EUROPEAN DATA PROTECTION SUPERVISOR

The EU's independent data protection authority

27 July 2021

Opinion 10/2021

on the Proposal for a Council Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis

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The European Data Protection Supervisor (EDPS) is an independent institution of the EU, responsible under Article 52(2) of Regulation (EU) No 2018/1725 '[w]ith 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) thereof '…for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data'.

Wojciech Rafał Wiewiorówski was appointed as Supervisor on 5 December 2019 for a term of five years.

Under ***Article 42(1)*** *of Regulation (EU) No 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'.*

This Opinion relates to the EDPS' mission to advise the EU institutions on coherently and consistently applying the EU data protection principles, including when negotiating agreements in law enforcement cooperation. It builds on the general obligation that international agreements must comply with the provisions of TFEU and the respect for fundamental rights that stands at the core of EU law. In particular, compliance with Articles 7 and 8 of the Charter of Fundamental Rights of the EU and Article 16 TFEU must be ensured.

Executive Summary

The Schengen area is one of the most significant and most visible achievements of the European Union. Its legal framework, the Schengen *acquis*, comprises of various measures, including an evaluation and monitoring mechanism.

On 2 June 2021, the Commission presented a Proposal for a Council Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing Regulation (EU) No 1053/2013. The proposal intends to: (1) increase the strategic focus of the Mechanism and ensure a more proportionate use of the different evaluation tools; (2) shorten and simplify the procedures to make the process more effective and efficient, and increase peer-pressure; (3) optimise the participation of Member State experts and the cooperation with Union bodies, offices and agencies; and (4) strengthen the evaluation of the respect for fundamental rights under the Schengen *acquis*.

In his Opinion, the EDPS welcomes the particular attention in the Proposal on the respect for fundamental rights, including the correct implementation of the data protection requirements of the Schengen acquis, when carrying out Schengen evaluations. At the same time, he makes two specific recommendations, aimed at ensuring legal certainty and respecting the independence of the data protection supervisory authorities.

The EDPS believes that the envisaged Regulation should define the scope of the Schengen evaluations by laying down a non-exhaustive list of relevant policy fields, which would be subject to evaluation. In particular, the new Schengen mechanism should continue to provide for evaluations dedicated exclusively to data protection, carried out by data protection experts.

In addition, the EDPS underlines the need to clearly distinguish the competencies of the various Union agencies, offices and bodies involved in the Schengen evaluations. In this context, the independence of the European Data Protection Supervisor, pursuant to Article 55 of Regulation (EU) 2018/1725, should be fully respected.

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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 Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA[2],

Having regard to Regulation (EU) 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 data[3], and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. Introduction and background

1. The Schengen area[4] is one of the most significant and most visible achievements of the European Union. It has enhanced the freedom of movement by enabling more than 420 million people to move without being subject to internal border controls.

2. The Schengen *acquis* comprises of the legal provisions integrated into the framework of the Union in accordance with Protocol No 19 annexed to the TEU and to the TFEU, together with the acts building upon them or otherwise related to them. The acquis thus includes (1) measures at the external borders (external border management), (2) compensatory measures (common visa policy, police cooperation, return policy and the Schengen Information System), and (3) an evaluation and monitoring mechanism. The Schengen *acquis* also comprises requirements on data protection and the respects for other fundamental rights.

3. The purpose of the Schengen evaluation mechanism is to ensure a well-functioning Schengen area by guaranteeing that Member States apply Schengen rules effectively, *inter alia* by maintaining a high level of mutual trust among participating Member States. The current Schengen evaluation and monitoring mechanism was established by Council Regulation (EU) No 1053/2013[5], which became operational in 2015.

