

EDPS Formal comments on the draft Commission Implementing Regulation on the functioning of the information system pursuant to Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation

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 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 ('EUDPR')¹, and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:

1. Introduction and background

1. On 22 October 2024, the European Commission consulted the EDPS on the draft Commission Implementing Regulation on the functioning of the information system pursuant to Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation ('the draft Implementing Regulation').
2. The objective of the draft Implementing Regulation is to lay down the rules for the functioning of the Information System², including rules for the protection of personal data and exchange of data with other IT systems³.
3. Regulation (EU) 2023/1115 lays down rules to minimise the Union's contribution to deforestation and forest degradation. It does this by imposing due diligence

¹ OJ L 295, 21.11.2018, p. 39.

² Article 3(a) of the draft Implementing Regulation provides that 'Information System' means the information system established and maintained by the Commission pursuant to Article 33 of Regulation (EU) 2023/1115.

³ Article 1 of the draft Implementing Regulation; Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150, 9.6.2023, p. 206–247.

obligations on operators and traders⁴ placing on, making available on, or exporting from the Union market certain commodities and products⁵. Operators are required to formally take responsibility for the compliance of the relevant products that they intend to place on the market or export by making available due diligence statements⁶. The Commission is required to develop and maintain an information system⁷, in which the Due Diligence Statements shall be submitted and managed⁸. Therefore it is necessary to set out the practical and operational arrangements of the functioning of the Information System⁹.

4. The draft Implementing Regulation is adopted pursuant to Article 33(3) of Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010. The said article empowers the European Commission to establish rules for the functioning of the information system that will contain the due diligence statements made available by operators, including rules for the protection of personal data and exchange of data with other IT systems.
5. The present formal comments of the EDPS are issued in response to a consultation by the European Commission pursuant to Article 42(1) of EUDPR. The EDPS welcomes the reference to this consultation in Recital 24 of the draft Implementing Regulation.
6. 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 acts¹⁰.
7. 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 Implementing Regulation that are relevant from a data protection perspective.

2. Comments

2.1. General comments

⁴ According to Article 3(c) of the draft Implementing Regulation, operators and traders, and their authorized representatives, if applicable, pursuant to Regulation (EU) 2023/1115 which are identified by individual registration within EU Login, are defined as 'Information System users'.

⁵ Recital 1 of the draft Implementing Regulation.

⁶ Recital 2 of the draft Implementing Regulation. See also Article 4 of Regulation (EU) 2023/1115.

⁷ See article 33 of Regulation (EU) 2023/1115 and recital 4 of the draft Implementing Regulation.

⁸ Article 2(2) and 4(1) of the draft Implementing Regulation.

⁹ Recital 5 of the draft Implementing Regulation.

¹⁰ 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.

8. The EDPS welcomes that the draft Implementing Regulation contains a specific provision on the processing of personal data in the Information System and lists the purposes for which such processing may take place¹¹.
9. The EDPS positively notes that Article 12(2) of the draft Implementing Regulation exhaustively lists all categories of personal data of the registered Information System Users to be processed. In this regard, the EDPS recalls that the personal data processed shall be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed, in accordance with the principle of data minimisation¹².
10. Recital 10 of the draft Implementing Regulation provides that the Information System should process data, including ‘*any other information deemed necessary to fulfil the requirements under Regulation (EU) 2023/1115*’. For the sake of clarity, the EDPS recommends that the draft Implementing Regulation avoid such open-ended terms, insofar as personal data are concerned, and suggests aligning the recital with Article 12(2).
11. The EDPS takes note of the data localisation requirements set by the draft Implementing Regulation, which provide that the storage of data shall be performed using information technology infrastructure located in the EEA¹³.
12. The EDPS welcomes that the draft Implementing Regulation determines the storage period of Due Diligence Statements, as well as the justification for why such retention period would be necessary¹⁴.

