

2 S L Q L R Q

on a proposal for an amendment of
Council Directive 2011/16/EU relating
to administrative cooperation in the
field of taxation

The European Data Protection Supervisor (EDPS) is an independent institution of the EU, responsible under Article 52(2) of Regulation (EU) 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’.

*Under **Article 42(1)** of Regulation (EU) 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’ and under Article 57(1)(g), the EDPS shall ‘advise on his or her own initiative or on request, all Union institutions and bodies on legislative and administrative measures relating to the protection of natural persons’ rights and freedoms with regard to the processing of personal data’.*

He was appointed in December 2020 with the specific remit of being constructive and proactive.

*This Opinion is issued by the EDPS, within the period of eight weeks from the receipt of the request for consultation laid down under **Article 42(3)** of Regulation (EU) 2018/1725, having regard to the impact on the protection of individuals’ rights and freedoms with regard to the processing of personal data of the following proposal for a legislative act adopted by the Commission: Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation.*

Executive Summary

With this Opinion, issued pursuant to Article 42(1) of Regulation (EU) 2018/1725, the EDPS puts forward recommendations aiming at **minimizing the impact** of a Commission's legislative proposal amending Directive 2011/16/EU on administrative cooperation in the field of taxation on the fundamental right to privacy and to the protection of personal data of individuals. These recommendations are intended to **ensure compliance** with the applicable data protection legal framework, while avoiding jeopardizing the efficacy and efficiency of the administrative action on the fight against tax evasion.

Whereas the EDPS acknowledges that tax compliance is an important objective of public interest, he insists that the **right balance** should be struck between the attainment of such goal and the right to privacy and personal data protection. In this regard, he calls for particular attention to the implementation of the principles of data protection by design and by default, data minimisation and data accuracy in the context of automatic exchanges of information between national tax authorities.

Concerning the management of the **secure central interface on administrative cooperation in the field of taxation**, the EDPS stresses the need for the Commission to ensure compliance with the provisions on security of processing under Regulation (EU) 2018/1725, in particular following the EDPS "Guidelines on the protection of personal data in IT governance and management of EU institutions". Moreover, the EDPS considers that the role of the Commission with regard to the management of the secure central interface pursuant to Regulation (EU) 2018/1725, needs to be **further ascertained** in particular in the light of any further arrangement with Member States and the factual circumstances of the technical and logistical support provided within the system..

The EDPS also stresses that, pursuant to Article 42(1) of Regulation (EU) 2018/1725, it expects to be consulted **before** its adoption by the Commission, on the **implementing acts** that will define the administrative arrangements to provide technical and logistical support for the **secure central interface** where Member States communicate with the use of standard forms pursuant to Directive 2011/16/EU.

Finally, he recalls that in its capacity as competent supervisory authority under Regulation (EU) 2018/1725, the EDPS may follow up on possible updates concerning the secure central interface and, more broadly, the implications stemming from the Commission role within the processing operations in the context of the administrative cooperation on taxation.

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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 Regulation (EU) 2016/679 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 and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)¹,

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 data², and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. INTRODUCTION AND BACKGROUND

1. On 2 September the EDPS was consulted by the European Commission on a Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation that was adopted on 15 July 2020 (hereafter, the “**Proposal**”). This consultation is made pursuant to Article 42 of Regulation 2018/1725.
2. Previously, on 29 April 2020 and on 5 May 2020 draft versions of the Proposal were submitted to the EDPS. The EDPS welcomes and encourages the possibility to be consulted by the Commission **early in the policy-making process** with a view to minimising the impact of the proposals on the fundamental rights to privacy and to the protection of personal data³.
3. The EDPS notes that the Proposal aims at improving the existing framework for the exchanges of information and administrative cooperation for the purpose of fighting tax evasion, having regard to direct taxation and the raising importance of digital platforms used by “sellers”. In addition to reinforcing existing rules, the Proposal highlights that *“the expansion of administrative cooperation to new areas is required in the EU, in order to address the challenges posed by the digitalisation of the economy and help tax administrations better collect their taxes and keep pace with new developments”*.⁴
4. **The EDPS acknowledges the objectives of the Proposal** and, in particular, the need to address the cross-border dimension of the services offered through the use of digital platform operators. As recalled by Recital 6 of the Proposal, *“tax compliance is suboptimal and the value of unreported income is significant. Member States' tax administrations have insufficient information to correctly assess and control gross income earned in their country from commercial activities performed with the intermediation of digital platforms. This is particularly problematic where the income or taxable amount flows via platforms established in another jurisdiction.”*⁵

