



EUROPEAN DATA PROTECTION SUPERVISOR

The EU's independent data
protection authority

4 July 2023

Opinion 30/2023

on the Proposal for a Regulation
amending Council Decision
2009/917/JHA as regards its alignment
with data protection rules

The European Data Protection Supervisor (EDPS) is an independent institution of the EU, responsible under Article 52(2) of Regulation 2018/1725 ‘With respect to the processing of personal data... for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to data protection, are respected by Union institutions and bodies’, and under Article 52(3)‘... for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data’.

Wojciech Rafał Wiewiórowski was appointed as Supervisor on 5 December 2019 for a term of five years.

*Under **Article 42(1)** of Regulation 2018/1725, the Commission shall ‘following the adoption of proposals for a legislative act, of recommendations or of proposals to the Council pursuant to Article 218 TFEU or when preparing delegated acts or implementing acts, consult the EDPS where there is an impact on the protection of individuals’ rights and freedoms with regard to the processing of personal data’.*

This Opinion relates to the Proposal for a Regulation of the European Parliament and of the Council amending Council Decision 2009/917/JHA, as regards its alignment with Union rules on the protection of personal data¹. This Opinion does not preclude any future additional comments or recommendations by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, this Opinion is without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Regulation (EU) 2018/1725. This Opinion is limited to the provisions of the Proposal that are relevant from a data protection perspective.

¹ COM(2023) 244 final.

Executive Summary

On 11 May 2023, the European Commission issued the Proposal for a Regulation of the European Parliament and of the Council amending Council Decision 2009/917/JHA, as regards its alignment with Union rules on the protection of personal data. Council Decision 2009/917/JHA is the legal act establishing the Customs Information System (CIS) in the former third pillar of the EU. Besides this legal act, there is Council Regulation (EC) No 515/97 which established the CIS of the former first pillar. The latter legal act is not affected by the Proposal.

The objective of the Proposal is to align the data protection rules in Council Decision 2009/917/JHA with the principles and rules laid down in Directive (EU) 2016/680 ('the LED'), in order to provide a strong and coherent personal data protection framework in the Union.

The EDPS focuses in this Opinion on the matter of granting international or regional organisations access to the CIS, on the need for further clarity regarding applicable law and supervision, and on the potential to further harmonize supervision coordination with regard to the CIS.

While the EDPS welcomes the introduction of certain additional safeguards as regards access by international or regional organisations, he also recommends laying down further substantive conditions that would go beyond the provisions on international transfers. The EDPS further recommends clarifying the role of the EDPS in the supervision of the CIS, as well as the applicable data protection rules. Lastly, the EDPS invites the EU co-legislators to examine how supervision coordination for the two different CIS under Council Decision 2009/917/JHA and Council Regulation (EC) No 515/97 can be reconciled in one body.

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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')², and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. Introduction

1. On 11 May 2023, the European Commission issued the Proposal for a Regulation of the European Parliament and of the Council amending Council Decision 2009/917/JHA, as regards its alignment with Union rules on the protection of personal data³ ('the Proposal'). Council Decision 2009/917/JHA is the legal act establishing the Customs Information System (CIS) in the former third pillar of the EU. Besides this legal act, there is the Council Regulation (EC) No 515/97⁴ which established the CIS of the former first pillar. The latter legal act is not affected by the Proposal.
2. The objective of the Proposal is to align the data protection rules in Council Decision 2009/917/JHA with the principles and rules laid down in Directive (EU) 2016/680⁵ ('the LED'), in order to provide a strong and coherent personal data protection framework in the Union⁶.
3. A legislative proposal to this effect was already envisaged in the Commission Communication of 24 June 2020 entitled 'Way forward on aligning the former third pillar acquis with data protection rules'⁷. That Communication identified current Council Decision 2009/917/JHA on the use of information technology for customs purposes [CIS former third pillar] and nine other legal acts that should be aligned with the LED. Pursuant to Article 62(6) of the LED, the Commission is required to review acts of Union law which regulate the processing of personal data by the competent authorities for the purposes set

² OJ L 295, 21.11.2018, p. 39.

³ COM(2023) 244 final.

⁴ Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ L 82, 22.3.1997, p. 1–16, as amended.

⁵ Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89.

⁶ COM(2023) 244 final, p. 1.

⁷ Communication from the Commission to the European Parliament and the Council, Way forward on aligning the former third pillar acquis with data protection rules, COM/2020/262 final.

out in Article 1(1) of the LED, in order to assess the need to align those acts with the LED and to make, where appropriate, the necessary proposals to amend these acts to ensure a consistent approach to the protection of personal data within the scope of the LED.