4. To address the challenges faced by the Schengen area, Commission President von der Leyen announced in her 2020 State of the Union address a Strategy on Schengen. One of the initiatives in this context is the revision of the Schengen evaluation and monitoring

mechanism. Consequently, on 2 June 2021, the Commission presented a Proposal for a Council Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing Regulation (EU) No 1053/2013[6]. The proposal intends to: (1) increase the strategic focus of the Mechanism and ensure a more proportionate use of the different evaluation tools; (2) shorten and simplify the procedures to make the process more effective and efficient, and increase peer-pressure; (3) optimise the participation of Member State experts and the cooperation with Union bodies, offices and agencies; and (4) strengthen the evaluation of the respect for fundamental rights under the Schengen *acquis.*

5. Pursuant to Article 42(1) of Regulation (EU) 2018/1725, the Commission has to consult the EDPS following the adoption of a proposal for a legislative act, where there is an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data. The EDPS was formally consulted by the Commission on 3 June 2021. The EDPS was also consulted informally during the process of preparation of the proposal, and communicated his informal comments in May 2021. He welcomes the fact that his views have been sought at an early stage of the procedure and encourages the Commission to continue with this good practice.

6. The present Opinion is without prejudice to any future additional comments or recommendations by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, this Opinion is without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Article 58 of Regulation (EU) 2018/1725.

2. General comments

7. The protection of fundamental rights, including the protection of personal data, is one of key building blocks of the Schengen area. The EDPS welcomes the acknowledgement of this fact in the Proposal, in particular in Recitals 1 and 10.

8. In the same vein, the EDPS fully supports Specific objective 3 of the Proposal about the need to **strengthen the implementation of fundamental rights safeguards** under the Schengen *acquis*[7]. In this regard, he would like to recall his position in the EDPS Strategy 2020-2024[8] that "[d]ata protection is one of the last lines of defence for vulnerable individuals, such as migrants and asylum seekers approaching EU external borders."

9. The EDPS welcomes the **reinforced cooperation with relevant Union bodies, offices** and agencies, which are involved in the implementation of the Schengen *acquis*, including the EDPS and the Fundamental Rights Agency (FRA). The EDPS experts have regularly participated as observers in Schengen evaluation missions in the field of data protection under Regulation (EU) No 1053/2013. In this regard, the EDPS appreciates the additional clarity about the role and tasks of the observers from the relevant EU agencies and bodies in the evaluation teams, provided for in Article 18 (7) of Proposal.

10. The EDPS also positively notes other elements of the Proposal, such as the **increased transparency** of the results of the evaluations, the **holistic approach** and the **strategic focus** of the Schengen evaluations, as well as **synergies with other evaluation and monitoring mechanisms**.

3. The scope of the Schengen evaluation

11. The Proposal no longer lists the specific **policy fields of the Schengen acquis subject to evaluation**[9]. This change is explained with the need for strategic focus, flexible programming and a shift towards risk-based evaluations. However, the EDPS believes that this new approach could diminish the legal certainty and might actually create gaps in the evaluations, contrary to the stated objectives of the reform.

12. The EDPS wishes to draw attention to the fact that even under the current legal framework the list of policy fields outlined in Article 4 (1) of Regulation (EU) 1053/2013 is not exhaustive and combines **foreseeability with flexibility**. Furthermore, the defining of 'core' policy fields does not preclude strategic prioritisation or possibility to "evaluate different aspects or possible new elements, allowing the Mechanism to adapt quickly to the dynamic nature of the Schengen *acquis*[10]".

13. An example of such new elements is the EU legislation establishing **new information systems** building on the Schengen acquis, notably the Entry/Exit System (EES)[11] and the European Travel Information and Authorisation System (ETIAS)[12], as well as the interoperability framework[13] between the SIS and other EU information systems in the areas of border, visa and law enforcement. The EDPS considers that the objective of the Commission to make the system more flexible, e.g. in order to evaluate the data protection requirements of the new IT-systems, does not contradict the requirement for legal certainty through defining the main scope of the Schengen evaluation. To this end, it would be appropriate to change the current policy field "Schengen Information System" into "Large-scale information systems".

14. In this context, the EDPS also draws attention to the work of the recently established **Coordinated Supervision Committee** within the framework of the European Data Protection Board (EDPB), which provides a single platform for coordinated supervision of the Union large-scale IT systems, pursuant to Article 62 of Regulation (EU) 2018/1725.

15. Therefore, **the EDPS recommends that the future Regulation should define the scope of the Schengen evaluations by laying down a non-exhaustive list of relevant policy fields, subject to evaluation. In particular, the new Schengen mechanism should continue to provide for evaluations dedicated exclusively to data protection, carried out by data protection experts**.

