

EDPS Formal comments on the draft Commission Implementing Regulation on technical arrangements for developing, maintaining and employing electronic systems for the exchange and storage of information under Regulation (EU) No 952/2013 of the European Parliament and the Council

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 3 December 2024, the European Commission consulted the EDPS on the draft Commission Implementing Regulation on technical arrangements for developing, maintaining and employing electronic systems for the exchange and storage of information under Regulation (EU) No 952/2013 of the European Parliament and the Council ('the draft implementing regulation').
2. The overall objective of the draft implementing regulation is to specify important technical arrangements for developing, maintaining and employing electronic systems for the exchange and storage of information under Regulation (EU) No 952/2013² ('Union Customs Code' or 'UCC'). The draft implementing regulation follows four predecessor Commission implementing regulations of 2017³, 2019⁴, 2021⁵,

¹ OJ L 295, 21.11.2018, p. 39.

² Regulation (EU) No 952/2013 of the European Parliament and the Council of 9 October 2013 laying down the Union Customs Code, OJ L 269, 10.10.2013, p. 1.

³ Commission Implementing Regulation (EU) 2017/2089 of 14 November 2017 on technical arrangements for developing, maintaining and employing electronic systems for the exchange of information and for the storage of such information under the Union Customs Code, OJ L 297, 15.11.2017, p. 13–21.

⁴ Commission Implementing Regulation (EU) 2019/1026 of 21 June 2019 on technical arrangements for developing, maintaining and employing electronic systems for the exchange of information and for the storage of such information under the Union Customs Code, OJ L 167, 24.6.2019, p. 3–17.

⁵ Commission Implementing Regulation (EU) 2021/414 of 8 March 2021 on technical arrangements for developing, maintaining and employing electronic systems for the exchange and storage of information under Regulation (EU) No 952/2013 of the European Parliament and of the Council, OJ L 81, 9.3.2021, p. 37–64.

and 2023⁶, the latter three replacing the previous one and laying down the technical arrangements for additional electronic systems. The current draft implementing regulation would additionally lay down the technical arrangements concerning the UCC Guarantee Management system. It would furthermore grant the Commission access to the central component of the Economic Operator Registration and Identification (EORI) system, a measure that, according to the recitals, aims to ensure uniform application of customs legislation and customs controls and to enable the Commission to provide Member States with enriched data and other information pertinent for the identification of risks through processing, comparing and analysing data from different sources at European Union level, and more generally supports the role of the Commission under Article 17(1) of the Treaty on European Union⁷.

3. Another objective of the current draft implementing regulation is to ensure business continuity by providing for the transitional rules and supporting mechanisms related to the Automated Export System (AES) to stay in place until 31 December 2025⁸.
4. The draft implementing regulation is adopted pursuant to Article 17 of the Union Customs Code. With regard to the procedural rules on the exchange and storage of information which can be made by means other than the electronic data-processing techniques, it is adopted pursuant to Article 8(1) point (b) of the UCC and with regard to measures to ensure uniform application of the customs controls, including the exchange of risk information and risk analysis results pursuant to Article 50(1) of the UCC.
5. The EDPS previously issued formal comments on the draft Implementing Regulation(s) on technical arrangements for developing, maintaining and employing electronic systems for the exchange of information and for the storage of such information under the Union Customs Code on 11 December 2020⁹, as well as on 20 March 2023¹⁰. Furthermore, the EDPS issued his Opinion 31/2023 on the Proposal for a Regulation establishing the Union Customs Code and the European Union Customs Authority on 11 July 2023¹¹. That Proposal would eventually replace the current basic act, i.e. Regulation (EU) No 952/2013.
6. The present formal comments of the EDPS are issued in response to a consultation by the European Commission pursuant to Article 42(1) of the EUDPR. The EDPS

⁶ [Commission Implementing Regulation \(EU\) 2023/1070 of 1 June 2023 on technical arrangements for developing, maintaining and employing electronic systems for the exchange and storage of information under Regulation \(EU\) No 952/2013 of the European Parliament and the Council](#), OJ L 143, 02/06/2023, p. 65–104.

⁷ Recital 9 of the draft implementing regulation.

