

Formal comments of the EDPS on the draft Implementing Regulation on technical arrangements for developing, maintaining and employing electronic systems for the exchange of information and for the storage of such information under the Union Customs Code

1. Introduction and background

- Article 6(1) of Regulation (EU) No 952/2013 (“the Union Customs Code”)¹ requires that all exchanges of information, such as declarations, applications or decisions, between customs authorities and between economic operators and customs authorities, and the storage of that information, as required under the customs legislation, are made by using electronic data-processing techniques.
- Commission Implementing Decision (EU) 2019/2151² establishes the Work Programme for the implementation of the electronic systems required for the application of the Code, which are to be developed through projects listed in section II of the Annex to that Implementing Decision.
- These comments are provided in reply to the request by the Commission, Directorate-General for Taxation and Customs (DG TAXUD) to the EDPS dated 27 November 2020 pursuant to Article 42(1) of Regulation (EU) 2018/1725 (“the EUDPR”)³ on the draft Implementing Regulation on technical arrangements for developing, maintaining and employing electronic systems for the exchange of information and for the storage of such information under the Union Customs Code (“the draft Implementing Regulation”). We limited our comments below to the provisions of the draft Implementing Regulation that are relevant from a data protection perspective.

2. EDPS comments

- We welcome the harmonisation and setting out of rules on technical arrangements, including on authentication, access and use of the electronic systems as developed or upgraded through the projects referred to in the Annex to Implementing Decision (EU) 2019/2151.

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

² Commission Implementing Decision (EU) 2019/2151 of 13 December 2019 establishing the work programme relating to the development and deployment of the electronic systems provided for in the Union Customs Code, OJ L 325, 16.12.2019, p. 168–182.

³ 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 (Text with EEA relevance), OJ L 295, 21.11.2018, p. 39–98.

- We also welcome the reference to Regulation (EU) 2016/679 (“the GDPR”)⁴ and to the EUDPR under recital 18⁵ of the draft Implementing Regulation.
- However, we note that the reference in the recitals of the draft Implementing Regulation to the **consultation of the EDPS pursuant to Article 42(1) of the EUDPR** is missing. Hence, we recommend inserting the following recital: *“The European Data Protection Supervisor was consulted in accordance with Article 42 of Regulation (EU) 2018/1725 of the European Parliament and of the Council.”*
- The EDPS also welcomes the introduction of the **single model of coordinated supervision** pursuant to Article 62 of the EUDPR under Article 83(2) of the draft Implementing Regulation⁶.
- The EDPS notes that, according to the wording of Article 88 of the draft Implementing Regulation, the Commission would have the **role of processor**, exception made for the case under letter (c) of the same article, stating that *“by way of derogation from paragraph (b), the Commission shall act as a joint controller together with the Member States in ICS2, where processing the data for monitoring and evaluating the implementation of the common security and safety risk criteria and standards and of the control measures and priority control in accordance with Article 85 (6) d, and in CRMS.”*
- The EDPS, in line with his recent **Guidelines on the notion of controller and processor**⁷ as well as with previous Opinions⁸, considers that it cannot be excluded that the Commission, contrary to the wording of the draft Implementing Regulation, might have the role of **controller or joint controller** with the Member State’s competent authorities also in other cases, in addition to the ones mentioned under aforesaid letter (c).

⁴ 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) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1–88.

⁵ “This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, and notably the right to protection of personal data. Where for the purposes of the application of the customs legislation of the Union it is necessary to process personal data in the electronic systems, those data must be processed in accordance with Regulations (EU) 2016/6795 and (EU) 2018/17256 of the European Parliament and of the Council. The personal data of economic operators and other persons processed by the electronic systems are restricted to the dataset as defined in Annex A, Title I, Chapter 1, Group 3 – Parties, Annex A, Title I, Chapter 2, Group 3 – Parties, , Annex B, Title I, Chapter 3, Group 3 – Parties, Annex B, Title II, Group 3 - Parties and Annex 12-01 to Commission Delegated Regulation (EU) 2015/2446.”

⁶ “In accordance with Article 62 of Regulation (EU) 2018/1725 of the European Parliament and of the Council, the national supervisory authorities in the field of personal data protection and the European Data Protection Supervisor shall cooperate to ensure coordinated supervision of the processing of personal data registered in the electronic systems.”

⁷ 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/19-11-07_edps_guidelines_on_controller_processor_and_jc_reg_2018_1725_en.pdf

⁸ See EDPS Opinion 6/2020 on a proposal for an amendment of Council Directive 2011/16/EU relating to administrative cooperation in the field of taxation, available at:

https://edps.europa.eu/sites/edp/files/publication/20-10-29_opinion_proposal_amendment_council_directive_2011-16-eu_signed_en.pdf

- We note that Article 1 of the draft Implementing Regulation refers to twelve electronic systems. We also note that Article 2 (definition 3) specifies that "*the Commission designs and maintains the common specifications for the electronic system in close cooperation with the Member States and operates and maintains the common components of that system*", whereas "*the Member States develop, operate and maintain national components and interfaces to provide the functionality of the system necessary for the information exchanges with economic operators through national components and interfaces, and with other Member States through common components.*" Hence, it cannot be ruled out that the Commission would be controller or joint-controller for the 'common components', as well as for the 'central systems', of electronic systems such as the central EORI system⁹ and the central AEO system¹⁰.
- In the EDPS's view, the role of the Commission pursuant to the EUDPR 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 common components of the electronic systems. 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 systems, before excluding a potential role of controller or joint controller. Therefore, **we recommend to reconsider the qualification of the Commission as "processor"** under letters (b) and (c) of Article 88 of the draft Implementing Regulation.
- Having regard to Article 84 of the draft Implementing Regulation, the EDPS recommends specifying in the draft Implementing Regulation the **maximum data retention period** applicable to data registered at national level, as well as for data registered in the common repositories, for each of the electronic systems referred to in the draft Implementing Regulation. This recommendation aims at ensuring compliance with the principle of storage limitation under Article 5(1)(e) of the GDPR and Article 4(1)(e) of the EUDPR.

Brussels, 11 December 2020

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(e-signed)

⁹ Referred to under Articles 30 and 33.

¹⁰ Referred to under Articles 35 and 39.