

Opinion of the European Data Protection Supervisor on the Commission Proposal for a Directive of the European Parliament and the Council on electronic invoicing in public procurement

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Articles 7 and 8 thereof,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,¹

Having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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, and in particular Article 28(2) thereof,²

HAS ADOPTED THE FOLLOWING OPINION:

1. INTRODUCTION

1. On 26 June 2013, the Commission adopted a proposal for a Directive of the European Parliament and of the Council on electronic invoicing in public procurement ('the Proposal').³ On 8 July 2013, the Proposal was sent to the EDPS for consultation.
2. The objective of the Proposal is to 'diminish market access barriers in cross-border public procurement, generated by insufficient interoperability of e-invoicing standards.'⁴ To achieve this, a 'new, common European standard would be developed and made available for use by all market operators. Acceptance by all contracting authorities of e-invoices compliant with this standard would be required in public procurement, without replacing existing technical solutions.'⁵

¹ OJ L281, 23.11.1995, p. 31.

² OJ L8, 12.1.2001, p. 1.

³ COM(2013) 449 final.

⁴ Executive Summary of the Impact Assessment (SWD(2013) 223 final), Section 3.1, page 4.

⁵ Idem, Section 5.3.4, page 7.

2. ANALYSIS OF THE PROPOSAL

2.1. General comments

Personal data processing in the context of e-invoicing

3. While the main objective of the Proposal is not the processing of personal data, processing e-invoices under the Proposal may nevertheless require the processing of certain amount of personal data. Therefore, data protection is a relevant consideration for e-invoicing.
4. First, certain elements (data fields) of the e-invoices may contain personal data. The contracting entities can be either legal or natural persons. Where the contracting entities are natural persons, their data will be considered personal data. This will also be the case where the official title of the legal person identifies one or more natural persons⁶.
5. Further, in cases where the contracting entities need to evidence that they have provided certain services (e.g. medical, social or educational services) to a number of defined individuals, the information that they may need to submit to the contracting authority will contain personal data regarding these individuals. This may sometimes also include sensitive data, for example, in the health and social sector the information may include the type of medical/psychological treatment or social services provided, which are linked (or can be linked), to the names of the individuals to whom these treatments/services were provided.
6. Finally, if and when the data contained in the e-invoices will be used for further purposes that ultimately aim linking the data to specific individuals (such as corporate officers, shareholders or employees of a company) - for example, to investigate a specific incident of tax fraud - the initially seemingly innocuous and non-personal data on the invoices will also be considered personal data.
7. In all these cases, personal data will require appropriate protection, and the national rules transposing Directive 95/46/EC become applicable.

Benefits and risks of e-invoicing: easier access in machine-readable format provides more room for 'mission creep'

8. The EDPS supports the objective of the Commission to facilitate the move towards paperless e-invoicing and recognises the benefits of e-invoicing, which include simpler and shorter processing times, and resulting cost savings, as well as reduction of paper waste and CO2 footprint.⁷
9. At the same time, he also calls attention to the privacy and data protection risks that will be increased as a result of the increasing availability of invoice data in paperless and machine-readable form for further purposes, including automated profiling and data-mining for tax and law enforcement purposes, that are currently not regulated in the

⁶ For the latter, see judgment of the CJEU in *Schecke* (C-92/09 and C-93/09), [2010] ECR I-11063, paras. 52-53.

⁷ See Impact Assessment, Section 2.1.2, pages 12-13.

Proposal, and only briefly and generally mentioned in the accompanying Impact Assessment.

10. As discussed in the Impact Assessment⁸, these additional purposes may bring additional benefits: 'The electronic processing of invoices positively influences the transparency of the procurement process. When a tax audit occurs, e-invoices can be more easily made available to tax authorities than paper invoices, allowing them to check for compliance more easily.' E-invoicing also 'significantly reduces operational risk of fraudulent invoices and duplicate payments'. Further, if 'e-invoicing is integrated with tax reporting, it can reduce administrative burden, as tax declarations can be generated automatically.'
11. Tax authorities and law enforcement authorities may - in general - more efficiently access and further process the data to help reduce tax fraud and combat other forms of crime, if and when they are given access to the data. In particular, new opportunities will arise with regard to profiling and data-mining. This is not specifically mentioned in the Proposal or in the Impact Assessment, but the Proposal does not exclude this either.
12. Similarly, publication of any part of the invoice data, or preparation of statistical datasets using the invoice data, will become a much easier task. If and when data based on the e-invoices will be published, this may increase the transparency of the procurement process.

Purpose limitation: limits on acceptable further use of data

13. Despite all these benefits, increasing availability of the data in machine-readable format will also pose the risk of mission creep, that is, use of the data for initially unforeseen purposes. These initially unforeseen purposes may or may not be compatible with the original purposes foreseen. Use of the data for these additional purposes may or may not be permissible and - if allowed - may require additional data protection safeguards.
14. In the context of e-invoicing, subject to appropriate data protection safeguards, e-payments and e-archiving may, in principle, be considered as compatible purposes. Some other further purposes, on the other hand, such as using the archived data for data mining to help reduce tax fraud will likely not be considered as compatible, and may only be possible, if at all, subject to the exceptions and strict criteria under Article 13 of Directive 95/46/EC.⁹

Importance of appropriate data protection safeguards

15. For these reasons, the EDPS welcomes the reference in recital (6) and Article 3(1)¹⁰ of the Proposal to the protection of personal data and to Directive 95/46/EC.

⁸ Idem, page 13, fourth paragraph.

⁹ On the concept of purpose limitation, see Opinion 03/2013 on Purpose Limitation of the Article 29 Data Protection Working Party adopted on 2 April 2013. On exceptions under Article 13, see specifically Section III.3 of the Opinion.

