulation on the European Border and Coast Guard (EBCG), to create a separate legal act on the FADO system and provide in it for the processing of personal data in the FADO<sup>5</sup>. Thus, the EDPS did not have the opportunity to assess the relevant provisions of the basic act and to provide possible comments and recommendations prior to adoption.
8. Article 5 of Regulation 2020/493 provides that the EBCG shall only process personal data where such processing is necessary for the performance of its task of operating the FADO system. The purpose of the FADO system is to contribute to the fight against document and identity fraud by sharing information on the security features of, and potential fraud characteristics in, authentic and false documents between the Member State authorities competent in the area of document fraud. In addition, the purpose of the FADO system is also to contribute to the fight against document and identity fraud by sharing information with other actors, including the general public<sup>6</sup>.

---

<sup>3</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, OJ, 21.11.2018, L.295, p. 39.

<sup>4</sup> In case of other implementing or delegated acts with an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data, the EDPS would like to remind that he needs to be consulted on those acts as well. The same applies in case of future amendments that would introduce new or modify existing provisions that directly or indirectly concern the processing of personal data.

<sup>5</sup> While the EDPS was consulted by the European Parliament on the on the Proposal for a Regulation on the European Border and Coast Guard and repealing Council Joint Action 98/700/JHA, Regulation (EU) 1052/2013 of the European Parliament and of the Council and Regulation (EU) 2016/1624 of the European Parliament and of the Council, that initial Proposal expressly stated that the FADO system 'shall not contain any personal data'.

<sup>6</sup> Article 1 of Regulation (EU) 2020/493.

9. Recital (7) of Regulation 2020/493 clarifies that, given the purposes for which the FADO system was created, only limited information related to an identified or identifiable person should be stored in the FADO system<sup>7</sup>. In particular, the FADO system should contain personal data in the form of facial images or alphanumerical information ‘only insofar as they are related to security features or the method of falsification of a document. It should be possible to store such limited personal data either in the form of different elements appearing in the specimens of authentic documents or in the form of pseudonymised data in authentic or false documents’<sup>8</sup>.
10. The draft Proposal aims to establish the technical architecture of the FADO system, as well as the specifications for the entering, storing, controlling and verifying of information stored the FADO system. As the architecture of the FADO system must provide users with different levels of access to information, the chosen architecture will have an impact on the processing of personal data, including as regards the users of the FADO system. According to the Commission, users whose personal data is processed in the FADO system comprise mainly authorities working in the field of border management, law enforcement and migration management.
11. In the draft Proposal, the Commission delegates nearly all decisions that relate directly to the processing of personal data to the Agency. While certain details of practical implementation may be left for the controller to decide, the EDPS considers that the draft Proposal should address those elements which are particularly relevant from a data protection perspective. In particular, the EDPS calls upon the Commission to specify in the draft Proposal the categories of personal data and categories of data subjects, as well as the roles and responsibilities of the actors involved. In addition, the EDPS invites the Commission to provide a more comprehensive description of the main functionalities of the system.

## **2.2. Categories of personal data and categories of data subjects**

12. The Annex to the draft Proposal, Part 2, No. 3(a) and (b) leaves it to the Agency to specify the categories of data subjects and the categories of personal data. However, both the categories of personal data and the categories of data subjects are essential elements of the processing. As these elements are only generally provided for in the basic act, the EDPS considers it important to define them more precisely in the implementing act, providing data subjects with legal certainty and foreseeability. The EDPS recommends that the Commission establishes an explicit list of categories of

---

<sup>7</sup> The scope and content of the FADO system is specified in Article 2 of Regulation (EU) 2020/493.

<sup>8</sup> Article 5(1) for Regulation (EU) 2020/493 confirms that as regards authentic documents, the FADO system shall only contain personal data included in the specimens of such documents or pseudonymised data. As regards false documents, the FADO system shall only contain personal data to the extent they are necessary to describe or illustrate the fraud characteristics or the method of falsification of such documents.

data that would be processed in each step of the process<sup>9</sup>. In this regard, the EDPS recalls that Regulation 2020/493 allows only for limited processing of personal data, as explained above.