⁸ Recital 12 of the draft implementing regulation.

⁹ [EDPS Formal comments on the draft Implementing Regulation on technical arrangements](#) for developing, maintaining and employing electronic systems for the exchange of information and for the storage of such information under the Union Customs Code, issued on 11 December 2020.

¹⁰ [EDPS Formal comments on the draft Commission Implementing Regulation on technical arrangements](#) for developing, maintaining and employing electronic systems for the exchange and storage of information, issued on 20 March 2023.

¹¹ [EDPS Opinion 31/2023 on the Proposal for a Regulation establishing the Union Customs Code and the European Union Customs Authority](#), issued on 11 July 2023.

welcomes the reference to this consultation in Recital 24 of the draft implementing regulation and recommends to add the issuance date of the EDPS' formal comments.

7. 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 acts¹².
8. 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

9. Article 6(1) of the Union Customs Code requires that all exchanges of information, such as declarations, applications or decisions, between customs authorities and between economic operators and customs authorities, and the storage of that information, as required under the customs legislation, are made by using electronic data-processing techniques.
10. According to Article 16(1) of the Union Customs Code, Member States shall cooperate with the Commission to develop, maintain and employ electronic systems for the exchange of information between customs authorities and with the Commission and for the storage of such information, in accordance with the Code.
11. According to Article 17 subparagraph 1, the Commission shall specify, by means of implementing acts, the technical arrangements for developing, maintaining and employing the electronic systems referred to in Article 16(1) of Union Customs Code.
12. According to Article 46(2) of the Union Customs Code, customs controls, other than random checks, shall primarily be based on risk analysis using electronic data-processing techniques, with the purpose of identifying and evaluating the risks and developing the necessary counter-measures, on the basis of criteria developed at national, Union and, where available, international level. According to Article 46(3), customs controls shall be performed within a common risk management framework, based upon the exchange of risk information and risk analysis results between customs administrations and establishing common risk criteria and standards, control measures and priority control areas. According to Article 46(5), customs authorities shall exchange risk information and risk analysis results where either the

¹² 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.

risks are assessed by a customs authority as being significant and requiring customs control and the results of the control establish that the event triggering the risks has occurred, or the control results do not establish that the event triggering the risks has occurred, but the customs authority concerned considers the threat to present a high risk elsewhere in the Union.

13. According to Article 50(1) of the Customs Code, the Commission shall adopt, by means of implementing acts, measures to ensure uniform application of the customs controls, including the exchange of risk information and risk analysis results, the common risk criteria and standards, the control measures and the priority control areas referred to in Article 46(3).
14. The EDPS has already noted in his formal comments issued on 20 March 2023, that the basic act, in particular Article 16(1) of the Union Customs Code, does not further elaborate on the electronic systems for the exchange of information between customs authorities and with the Commission and for the storage of such information. The basic act only occasionally refers explicitly to the exchange of data, such as in the case of risk management. Against this background, the EDPS recommended providing a more comprehensive legal basis for each electronic system at the level of the basic act, with clearly defined purposes, roles and responsibilities, categories of personal data, categories of data subjects and storage duration for each system. Similar recommendations were made by the EDPS in the context of his Opinion 31/2023 on the Proposal for a Regulation establishing the Union Customs Code and the European Union Customs Authority on 11 July 2023¹³.
15. For the purposes of this consultation, however, the EDPS will focus on the draft implementing regulation, having regard to the existing empowering provisions included in the Union Customs Code.

2.2. Access to personal data in the Economic Operator Registration and Identification ('EORI') system by the Commission

16. The draft implementing regulation would provide the Commission with access to personal data in the Economic Operator Registration and Identification ('EORI') system for two purposes: a) First, to be able to provide Member States with enriched data and other information pertinent for the identification of risks through processing, comparing and analysing data from different at European Union level¹⁴. b) Second, the EORI system should also be used by the Commission to ensure to ensure the uniform, effective and efficient implementation of customs legislation¹⁵.
17. Consequently, Article 13 of the implementing regulation would be complemented by a paragraph 4 allowing the use of the customs reference services *inter alia* by the Commission to consult, replicate and validate data from the EORI system, for the

¹³ [EDPS Opinion 31/2023 on the Proposal for a Regulation establishing the Union Customs Code and the European Union Customs Authority](#), issued on 11 July 2023.