¹⁰ See paragraph 19 below.

16. At the same time, he recommends further improvements in the precise drafting of these provisions, and proposes a limited number of additional safeguards to be outlined in the Proposal, as set out below.

2.2. Specific comments

Reference to applicable data protection law and EDPS consultation

17. The EDPS recommends clarifying that the Proposal is not meant to provide for general derogations from data protection principles and that relevant personal data processing legislation (national law implementing Directive 95/46/EC) remains fully applicable in the e-invoicing context. This should preferably be done in a substantive provision in the operative part of the text, possibly supplemented by a dedicated recital.
18. Further, the EDPS recommends adding a recital referring to the fact that he has been consulted and issued this Opinion.

European standard for the semantic data model of the core electronic invoice

19. Article 3(1) of the Proposal provides that the 'Commission shall request the relevant European standardisation organisation to draw up a European standard for the semantic data model of the core electronic invoice'. The same paragraph further provides that 'the Commission shall require that the European standard for the semantic data model of the core electronic invoice ... guarantee personal data protection in accordance with Directive 95/46/EC'.
20. In order to ensure appropriate protection for personal data, it is indeed essential that the standardised elements of the e-invoices, that are foreseen to be provided for in the new European standard, be designed so as to contain no more personal data than what is necessary for purposes of processing the e-invoices (and for any further purposes that are compatible with this purpose), in accordance with the principles of proportionality, data minimisation and purpose limitation.¹¹ This is also in accordance with the principle of data protection by design, which requires that data protection concerns be taken into account from the very beginning.¹²
21. For these reasons, the EDPS welcomes that the Proposal requires that data protection safeguards be considered right from the outset when developing the standard. On the other hand, he also calls attention to the fact that a good and well-considered standard, while it can go some way to help address data protection concerns, cannot in itself 'guarantee' personal data protection.

¹¹ See Article 6(1)(b) and (c) of Directive 95/46/EC.

¹² On data protection by design, see Article 23 of the Commission proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (COM(2012)11 final). See also paras 177-182 of the 7 March 2012 EDPS Opinion on the data protection reform package, available at http://www.edps.europa.eu/EDPSWEB/edps/Consultation/Reform_package;jsessionid=46ACCFDB9005EB950DF9C7D58BDE5377.

22. Based on these considerations, and to further improve the provision, the EDPS recommends that the provision be slightly reworded and require that
- the standard help ensure compliance with Directive 95/46/EC
 - in accordance with the principle of data protection by design,¹³ and
 - in particular, that the standard must ensure - in accordance with the principles of proportionality and data minimisation - that the elements of the e-invoice contain no more personal data than what is necessary for purposes of processing the e-invoices (and for any further purposes that are compatible with this purpose).
23. In addition, the EDPS recommends that the following (or similar) specification be added to the Proposal:
- Unless otherwise specified in EU or national law and subject to appropriate safeguards under Article 13 of Directive 95/46/EC, personal data in e-invoices shall be only used for purposes of processing the e-invoices (and for any further purposes that are compatible with this purpose), in accordance with the principle of purpose limitation.

Publication of information

24. As noted above, the Proposal does not state explicitly that e-invoices, or any data (for example statistical data) derived from them would be made publicly available and if so, whether such publication could include personal data.
25. If it is the intention of the legislator to provide for the publication of personal data, or if it is foreseen that this may happen at least in some Member States, for example, to increase transparency and accountability, the EDPS recommends including explicit provisions to that effect in the Proposal.
26. As a minimum, a substantive provision should clarify what kind of personal data may be made public and for what purpose(s). In this context, attention is drawn to the *Schecke* judgment in which the Court of Justice underlined that, in order to strike a proper balance between the various interests involved, the EU institutions must take into consideration methods of publishing information which would be consistent with the objective of such publication while at the same time causing less interference with an individual's right to respect for their private life and to protection of their personal data¹⁴.
27. An alternative to providing a harmonised solution to publication at the EU level would be adding a provision in the Proposal stating that
- EU or national law must specify, subject to appropriate safeguards under Article 13 of Directive 95/46/EC that a necessary and proportionate amount of personal data, in particular, those relating to the contracting entities, may be published for

¹³ An example of data protection by design could be to automatically flag data fields that may contain/or do contain personal data, so that it could be deleted automatically when using the data for further purposes, sharing the data with third parties, or publishing it. This can help minimise unnecessary data sharing (e.g. with tax authorities, or in case of publication).

¹⁴ CJEU, *Schecke* (C-92/09 and C-93/09), [2010] ECR I-11063, para. 81.

purposes of transparency and accountability. Such law should also specify that further use of the data for incompatible purposes is not permitted.

3. CONCLUSIONS

28. The EDPS appreciates that certain data protection issues have been taken into account in the Proposal. In this Opinion he gives recommendations on how the Proposal could be further improved from a data protection perspective.

29. In particular, the EDPS recommends:

- including a substantive provision to clarify that the Proposal is not meant to provide for general derogations from data protection principles and that relevant personal data protection legislation (i.e. national rules implementing Directive 95/46/EC) remain fully applicable in the context of e-invoicing;
- amending Article 3(2) of the Proposal to ensure that the European standards to be adopted will follow a 'privacy by design' approach and ensure that data protection requirements are taken into account, and that the standards will respect, in particular, the principles of proportionality, data minimisation and purpose limitation;
- should it be the intention of the legislator to provide for the publication of personal data for purposes of transparency and accountability, including explicit substantive provisions that would specify what kind of personal data may be made public and for what purpose(s); alternatively, including a reference to EU or national law, which should, in turn, provide appropriate safeguards.

Done in Brussels, 11 November 2013

(signed)

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