

Formal comments of the EDPS on the Proposal for a Regulation on the European Citizen's Initiative

Context

On 13 September 2017, the European Commission tabled a Proposal for a Regulation on the European Citizens' Initiative¹ (hereinafter "ECI Proposal").

The European Citizens Initiative (hereinafter "ECI") is an instrument of participatory democracy provided for by the Treaty on European Union², which allows no less than one million citizens who are nationals of a significant number of Member States to request the Commission to propose a legislation on matters where the EU is competent to legislate.

Regulation (EU) No 211/2011³ lays down the rules and procedures for the ECI and is complemented by Commission Implementing Regulation (EU) No 1179/2011⁴, which provides for the technical specifications for the online collection systems. The EDPS issued an Opinion⁵ on the proposal for Regulation (EU) No 211/2011 at the time. He also provided comments informally on the Commission Implementing Regulation (EU) No 1179/2011.

The Commission conducted an analysis of the implementation of Regulation (EU) No 211/2011 several years after its entry into force. The Commission has notably launched a number of studies on the implementation of the ECI. Following the results of those analysis, the Commission considered that the functioning of the ECI could be improved and that Regulation (EU) No 211/2011 should be revised. The ECI Proposal thus introduces a number of changes to improve the functioning of the ECI.

Aim and scope of these comments

One of the EDPS' mission is to advise the Commission services in the drafting of new legislative proposals with data protection implications. The EDPS welcomes that he has already been consulted informally on the ECI Proposal.

The EDPS has limited the comments below to the provisions of the ECI Proposal that are particularly relevant from a data protection perspective.

The EDPS first welcomes the attention paid to data protection in the Proposal and references to the data protection legal instruments applicable in Recitals 26 and 28, i.e. Regulation (EU) 2016/679⁶ (hereinafter "GDPR") for processing of personal data carried out by the organisers and Member States authorities in the context of an ECI and Regulation (EC) No 45/2001⁷ for the processing of personal data carried out by the Commission. The EDPS furthermore welcomes the reference to these comments that will be included in Recital 34.

Comments

1. Joint-controllership for the Central Online Collection System

In data protection legislation, the term “controller” refers to the entity that defines the purposes and means of the processing of personal data⁸. Where the purposes and means of the processing are determined by law, the law may also designate the controller or include the criteria for designating the controller. Article 18(1) of the ECI Proposal provides that the representative of the group of organisers of an ECI or, in cases where the organisers decide to create a legal entity in order to manage the initiative (Article 5(7)), that legal entity will be the controller.

Furthermore, Article 10 of the ECI Proposal sets out that, for the purpose of online collection of statements of support, the Commission shall set-up and operate a Central Online Collection System. In case the organisers of an ECI choose to use that system instead of an individual online collection system, the ECI Proposal does not specify further the roles and responsibilities of the parties involved, i.e. the organisers and the Commission. The role as controller or processor of the Commission is not defined in the ECI Proposal.

On the basis of the available information, the EDPS considers that the role of the Commission appears to be more than that of a mere processor in relation to the setting up and operation of the Central Online Collection System, and that its role would be better described as that of a joint controller in such cases.

To support such conclusion, the EDPS takes notably into consideration Opinion 1/2010⁹ of the Article 29 Data Protection Working Party on the concepts of “controller” and “processor”. Opinion 1/2010 states that the concept of controller is a functional concept intended to allocate responsibilities where the factual influence is, and thus is based on a factual rather than a formal analysis. Opinion 1/2010¹⁰ further specifies that in case of doubt, elements such as the degree of actual control exercised by a party, the image given to data subjects and reasonable expectations of data subjects on the basis of this visibility need to be considered. Considering that the data would be stored on the servers provided by the Commission (Article 10 (1)) and based on the available information, it appears that organisers have no or only very limited influence on the design, setting up and operation of the Central Online Collection System.

While the purposes (and to a certain extent the means) of the Central Online Collection System are defined in the Proposal, the controller will be accountable for implementing appropriate technical and organisational measures to ensure that the processing is carried out in accordance with data protection rules, as well as should be able to demonstrate compliance with these rules (e.g. providing evidence that information security is properly managed). Therefore, based on the above-mentioned considerations, the role of the Commission seems indeed to be that of a joint controller for the Central Online Collection System.

The absence of clear distribution of roles in the ECI Proposal may lead to a situation where the representative of a group of organisers for an ECI could be held accountable (as the controller) for matters being outside of the scope of his or her influence (i.e. the operation of the Central Online Collection System). This would probably also be contrary to the main policy objective of making the ECI more accessible, less burdensome and easier to use for organisers.

Moreover, the EDPS takes note of the Study launched by the European Commission on online collection systems and technical specification¹¹, which considers that the Commission would be the data controller for statements of support collected through the Central Online Collection System.

For all the considerations mentioned above, **the EDPS recommends introducing a more accurate description of the division of roles and responsibilities between the Commission and the organizers by considering, where appropriate, their designation as joint controllers.**

2. Processing of special category of personal data

In the light of the first Recital of the ECI Proposal, which defines the ECI as an “*instrument of participatory democracy which affords citizens of the Union the possibility of directly approaching the Commission with a request inviting it to submit a proposal for a legal act of the Union*”, the EDPS considers that the signature of a statement of support for a particular initiative may often be regarded as expression of political opinions. Personal data that could reveal political opinions are considered as a special category of personal data under Article 9(1) of the GDPR.