5. The present Opinion focusses on the relevant aspects of the Proposal with regard to the protection of personal data of individuals and **seeks to provide a pragmatic advice on how to minimise the impact of the processing of personal data required by the Proposal for taxation purposes**, while maintaining the effectiveness of the envisaged measures.

2. COMMENTS AND RECOMMENDATIONS

2.1 General remarks

6. The EDPS acknowledges that **the fight against tax evasion is an important objective of general interest** whose attainment would significantly benefit from a better exchange between national administrations. By improving the exchanges of information, national tax administrations could reduce the risk of information asymmetries that represent an obstacle to complete tax collection.
7. At the same time, the EDPS would like to highlight that **the right balance should be struck between the achievement of tax compliance and the right to privacy and personal data protection**. To this purpose, it is important that the systems created and used for the exchange of information follow an approach which respects data protection rights, including the principles of data minimisation and data accuracy.
8. The EDPS welcomes that **the Directive strives to respect the principle of data minimisation** in line with in Article 5(1)(c) of the GDPR and Article 4(1)(c) of Regulation (EU) 2018/1725, which provide that personal data must be "*adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed*". In this regard, in the Explanatory Memorandum of the Proposal the Commission states that "*the set of data elements to be transmitted to tax administrations are defined in a way to capture only the minimum data necessary to detect non-compliant underreporting or non-reporting, in line with the with the GDPR obligations*".
9. Moreover, the EDPS welcomes also that the Proposal expressly provides for data protection safeguards within Directive 2011/16/EU. In particular, Article 1(19) of the Proposal amending Article 25(3)⁶ of the Directive establishes an obligation for Member States **to ensure** that its competent authority or each Reporting Financial Institution or intermediary or Reporting Platform Operator, as the case may be, complies with the right of information by informing "*each individual concerned that information relating to this individual will be collected and transferred in accordance with the Directive*", and providing "*to each individual all information that he/she is entitled to from the data controller in sufficient time for the individual to exercise his data protection rights and, in any case, before the information is reported*".
10. The EDPS notes that **the Proposal is in line with the principle of storage limitation** established in Article 5(1)(e) of the GDPR. Pursuant to this principle, personal data shall be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed. In this regard, the EDPS welcomes that Section IV, paragraph B, of Annex V of the Proposal specifies a minimum and a maximum retention period of retention of the records of the steps undertaken and the information relied upon for the reporting requirements.

11. Regarding the systems created and used for the exchange of information within the scope of Directive 2011/16/EU, the EDPS draws attention to **Opinion 5/2018 on privacy by design**⁷, which provides examples of methodologies to identify privacy and data protection requirements and integrate them into privacy engineering processes in view of implementing appropriate technological and organisational safeguards.
12. The EDPS draws attention to the fact that the Proposal provides for the **automatic exchange of information** reported by Platform Operators between Member States. In particular, the automatic exchange of information pursuant to Article 8s and 8ac of Council Directive 2011/16/EU shall be carried out using a standard computerised format adopted by the Commission that is aimed at facilitating such automatic exchange. On this point, the EDPS recalls its **formal comments**⁸ on the proposal for a previous amendment of Directive 2011/16/EU⁹ issued on 17 June 2015, which remain relevant to the Proposal. In particular, he notes that while the Directive 2011/16/EU regulated information exchange in relation to both natural and legal persons, it provides that the automatic exchange of information shall not apply in a case where an advance cross-border ruling exclusively concerns and involves the tax affairs of one or more natural persons.