4. The present Opinion of the EDPS is issued in response to a consultation by the European Commission of 11 May 2023, pursuant to Article 42(1) of EUDPR. The EDPS welcomes the reference to this consultation in Recital 8 of the Proposal. In this regard, the EDPS also positively notes that he was already previously informally consulted pursuant to recital 60 of EUDPR.

2. General remarks

5. The EDPS welcomes the alignment of the Council Decision with the LED as proposed by the Commission and in particular with regard to purpose specification, limitation to specific categories of data subjects and categories of personal data, and conditions for subsequent processing.
6. The EDPS further welcomes the decision to replace the term ‘serious contravention’ by the term ‘criminal offences’ throughout the text, including in Articles 15(3) and 22, and the additional clarifications provided in Recital 3 of the Proposal. The EDPS considers it particularly important and welcomes that the Commission recalls that the objective of the CIS should remain limited to assisting in connection to the prevention, investigation, detection or prosecution of the criminal offences under national laws in respect of which national customs administrations are competent. In conclusion, the Commission alludes to the fact that as a result, not all criminal offences should be considered to be covered, but only those which are particularly relevant in the context of customs (e.g., illicit drugs trafficking, illicit weapons trafficking and money laundering). In the same vein, it is also useful that the recital recalls that the introduction of the term ‘criminal offences’ would not affect the specific requirements set out in Council Decision 2009/917/JA regarding the establishment and sending of a list of relevant criminal offences under national law.
7. The EDPS focuses in this Opinion on the matter of granting international or regional organisations access to the CIS, on the need for further clarity regarding applicable law and supervision, and on the potential to further harmonize supervision coordination with regard to the CIS.

3. Access to the CIS by international or regional organisations

8. The EDPS notes that Article 1(6) of the Proposal would introduce changes to Article 7(3) of the Council Decision regarding access to the Customs Information System by international or regional organisations. While the provision currently requires the Council to take into account any reciprocal arrangements and any opinion on the adequacy of data protection measures by the Joint Supervisory Authority, the Proposal would make access dependent

on compliance with the conditions for international transfers of data under the LED. In addition, and in line with the new model of coordinated supervision, the opinion of the Joint Supervisory Authority would be replaced by consultation of the EDPB.

9. While the EDPS welcomes the clarification that access to the CIS by international or regional organisations should be “exceptional”, he considers that the Proposal should also specify substantive criteria on the basis of which such exceptional access would be granted.
10. The EDPS recalls that providing access to large-scale IT systems of the Union to international organisations should remain an exception. In fact, most of the legal acts establishing Union large-scale IT systems in the field of the JHA actually lay down a prohibition of the transfer of the data stored in them to third countries or international organisations, with some clearly defined exceptions⁸.
11. Therefore, the EDPS recommends further enhancing Article 7(3) of the Council Decision by ensuring that access to CIS by international or regional organisations would be possible only if specific substantive conditions, defining especially the types of cooperation that could warrant such access, the types of international or regional organisations, the specific purposes that could justify granting of access, the types of personal data to be accessed, as well as technical and organisational safeguards applicable in that context.

4. Role of the European Data Protection Supervisor

12. The EDPS welcomes the decision to abandon the model of joint supervision of the CIS by a Joint Supervisory Authority, in line with the CIS for the former first pillar⁹, and have the processing activities at European level monitored by the EDPS. The general competence for the EDPS to supervise the CIS follows from Article 52(3) EUDPR¹⁰ in the absence of a specific provision. The new Article 26 of the Council Decision, as amended by the Proposal, would only address the necessary coordinated supervision, without clarifying the role of the EDPS¹¹.
13. However, as a rule, the co-legislators have so far not relied on Article 52(3) EUDPR alone when establishing coordinated supervision within the framework of the EDPB, but clarified

⁸ See for example Article 65 of Regulation (EU) 2018/1862 (SIS), Article 31 of Regulation (EC) No 767/2008 (VIS), Article 41 of Regulation (EU) 2017/2226 (EES), Article 65 of Regulation (EU) 2018/1240 (ETIAS) and others.

⁹ cf. Article 37 of Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ L 82, 22.3.1997, p. 1–16, as amended.

¹⁰ Under Article 52(3) of the EUDPR, the European Data Protection Supervisor shall be responsible for monitoring and ensuring the application of the provisions of this Regulation and of any other Union act relating to the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data by a Union institution or body, and for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data. As the Commission will be the processor for all data in the CIS, there will be a dual competence, together with the supervisory authorities of the Member States, to supervise this processing.