4. Verification of the activities of Union bodies, offices and agencies

16. The EDPS considers that more clarity is needed about the proposed extension of the scope of the evaluation and monitoring mechanism in order to cover the "activities of [...] Union bodies, offices and agencies in so far as they perform functions on behalf of the Member States to assist in the operational application of provisions of the Schengen *acquis*"[14]. Furthermore, he notes that this important aspect of the Schengen evaluations is stipulated only in the preamble and is not further regulated in the operational part of the proposed legal act.

17. The EDPS notes that "[v]erification of these activities in this regard should be [...] carried out without prejudice to and in full respect of the responsibilities attributed to the Commission and to the relevant governing bodies of the agencies, offices and bodies concerned by their

establishing regulations and their own evaluation and monitoring procedures therein"[15]. In this regard, he recalls that, pursuant to Regulation (EU) 2018/1725, Frontex, Europol, eu-LISA and the other relevant EU agencies are supervised by the EDPS with regard to the processing of personal data. This supervision is separate and independent from the responsibilities of the Commission pursuant to Article 17 TEU, as well as from the internal control mechanism of these Union agencies, offices and bodies.

18. Therefore, **the EDPS invites the Commission to further elaborate how this new element would be implemented in practice, including the possible measures to "avoid the duplication of efforts and conflicting measures"[16]. In addition, the competencies of the various actors should be clearly distinguished. Finally, the Proposal should ensure that the independence of the European Data Protection Supervisor, pursuant to Article 55 of Regulation (EU) 2018/1725, is fully respected.**

5. Conclusions

19. The EDPS welcomes the particular attention in the Proposal on the respect for fundamental rights, including the correct implementation and application of the data protection requirements of the Schengen *acquis*, when carrying out Schengen evaluations.

20. Regarding the scope of the Schengen evaluations, the EDPS believes that the future Regulation should define it by laying down a non-exhaustive list of relevant policy fields, which would be subject to evaluation. In particular, the new Schengen mechanism should continue to provide for evaluations dedicated exclusively to data protection, carried out by data protection experts.

21. Finally, the EDPS underlines that the competencies of the various Union agencies, offices and bodies involved in the Schengen evaluations should be clearly distinguished. In particular, the Proposal should ensure that the independence of the European Data Protection Supervisor, pursuant to Article 55 of Regulation (EU) 2018/1725, is fully respected.

Brussels, 27 July 2021

Wojciech Rafał WIEWIÓROWSKI

[e-signed]

Notes

[1] OJ L 119, 4.5.2016, p. 1.
[2] OJ L 119, 4.5.2016, p. 89.
[3] OJ L 295, 21.11.2018, p. 39.
[4] The Schengen area covers EU Member States, as well as Iceland, Norway, Switzerland and Liechtenstein (so-called 'Schengen Associated Countries'). However, Bulgaria, Croatia, Cyprus and Romania are bound by the Schengen acquis but internal border controls have not yet been lifted in respect of these Member States. Furthermore, Ireland is not part of the Schengen area but it applies the Schengen acquis in part since 1 January 2021.
[5] Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (OJ L 295, 6.11.2013, p. 27).
[6] COM(2021) 278 final.
[7] Explanatory Memorandum, page 15.
[8] EDPS Strategy 2020-2024 Shaping a Safer Digital Future: a new Strategy for a new decade https://edps.europa.eu/sites/edp/files/publication/20-06-30_edps_shaping_safer_digital_future_en.pdf
[9] See Article 4 (1) of the current Regulation (EU) 1053/2013.
[10] Explanatory Memorandum, page 5.
[11] Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third country nationals crossing the external borders of the Member States and determining the conditions for access to the Entry/Exit System for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011, OJ L 327, 9.12.2017, p. 20.
[12] Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, OJ L 236, 19.9.2018, p. 1–71.
[13] Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA, OJ L 135, 22.5.2019, p. 27. and Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816, OJ L 135, 22.5.2019, p. 85.
[14] See Recital 7 of the Proposal.
[15] *Idem*
[16] Article 10 (1) of the Proposal.