2.2 Specific Remarks

2.2.1 Extent of the information to be reported by Reporting Platforms Operators to the national tax administrations

13. The Proposal also puts forward new reporting rules (**reporting obligations**) for **platform operators**, laid down in particular under new Article 8ac of Directive 2011/16/EU, and further specified in Annex V of the Proposal. The “Relevant Activity” to be reported by the “Reporting Platform Operators” include the rental of immovable property, a personal or professional service, the sale of goods, the rental of any mode of transport (by so-called “Sellers”)¹⁰. The information, as collected and verified, shall be **reported by the platforms operators to the national competent tax authority** within one month following the end of the Reportable Period. Reporting shall only take place in one Member State (i.e. single reporting).
14. According to the new Article 8ac of Directive 2011/16/EU (as inserted by Article 1(6) of the Proposal), “*each Member State shall take the necessary measures to require Reporting Platform Operators to carry out the due diligence and reporting requirements laid down in Sections II and III of Annex V*”. In particular, **Section III.B.2.c) of Annex V of the Proposal** indicates that each Reporting Platform Operator shall report with respect to each Reportable Seller that carried out Relevant Activity, other than immovable property rental, the following information: “*where different from the name of the Reportable Seller, the name of the holder of the financial account to which the Consideration is paid or credited, to the extent available to the Reporting Platform Operator, as well as any other identifying information available to the Reporting Platform Operator with respect to that account holder*”.
15. In this regard, the EDPS considers that the scope of this provisions is too broad, as it could involve the transfer of any type of identifying information from the Seller, even data which may be excessive for the purposes of the reporting obligation. Therefore, the EDPS recommends **amending this provision** to better define the “identifying

information” to be reported, **for instance by aligning it with the very similar one in Section III.B.3.c) of Annex V of the Proposal** concerning immovable property rental services, and limiting the information required to that of financial nature, i.e. specifying “*as well as any other **financial identification information** available to the Reporting Platform Operator with respect to the account holder*” (emphasis added). Indeed, in the EDPS’s view, there is no justification for a more extensive scope of the provision only based on the type of relevant activity performed by the Reportable Seller and thus, the more limited one should be preferred.

2.2.2 On the data processing through the secure central interface on administrative cooperation in the field of taxation provided by the Commission

16. A key element of the Proposal is brought forward by Article 1(15), which adds Article 21(7) to the Council Directive 2011/16/EU, provides that “*the Commission shall develop and provide technical and logistical support for a **secure central interface** on administrative cooperation in the field of taxation where Member States communicate with the use of standard forms pursuant to Article 20(1) and (3).” (...)” and shall “by means of **implementing acts**, lay down the necessary practical arrangements”¹¹.*
17. According to the information provided by the Commission, the **secure central interface** is in place since 1 January 2019. The new paragraph (7) to Article 21 of Directive 2011/16/EU is intended to provide a legal basis for the said secure central interface, since in practice, the Commission will continue to provide technical and logistical support to the interface as before. In this regard, the EDPS recalls that when providing such technical and logistical support, the Commission must comply with all relevant provisions of the Regulation (EU) 2018/1725, and that the strict respect of the provisions on **security** of processing are of particular importance. In this context, the EDPS draws attention to its “**Guidelines on the protection of personal data in IT governance and IT management of EU institutions**”¹². Moreover, the EDPS considers that the safeguards applicable to the management of the central database listed in its **Opinion 1/2019 on two legislative proposals relating to combating VAT fraud**¹³, are also applicable in this case.
18. The EDPS also notes that, according to the wording of the new **Article 25 paragraphs 2 and 3 of Directive 2011/16/EU**, the Commission would have the **role of processor**. However, the EDPS, in line with his recent **Guidelines on the notion of controller and processor**¹⁴ as well as with previous Opinions¹⁵, considers that it cannot be excluded that the Commission, contrary to the wording of the Proposal¹⁶, might have the role of **controller or joint controller** with the Member State’s competent authorities. In the EDPS’s view, the role of the Commission pursuant to Regulation (EU) 2018/1725, needs to be **further ascertained** in particular in the light of an assessment of the Commissions’ decision-making capacity arising from the particular arrangements with the Member States and the factual circumstances of the technical and logistical support provided within the central secure interface. In other words, the EDPS invites the Commission to make an assessment as to its decision-making power over the means used for the processing of the personal data in the central secure interface, in order to exclude a potential implicit competence as controller or joint controller. Therefore, **we recommend to reconsider the qualification of the Commission as “processor” in the Proposal** (under the new Article 25(2) and 25(5))