2.2. Roles and responsibilities

13. In Article 12(6), the draft Implementing Regulation stipulates that without prejudice to the data processing activities set out in Article 14, each Information System actor shall be a separate controller with respect to the data processing activities which the Information System actor performs. Article 13(3) of the draft Implementing Regulation provides that where the Commission processes personal data in the operation of the Information System for the purpose of exchanging information, it shall be considered a separate controller for the personal data processing activities it carries out pursuant to Article 27 of Regulation (EU) 2023/1115. Considering that the Commission is an Information System actor, the EDPS recommends the deletion of Article 13(3) to increase clarity¹⁵.

¹¹ Article 12(1) of the draft Implementing Regulation.

¹² Article 5(c) of 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 (‘GDPR’), OJ L 119, 4.5.2016, p. 1–88; Article 4(c) EUDPR.

¹³ Article 12(4) of the draft Implementing Regulation.

¹⁴ Recital 11 of the draft Implementing Regulation; Articles 4(3) and 5(4) of Regulation (EU) 2023/1115.

¹⁵ In this case, Article 12(6) of the draft Implementing Regulation should be amended to make reference to the definition of controller in both the GDPR and EUDPR.

14. The draft Implementing Regulation states that the Commission shall be a processor within the meaning of Article 3, point (12), of Regulation (EU) 2018/1725 with respect to the processing of personal data when registering Information System users in the Information System¹⁶. At the same time, the draft Implementing Regulation also provides that the Commission shall be a controller within the meaning of Article 3, point (8), of Regulation (EU) 2018/1725 with respect to the processing of personal data of the Information System users¹⁷. The EDPS understands that both provisions pertain to user management and the processing of personal data concerning Information System users. Against this background, the EDPS recommends ensuring that the Commission's role is defined consistently in both cases.
15. The draft Implementing Regulation provides that when Information System actors¹⁸ carry out implementation and enforcement in cooperation pursuant to Article 21 of Regulation (EU) 2023/1115, the concerned Information system actors shall be joint controllers, within the meaning of Article 26(1) GDPR, for the transmission, storage and other processing of personal data in the Information System in the context of such particular cooperation¹⁹. The EDPS recalls that in case of joint controllership, it is important for joint controllers to determine their respective responsibilities for compliance with their data protection obligations in accordance with Article 26 GDPR.
16. The EDPS also observes that the draft Implementing Regulation provides that the Commission shall be a processor within the meaning of Article 3(12) EUDPR for the processing of personal data carried out for joint investigations pursuant to Article 21 of Regulation (EU) 2023/1115 carried out in the context of the implementation and enforcement under Regulation (EU) 2023/1115²⁰. Against this background, the EDPS understands that the reference to Information System actors as joint controllers in Article 14 of the draft Implementing Regulation aims to refer only to competent authorities under Article 21 of Regulation (EU) 2023/1115 and not to the Commission. For the avoidance of doubt, the EDPS recommends referring to 'competent authorities' rather than to 'Information System actors' in Article 14 of the draft Implementing Regulation.

2.3. Coordinated supervision

17. In addition, the draft Implementing Regulation stipulates that the national Supervisory Authorities and the European Data Protection Supervisor, each acting within the scope of their respective competence, shall ensure coordinated supervision of the Information System and its use by Information System actors and Information System users²¹. In light of Article 62(1) EUDPR, the EDPS considers that Article 12(7)

¹⁶ Article 13(1) of the draft Implementing Regulation.

¹⁷ Article 13(2) of the draft Implementing Regulation.

¹⁸ According to Article 3(b) of the draft Implementing Regulation, 'Information System actor' means the competent authorities and customs authorities pursuant to Regulation (EU) 2023/1115, the Commission, to carry out the tasks conferred on them in accordance with Regulation (EU) 2023/1115.

¹⁹ Article 14 of the draft Implementing Regulation.

²⁰ Article 13(5) of the draft Implementing Regulation.

²¹ Article 12(7) of the draft Implementing Regulation.

of the draft Implementing Regulation should include an explicit mention to Article 62 EUDPR, as follows: “The national supervisory authorities and the European Data Protection Supervisor, each acting within the scope of their respective competences, shall cooperate with each other to ensure the coordinated supervision of the Information System, in accordance with Article 62 of Regulation (EU) 2018/1725”.

Brussels,