¹¹ In contrast, Council Regulation (EC) No 515/97, which established the CIS in the former first pillar of the EU, provides in Article 37(3a) that the European Data Protection Supervisor shall supervise compliance of the CIS with the EUDPR (and provides for a coordination between EDPS and Member States’ supervisory authorities in para. 4 of the same Article).

explicitly that the EDPS is responsible for monitoring the processing of personal data by the respective EU institution or agency and for ensuring that it is carried out in accordance with the respective legal act, for example in Article 70 of Regulation (EU) 2018/1862¹², Article 43 of Regulation (EU) 2016/794¹³, Article 42 of Regulation (EC) No 767/2008¹⁴, Article 56 of Regulation (EU) 2017/2226¹⁵ and Article 67 of Regulation (EU) 2018/1240¹⁶. For the sake of clarity and legal security, the EDPS recommends to maintain this practice and clarify the role of the EDPS in the Proposal, using the cited provisions as a blueprint.

5. Applicable data protection law

14. In the same vein, the EDPS takes note of Article 1(11) which would provide for an amendment of Article 20 according to which Directive (EU) 2016/680 shall apply to the processing of personal data under this Decision. However, the LED cannot apply to the activities of the Commission as processor of the CIS directly. While it is possible that the Member States as controllers reach agreements with the Commission as processor on the basis of national laws implementing the LED, the processing activities of the Commission, including the CIS as such, would still fall under the EUDPR (whereas the processing operations in the CIS by the competent authorities of the Member States fall under the national laws implementing the LED).
15. Therefore, the EDPS recommends to amend Article 1(11) of the Proposal to also refer to the EUDPR in addition of the LED, as applicable. As both legal acts would apply *de lege*, alternatively Article 1(11) could also provide for the deletion of Article 20, and instead of a provision in the enacting terms, a recital could confirm the applicability of the relevant data protection rules.

¹² Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, OJ L 312, 7.12.2018, p. 56–106.

¹³ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, p. 53–114, as amended by Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022 amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation, OJ L 169, 27.6.2022, p. 1–42.

¹⁴ Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ L 218, 13.8.2008, p. 60–81, as amended by Article 1(42) of Regulation (EU) 2021/1134 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EC) No 767/2008, (EC) No 810/2009, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861, (EU) 2019/817 and (EU) 2019/1896 of the European Parliament and of the Council and repealing Council Decisions 2004/512/EC and 2008/633/JHA, for the purpose of reforming the Visa Information System, OJ L 248, 13.7.2021, p. 11–87.

¹⁵ Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011, OJ L 327, 9.12.2017, p. 20–82.

¹⁶ Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, OJ L 236, 19.9.2018, p. 1–71.

6. Undivided supervision coordination for the CIS as a whole

16. The dissolution of the Joint Supervisory Authority and supervision at EU level vested in the EDPS, would bring about the need to coordinate supervision at Member State level with the EDPS. The Proposal provides that the model of coordinated supervision pursuant to Article 62 of the EUDPR should apply to the CIS of the former third pillar. That means the framework of the EDPB would be used to coordinate among Member States' supervisory authorities and with the EDPS, rather than setting up a specific coordination group. The EDPS welcomes the choice for this horizontal model of supervision which applies to a steadily growing number of important electronic systems. In the customs sector, the electronic systems established under the Union Customs Code¹⁷ already follow this model of supervision coordination¹⁸.
17. However, it should be noted that the replacement of the joint supervision model by coordinated supervision provides for an opportunity to consolidate supervision coordination for the two different CIS under Council Decision 2009/917/JHA and Council Regulation (EC) No 515/97. Council Regulation (EC) No 515/97 provides already for coordinated supervision, but follows the model of system-specific supervision coordination. A specific body, the CIS Supervision Coordination Group, has been set up for this purpose. The EDPS regrets that, at this point in time, there is still no prospect of transferring the supervision coordination for the CIS of the former first pillar to the framework of Article 62 EUDPR. As a result, two parallel formats co-exist in which CIS data protection matters are discussed and coordinated among supervisory authorities.
18. The EDPS therefore invites the co-legislators to examine if Article 37 of Council Regulation (EC) No 515/97 could not be brought in line with the horizontal model of coordinated supervision, on the occasion of this Proposal.

7. Conclusions

19. In light of the above, the EDPS makes the following recommendations:
 - (1) to specify the substantive conditions, in addition to the provisions on international transfers, that must be fulfilled so that the Council may permit under exceptional circumstances an international or regional organisation to have direct access to data in the CIS,
 - (2) to clarify the role of the EDPS in the supervision of the CIS,

¹⁷ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), OJ L 269, 10.10.2013, p. 1–101.

¹⁸ Article 107(2) of 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, 2.6.2023, p. 65–104.

- (3) to modify Article 1(11) of the Proposal as to either add a reference to the EUDPR, as applicable, or to delete Article 20 of Council Decision 2009/917/JHA and recall the applicable law in a recital, and
- (4) to examine how to reconcile supervision coordination for the two different CIS under Council Decision 2009/917/JHA and Council Regulation (EC) No 515/97 in one body.

Brussels, 4 July 2023

(e-signed)

Wojciech Rafał WIEWIÓROWSKI

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