of Directive 2011/16/EU as inserted by Article 1(19) of the Proposal and in Recital 25 of the Proposal).

19. Finally, the EDPS highlights that **he expects to be consulted by the Commission** prior to the adoption of the implementing acts *lay* down the necessary practical arrangements for the secure central interface in accordance with Article 42(1) of Regulation (EU) 2018/1725.

3. CONCLUSIONS

20. In the light of the above, the EDPS recommends the following:

- To follow an **approach which respects data protection rights**, particularly the principles of data protection by design and by default, data minimisation and data accuracy in the systems created and used for the exchange of information;
- To amend Section III.B.2.c) of Annex V of the Proposal to better specifying the “identifying information” to be reported and restricting it to financial identification information;
- to ensure **compliance of the secure central interface with the provisions on security of processing** under Regulation (EU) 2018/1725, in particular following the EDPS “Guidelines on the protection of personal data in IT governance and management of EU institutions”;
- with regard to the secure central interface, to reconsider the **reference to the role of the Commission as “processor”** in the Proposal (under the new Article 25(2) and (5) of Directive 2011/16/EU as inserted by Article 1(19) of the Proposal and in Recital 25 of the Proposal);

Brussels, 28 October 2020

Wojciech WIEWIÓROWSKI

(e-signed)

Notes

¹ Regulation (EU) 2016/679 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 and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), L119 of 4.5.2016.

² Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons 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, L 295, 21.11.2018.

³ See Recital 60 of Regulation (EU) 2018/1725: “*In order to ensure consistency of data protection rules throughout the Union, when preparing proposals or recommendations, the Commission should endeavour to consult the European Data Protection Supervisor. A consultation by the Commission should be obligatory following the adoption of legislative acts or during the preparation of delegated acts and implementing acts as defined in Article 289, 290 and 291 TFEU and following the adoption of recommendations and proposals relating to agreements with third countries and international organisations as provided for in Article 218 TFEU which have an impact on the right to protection of personal data. In such cases, the Commission should be obliged to consult the European Data Protection Supervisor, except where the Regulation (EU) 2016/679 provides for mandatory consultation of the European Data Protection Board, for example on adequacy decisions or delegated acts on standardised icons and requirements for certification mechanisms.*”

⁴ See Explanatory Memorandum of the Proposal

⁵ The EDPS would like to recall that tax evasion issues in relation to **digital platforms**, having regard to *indirect* taxation, have formed the object of the EDPS Opinion 1/2019 on two legislative proposals relating to combating VAT fraud, available at:

https://edps.europa.eu/sites/edp/files/publication/19-03-15_edps_opinion_on_two_legislative_proposals_relating_to_combating_vat_fraud_en.pdf

whereby the EDPS noted, among others, “In particular, we point out to that, in the context of these proposals, the data undergoing processing **should not relate to the consumers (the payers) but only to the online businesses (payees)**. This would limit the risk of the information being used for other purposes, such as controlling purchase habits of the consumers. **We appreciate the fact that the Commission followed this approach and we strongly recommend that this approach is maintained in the negotiations with the co-legislators leading to the final approval of the proposals.**”