¹⁴ Recital 9 of the draft implementing regulation.

¹⁵ OJ C 202, 7.6.2016; [consolidated version of 2016](#).

purposes laid down by Union law. Furthermore, Article 31 would be amended in paragraph 1 by adding the Commission as a user and by adding two purposes for the processing in the EORI system as Article 31(1) letter (d), to ensure the uniform application of customs controls and customs legislation, and letter (e), to minimise risks, including through data mining and exchanging risk information. The new Article 31(2) of the draft implementing regulation finally provides that the EORI system may also be used by the Commission and by the Member States where the legal basis for such use is laid down by Union law. In the same vein, the new Article 116(6) states that data registered in the common components of the EORI system may be accessed and processed by the Commission.

18. The EDPS considers that the purpose of ‘ensuring the uniform application of customs controls and customs legislation’ does not provide a clear indication of which purposes are being pursued or to determine which categories of personal data would be relevant, necessary and proportionate to the purpose¹⁶. Against this background, the EDPS recommends to revise these provisions of the draft implementing regulation to make reference to the specific purposes for which personal data would be processed or, at a minimum, to make reference to specific provisions of Union customs legislation or other Union legislation that would justify the processing of personal data.

2.3. Deployment of data mining techniques

19. Article 31(1)(e), Article 33(1)(b) and Article 100(3) of the draft implementing regulation explicitly provide for ‘data mining’ techniques to be deployed. Article 2 point (7) of the draft implementing regulation defines ‘data mining’ as the analysing of large volumes of data in digital form, by any analytical technique, in order to generate information which includes but is not limited to patterns, trends and correlations in order to contribute to mitigating risks and inform decision-making.
20. The EDPS considers that the authorisation to use ‘data mining’ techniques, combined with this definition, is insufficiently clear and precise as to the categories of personal data and their source¹⁷. A clear specification of the categories of personal data and the sources with which those personal data may be combined (or compared) is necessary in order to establish that the processing of personal data in the context of customs risk management is limited to what is strictly necessary.

¹⁶ See also [EDPS Opinion 31/2023 on the Proposal for a Regulation establishing the Union Customs Code and the European Union Customs Authority](#), issued on 11 July 2023, at paragraph 14-18.

¹⁷ In this regard, the EDPS observes that recital (9) of the draft implementing regulation outlines as one of the objectives of the proposed amendments to enable the Commission to provide Member States with enriched data and other information pertinent for the identification of risks through processing, comparing and analysing data ‘*from different sources at European Union level*’ without clear indications regarding the sources or categories of personal data concerned.

21. The EDPS recalls that a risk analysis based on the processing of large volumes of data may amount to automated decision-making, depending on whether there is prior and meaningful assessment by a human involved, or not.
22. The EDPS recommends to clarify in the enacting terms whether the ‘data mining’ provided for produces the risk assessment autonomously or only after a human assessment of the findings of the automated process.
23. In the case of a solely automatic data mining for risk analysis process, the EDPS recalls that Article 22 GDPR and Article 24 EUDPR grant the data subject a right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her. In order to authorise such decision-making, the draft implementing regulation, according to Article 22(2)(b) GDPR or Article 24(2)(b) EUDPR, would have to lay down suitable measures to safeguard the data subject’s rights and freedoms and legitimate interests.
24. Recital 71 of the GDPR mentions as examples for safeguards a specific information to the data subject and the right to obtain human intervention, to express his or her point of view, to obtain an explanation of the decision reached after such assessment and to challenge the decision¹⁸.
25. In addition, controllers should carry out frequent assessments on the data sets they process to check for any bias, and develop ways to address any prejudicial elements, including any over-reliance on correlations¹⁹. Systems that audit algorithms and regular reviews of the accuracy and relevance of automated decision-making including profiling are other useful measures²⁰.
26. The EDPS further recalls that according to the case law of the CJEU, the risk criteria to be used to select persons by means of an automated processing, when resulting in individual decisions, should: (1) be based on circumstances that are reliable and directly linked to objective factors; (2) not entail a (direct or indirect) risk of discrimination (such as race, ethnic origin, religion, political orientation, sexual orientation); and (3) not be excessively broad²¹. Such criteria should apply in the context of customs controls²².