### **2.3. Roles and responsibilities**

13. Article 9(3) of Regulation 2020/493 refers to the concept of information in the “ownership” of Member States, which might be understood as an indication that Member States keep the responsibility and accountability for the data once entered into FADO. However, data “ownership” is not defined in the GDPR nor the EUDPR, which refer instead to those involved in the processing of personal data as controllers and processors. The EDPS thus recommends to define the respective roles of the Agency (Frontex), eu-LISA, Member States’ and EU agencies in terms of (joint) controllership/processorship for the relevant processing operations, to ensure accountability for (joint) controllers and processors.
14. The EDPS recalls that the concepts of controller, joint controller and processor play a crucial role in the application of data protection law, since they determine who is responsible for compliance with different data protection rules including data security requirements, and how data subjects can exercise their rights in practice. Furthermore, in line with Articles 28 of the EUDPR and 26 of the GDPR, where two or more controllers together determine the purposes and means of the processing, they are considered to be joint controllers. In addition, the concept of controllership does not necessarily refer to one single entity, but can also involve multiple parties playing a role in a processing operation. As a result, each of the actors involved would have obligations under data protection law. In case of joint controllers, the distribution of tasks between them has to be specified by means of an arrangement between them. Contrary to what is mentioned in Annex, Part 2 point 3(c), of the draft Proposal, it is not up to the Agency to specify who the controllers will be, but the identification of the latter should result from their role in the data processing, defined by the draft Proposal itself.

### **2.4. Technical architecture of the system**

15. Article 6(1)(a) of Regulation 2020/493 requires the Commission to establish the technical architecture of the FADO system. The EDPS notes that according to the draft Proposal, the FADO system will offer a single point for access for the public. A different component dedicated to the verification and quality control of information prior to their publication and/or insertion to the system is also provisioned. In addition, a public domain with no access controls, a part for sensitive non-classified information, as well as a part for EU Restricted (classified) information is introduced by the draft Proposal.

---

<sup>9</sup> For example, neither the Regulation nor the draft Proposal define what specimens of documents are. It is the EDPS’ understanding that specimens in the sense of Regulation 2020/493 and of this draft Proposal may contain personal data (at least a photograph). It would be beneficial to include a clear definition, explicitly identifying the categories of personal data concerned.

16. The EDPS considers that the technical architecture of the system should be defined more precisely in the draft Proposal. In particular, the draft Proposal should enable the identification of where different types of personal data would be stored and which form the single point for public access would take (e.g. would that be a public website, would it also serve access by other agencies, etc.), including communication and interaction between different components. Moreover, information on the channels to be used to transmit personal data should be provided.
17. Therefore, the EDPS considers that the draft Proposal should provide a more detailed description of the technical architecture of the system, including all the above mentioned elements and explicitly differentiating the description of the classified part (including infrastructure, channels for input/output). The draft proposal should also define which type of access - and for which purpose(s) - the different users of the system would have, to each part or process of the system.

## **2.5. Recipients of personal data**

18. The draft Proposal, Part 2, point 3 (d) of the Annex, would leave it to the Agency to define recipients of each type of personal data processed in the system, and their access rights. In the EDPS view, this contradicts Article 4(5) of Regulation (EU) 2020/493, which requires the Commission to adopt delegated acts establishing measures granting access to information stored in the FADO system to the actors listed in paragraph 4 of the same Article. The EDPS is of the view that such a delegated act would also have to cover the recipients of personal data, leaving no or very limited and clearly specified margin of appreciation to the Agency. On this occasion, the EDPS invites the Commission to consult him on any draft delegated acts under Article 4(5) of the Regulation.

Brussels, 30 January 2023

*(e-signed)*  
Wojciech Rafał WIEWIÓROWSKI