

Comments of the European Data Protection Supervisor on the proposal for a Council Directive amending the Directive 2011/16/EU on administrative cooperation in the field of taxation

On 12 June 2013, the Commission adopted a proposal for a Council Directive amending the Directive 2011/16/EC as regards mandatory automatic exchange of information in the field of taxation (the Directive).¹ The EDPS has not been consulted by the Commission as required by Article 28(2) of Regulation (EC) No 45/2001 but members of a political group in the European Parliament requested comments on 15 October 2013. On the basis of this request, the EDPS decided to provide his comments according to Article 41(2) of Regulation (EC) No 45/2001. We recommend that a reference to the EDPS consultation be included in the preamble of the proposal.

Already in January 2010, the EDPS published an Opinion² analysing the data protection aspects of the proposal for Directive 2011/16/EC. The present comments will focus on the changes to Article 8 of the Directive introduced by the current proposal. For a more in-depth analysis of other aspects, we refer to the Opinion of January 2010. The provisions in the current proposal are also to be seen in the light of the EU and Member States response to the US Foreign Account Compliance Act (FATCA). In 2012, the Article 29 Working Party (WP 29) published two letters analysing how the FATCA interacts with the EU data protection framework, especially with Directive 95/46/EU³. These comments should be read in conjunction with our Opinion and the WP 29 letters.

Further improving the automatic exchange of information (AEOI) for the purposes of reducing tax fraud and tax evasion beyond the current levels of cooperation is the main purpose of the Directive. In most cases, such automatic exchange concerns information (also) relating to natural persons. The objective of the current proposal is to expand the scope of AEOI in the EU beyond what is provided for in existing EU automatic information exchange arrangements. It would bring the following items within the scope of the AEOI: dividends, capital gains, other financial income and account balances. The Commission also proposes to remove the reference in Article 8(3) of the Directive to a threshold below which a Member State may not wish to receive information from other Member States.

As stated in the EDPS Opinion of 2010, The EDPS is aware of the importance of enhancing the effectiveness of administrative cooperation between Member States in the field of taxation. The EDPS furthermore acknowledges the advantages and understands

¹ COM(2013) 348 final of 12 June 2013.

² EDPS Opinion of 6 January 2010 on the proposal for a Council Directive on administrative cooperation in the field of taxation, OJ C 101/01, 20.04.2010.

³ Article 29 Working Party letters of 21.06.2012, just c.3(2012)866296 and of 01.10.2012, just c.3(2012)1340967 on FATCA.

the need to share information, but at the same time wishes to underline that the processing of such data must at all times take place in conformity with the EU rules on data protection.

The proposal is bound to increase the number of situations involving the trans-border exchange of personal data of EU citizens. This in itself calls for special attention, since such an increase necessarily leads to bigger risks for the rights and legitimate interests of natural persons involved. It also requires greater efforts to ensure compliance with the requirements stemming from EU legislation on data protection. In a cross border context, the responsibilities of the different actors must be clearly addressed, also to facilitate supervision by the competent authorities, as well as judicial control, in different contexts.

Consequently, the extension of the scope and the removal of the thresholds for the AEOI further increases the risks described above and makes the need for the legislator to address the issues highlighted in the EDPS Opinion of 2010 all the more pressing.

In this context, the EDPS wishes to highlight the following points.

One of the fundamental principles of data protection law is that personal data must be processed for specified, explicit and legitimate purpose(s) and that it may not be further processed in a way incompatible with those purposes.⁴ The data used to achieve the stated purpose(s) should furthermore be necessary and should be adequate, relevant and not excessive in relation to the purpose.⁵ The EDPS therefore urges the legislator to specify the types of personal data that may be exchanged pursuant to the Directive and to better define the purposes and the context for which personal data can be exchanged. In addition, it must be ensured that the necessity and proportionality principles are respected under the Directive.

Articles 10 and 11 of the general Data Protection Directive 95/46/EC set out the obligations for the person or entity responsible for the data processing - in data protection terminology referred to as the 'controller'⁶ - to inform the individual concerned (the 'data subject') before the data are collected or, in case the data are not obtained from the data subject, at the time of undertaking the recording of the data. The data subject has to be informed about the identity of the controller, the purpose of the data processing and must also receive further information such as the recipients of the data and the existence of the right of access to and the right to rectify the data concerning her or him in order for the data subject to be enabled to identify the context in which the processing of personal data is taking place. These Articles can be considered as elaborations of the general principle of transparency which is part of the fairness of processing as required in Article 6(1)(a) of Directive 95/46/EC. The EDPS notes that neither the current Directive nor the new proposal contain provisions which spell out how the transparency principle should be complied with in practice, for instance on whether (and how) the exchange of information is communicated to the public at large or how data subjects will be informed about the data processing. The EDPS therefore urges the legislator to adopt a provision in which the transparency of the proposed information exchanges is addressed.

⁴ See Article 6(b) of Directive 95/46/EC and Article 4(1)(b) of Regulation (EC) No 45/2001.

⁵ The notion of 'necessity' can be found throughout Directive 95/46/EC and Regulation (EC) No 45/2001. See notably Article 7 of Directive 95/46/EC and Article 5 of Regulation (EC) No 45/2001. The data quality requirements are contained in Article 6(d) of Directive 95/46/EC and Article 4(c) of Regulation (EC) No 45/2001.

⁶ See Article 2(d) of Directive 95/46/EC and Article 2(d) of Regulation (EC) No 45/2001. Both provisions envisage the possibility of single and joint control ("... alone or jointly with others ...").

Done in Brussels, 5 November 2013

(signed)

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