Therefore, the EDPS recalls that, under the GDPR, the processing of special categories of personal data on a large scale may trigger several obligations for the controller, such as the performance of a data protection impact assessment¹² and the designation of a data protection officer¹³. Both requirements will have to be introduced then by the initiative which by default operates in more than one Member State.

Moreover, similarly to the current Regulation (EU) No 211/2011 (Article 8(2)), the ECI Proposal provides for an obligation for Member States to verify the statements of support “*on the basis of appropriate checks, which may be based on random sampling, in accordance with national law and practice*” (Article 12(4)). The EDPS considers that the political opinions of signatories could be the most exposed during the verification process. Therefore, **the EDPS suggests including in the ECI Proposal that the verification process be based on random sampling whenever possible under national legislation, and recommends forbidding targeted verification of signatories.**

3. Security and technical requirements

Articles 10 and 11 of the ECI Proposal include the provisions related to the Central Online Collection System and individual collection systems respectively. The security and technical requirements that an individual online collection system should meet are laid down in Article 11(4), while there is no similar provision in Article 10 that would apply to the Central Online Collection System provided by the Commission. **The EDPS recommends including a new paragraph in Article 10 that levels the requirements for both type of online collection systems, or make of Article 11(4) a standalone provision that would apply to both type of online collection systems.**

Article 9(5) of the ECI Proposal makes the organisers of an ECI responsible for the collection of paper statements of support. Pursuant to Article 12(2), the organisers shall submit separately to the competent authorities the statements of support collected online and the statements of support collected in paper form. The EDPS has concerns regarding the lack of

security requirements that should meet the storage, processing and transfer of paper statements of support and **recommends amending Article 9(5) in order to include the requirement for security measures when processing personal data in paper forms.**

Article 10(3) gives the possibility to the organisers to upload the paper statements of support to the Central Online Collection System but the ECI Proposal does not describe how the uploaded paper statements should be managed afterwards (e.g. retention period of paper forms). **The EDPS recommends introducing a description of the procedure that should be followed for both successful and unsuccessful ECIs.**

The EDPS welcomes the requirement included in Article 11(4)(a) that only natural persons be able to sign a statement of support. However, given the sensitivity of the data being processed and the increasing number and sophistication of botnets, **the EDPS recommends including in Article 11 a specific requirement to protect online collection systems against automated submission of statements of support.**

Article 12(2) of the ECI Proposal imposes on the group of organisers of an ECI the obligation to submit the statements of support to the competent authorities of the Member States. To meet that obligation, the current version of the User Manual¹⁴ for online collection systems provided by the European Commission allows the organisers to get a copy in electronic format of all statements of support stored on online collection systems. In the case of the future Central Online Collection System, the statements of support data could be sent directly from the servers of the European Commission to national competent authorities of the Member States through Open e-TrustEx, part of the EU File Sharing Service. **The EDPS recommends that, following the Privacy by Design and Privacy by Default principles, statements of support that will be stored on the servers of the European Commission should not be exported to the organisers, but only to the national competent authorities for the purpose of the verification process laid down in Article 12 of the ECI Proposal.**

The possible coexistence of paper and digital statements of support imposes a burden over controllers and processors if they are to comply with the obligation to check for statements of support signed by the same citizen for a given ECI, or if they want to comply with the obligation to respond in due time to requests to exercise their rights by data subjects. **The EDPS suggests considering the digitalization of all paper statements of support, which would facilitate the exercise of their rights by data subjects.**

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¹ Proposal for a Regulation of the European Parliament and the Council on the European citizens' initiative, COM(2017) 482 final.

² TEU, Article 11.

³ Regulation (EU) No 211/2011 of the European Parliament and the Council of 16 February 2011 on the citizens' initiative, OJ L 65, 11.03.2011, p. 1.

⁴ Commission Implementing Regulation (EU) No 1179/2011 of 17 November 2011 laying down technical specifications for online collection systems pursuant to Regulation (EU) No 211/2011 of the European Parliament and of the Council on the citizens' initiative, OJ L 301, 18.11.2011, p. 3.

⁵ EDPS Opinion of 21 April 2010 on the proposal for a Regulation of the European Parliament and of the Council on the citizens' initiative, available at: https://edps.europa.eu/sites/edp/files/publication/10-04-21_citizens_initiative_en.pdf

⁶ Regulation (EU) 2016/679 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 (General Data Protection Regulation), OJ L 119, 04.05.2016, p. 1 (hereinafter "GDPR").

⁷ 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, OJ L 8, 12.01.2001, p. 1.

⁸ Article 2 (d) of Directive 95/46/EC; Article 4(7) of the GDPR; Article 2(d) of Regulation 45/2001.

⁹ Opinion 1/2010 of 16 February 2010 of the on the concepts of "controller" and "processor", WP 169, p. 11.

¹⁰ Opinion 1/2010 of 16 February 2010 of the on the concepts of "controller" and "processor", WP 169, p. 12.

¹¹ Study on online collection systems and technical specification pursuant to Regulation (EU) No 211/2011 and Commission Implementing Regulation (EU) No 1179/2011, Final Report of September 2017, p. 60.

¹² Article 35 of the GDPR.

¹³ Article 37 of the GDPR.

¹⁴ Online Collection Software for European Citizens' Initiatives – User Manual, p. 38-39, available at: https://joinup.ec.europa.eu/rdf_entity/http_e_f_fdata_ceuropa_ceu_fw21_f11702d04_bc206_b4bb2_b95cd_b526_79d51861f