¹⁸ The EDPS notes, however, that some of these safeguards may potentially conflict with the envisaged restriction of data subjects rights - see further section 2.5 below.

¹⁹ EDPB [Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679](#), p. 28.

²⁰ *Ibid.*

²¹ See the Opinion 1/15 of the Court (Grand Chamber), *PNR Canada*, 26 July 2017, ECLI:EU:C:2017:592, 172." [...] *the extent of the interference which automated analyses of PNR data entail in respect of the rights enshrined in Articles 7 and 8 of the Charter essentially depends on the pre-established models and criteria and on the databases on which that type of data processing is based. Consequently, [...], the pre-established models and criteria should be specific and reliable, making it possible, as the Advocate General has observed at point 256 of his Opinion, to arrive at results targeting individuals who might be under a „reasonable suspicion“ of participation in terrorist offences or serious transnational crime and should be non-discriminatory. [...]*".

²² See also [EDPS Opinion 31/2023 on the Proposal for a Regulation establishing the Union Customs Code and the European Union Customs Authority](#), issued on 11 July 2023, at paragraph 29.

27. Against this background, the EDPS recommends a careful assessment and appropriate mitigation of potential adverse effects on the persons subject of control, in particular having regard to any possible stigmatisation or prejudice against affected persons²³.

2.4. Roles and responsibilities

28. Article 119 of the draft implementing regulation attributes the roles of controller and processor. The amendment in the new letter (g), refers explicitly to the necessity under Article 26 of the GDPR and Article 28 of the EUDPR to conclude joint controllership agreements, where applicable. As this addition would only repeat an already existing obligation, the EDPS recommends to remove it from the enacting terms. However, the EDPS welcomes the intention to remind customs authorities of their obligation and invites the Commission to recall this obligation by way of a recital.

2.5. Restriction of data subjects rights

29. The new Article 120 provides for restrictions of data subjects' rights for the case that the exercise of the right would jeopardise inter alia "*the management of a specific risk for the security and safety of the financial interests of the Union or a Member State, identified in relation to a natural person in the field of customs*"²⁴.

30. The EDPS is of the opinion that the terms "the management of a specific risk for the security and safety of the financial interests of the Union or a Member State" are not sufficiently clear to give individuals an adequate indication of the circumstances in and conditions under which controllers are empowered to resort to any such restrictions, as required by Article 23 GDPR²⁵. The EDPS therefore recommends to replace the formula by the specific case scenarios that are envisaged by this provision.

2.7. Data storage

31. The EDPS welcomes that Article 121 of the draft implementing regulation would be amended to clarify the purposes for which personal data shall be retained for the defined retention period, in contrast with previous versions of the implementing regulation on the technical arrangements.

²³ *Ibid*, paragraph 30.

²⁴ Article 120(1) sentence 1 of the draft implementing regulation.

²⁵ [EDPB Guidelines 10/2020 on restrictions under Article 23 GDPR](#), Version 2.1, adopted on 13 October 2021, para. 17. See also Judgment of the Court of Justice of 24 February 2022, '*SS' SIA v Valsts ieņēmumu dienests*, C-175/20, ECLI:EU:C:2022:124, in particular at paragraph 56.

32. However, the EDPS notes that in Article 121, irrespective of the system and its purposes, the storage period would be set for 10 years. The EDPS recommends to provide further clarifications, by way of a recital, as to why it necessary to continue to store personal data for this period of time in order to achieve the purposes of the processing.
33. Article 121(2) letter (b) addresses a “beneficiary country” within the context of the Registered Exporter (REX) system. The EDPS notes that an implementing act cannot directly oblige third countries. Therefore, any obligation to erase personal data after the storage period would, absent an international agreement, need to be directed towards the Commission or Member States.

2.8. Reference to this consultation

34. Lastly, the EDPS recommends to add the issuance date of these formal comments to the reference in recital 24.

Brussels, 30 January 2025

(e-signed)

Wojciech Rafał WIEWIÓROWSKI