⁶ The new Article 25(3) of the Directive provides that “*Notwithstanding paragraph 1, each Member State shall ensure that its competent authority or each Reporting Financial Institution or intermediary or Reporting Platform Operator, as the case may be, which is under its jurisdiction:*

(a) informs each individual concerned that information relating to this individual will be collected and transferred in accordance with this Directive;

(b) provides to each individual all information that the individual is entitled to from the data controller in sufficient time for the individual to exercise his data protection rights and, in any case, before the information is reported.

⁷ See https://edps.europa.eu/sites/edp/files/publication/18-05-31_preliminary_opinion_on_privacy_by_design_en_0.pdf

⁸ Available at https://edps.europa.eu/sites/edp/files/publication/15-06-17_comments_tax_rulings_en.pdf

⁹ (COM (2015) 135)

¹⁰ **Sellers** are defined in the Proposal, under Section I, 5, B of Annex V, as “*a Platform user that is registered at any moment during the Reportable Period on the Platform and carries out the Relevant Activity. Entities may also qualify as Sellers. An “Active Seller” is any Seller that provided Relevant Activity during the Reportable Period. A “Reportable Seller” is any Active Seller, other than an Excluded Seller, that carried out a Relevant Activity during the Reportable Period while being resident in a Member State or that rented immovable property located in a Member State during the Reportable Period.*”

¹¹ “*The Commission shall develop and provide technical and logistical support for a **secure central interface** on administrative cooperation in the field of taxation where Member States communicate with the use of standard forms pursuant to Article 20(1) and (3). The competent authorities of all Member States shall have access to that interface. For the purpose of collecting statistics, the Commission shall also have access to the information which is recorded to the interface and can be extracted automatically. The access by the Commission shall be without prejudice to the obligation of Member States to provide statistics on exchanges of information in accordance with Article 23(4).*

*The Commission shall, by means of **implementing acts**, lay down the necessary practical arrangements. Those implementing acts shall be adopted in accordance with the procedure referred to in Article 26(2).*”

¹² **Guidelines on the protection of personal data in IT governance and IT management of EU institutions**, March 2018, available at: https://edps.europa.eu/sites/edp/files/publication/it_governance_management_en.pdf

¹³ [https://edps.europa.eu/sites/edp/files/publication/19-03-](https://edps.europa.eu/sites/edp/files/publication/19-03-15_edps_opinion_on_two_legislative_proposals_relating_to_combating_vat_fraud_en.pdf)

[15_edps_opinion_on_two_legislative_proposals_relating_to_combating_vat_fraud_en.pdf](https://edps.europa.eu/sites/edp/files/publication/19-03-15_edps_opinion_on_two_legislative_proposals_relating_to_combating_vat_fraud_en.pdf)

¹⁴ EDPS Guidelines on the concepts of controller, processor and joint controllership under Regulation (EU) 2018/1725, available at:

[https://edps.europa.eu/sites/edp/files/publication/19-11-](https://edps.europa.eu/sites/edp/files/publication/19-11-07_edps_guidelines_on_controller_processor_and_jc_reg_2018_1725_en.pdf)

[07_edps_guidelines_on_controller_processor_and_jc_reg_2018_1725_en.pdf](https://edps.europa.eu/sites/edp/files/publication/19-11-07_edps_guidelines_on_controller_processor_and_jc_reg_2018_1725_en.pdf)

¹⁵ EDPS Opinion 1/2019 on two legislative proposals relating to combating VAT fraud, page 8, paragraph 13.

¹⁶ Recital 25: “*Reporting Financial Institutions, intermediaries, Reporting Platform Operators and the competent authorities of each Member State shall be considered to be joint data controllers and the Commission shall be considered to be data **processor** within the meaning of Regulation 2016/679/EU.*”