



Formal comments of the EDPS on the Proposal for a Directive of the European Parliament and of the Council on the resilience of critical entities

1. Introduction and background

- On 21 June 2021, the EDPS was consulted according to Article 42(1) of Regulation 2018/1725¹ on the Proposal for a Directive of the European Parliament and of the Council on the resilience of critical entities.²
- According to the Explanatory Memorandum, the Proposal would address shortcomings of the current legislative framework, including the European Critical Infrastructure (ECI) Directive³, such as the following:
 - limited application to the energy and transport sectors,
 - focused solely on protective measures,
 - providing a procedure for identifying and designating ECIs through cross-border dialogue.
- The proposed directive would have a much wider sectoral scope, covering ten sectors, namely energy, transport, banking, financial market infrastructure, health, drinking water, waste water, digital infrastructure, public administration, and space.
- Secondly, the directive provides a procedure for Member States to identify critical entities using common criteria on the basis of a national risk assessment.
- Thirdly, the proposal sets out obligations on Member States and the critical entities that they identify, including ones with particular European significance, i.e. critical entities that provide essential services to or in more than one third of Member States that would be subject to specific oversight.
- With these changes outlined above, the EU Commission suggests a new legal framework that shall be better adjusted to the operational environment in which critical entities operate, which is said to have changed significantly in recent years. For example, the risk landscape is said to be more complex than in 2008, involving today natural hazards (in many cases exacerbated by climate change), state-sponsored hybrid actions, terrorism, insider threats, pandemics, and accidents (such as industrial accidents). Secondly, operators are confronted with challenges in integrating new technologies such as 5G and unmanned vehicles into their operations, while at the same time addressing

¹ 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, OJ, 21.11.2018, L.295, p.39 (Regulation 2018/1725).

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:829:FIN>

³ Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection, OJ, 23.12.2008, p. 75.

the vulnerabilities that such technologies could potentially create. Thirdly, these technologies and other trends make operators increasingly reliant on one another.

- The scope of the Proposal partially overlaps with the proposed NIS 2 Directive, as particularly critical entities in the sectors considered to be ‘essential’ under NIS 2 are also subject to more general resilience-enhancing obligations to address non-cyber risks.
- The Proposal’s provisions aimed at ensuring effective employee security management are of particular interest to the EDPS, as such employee security management involving background checks typically requires the processing of personal data. The Proposal explains that such background checks will be limited to specific categories of personnel. The risk of employees of critical entities misusing for instance their access rights within the entity’s organisation to cause damage is said to be of increasing concern. That risk was exacerbated by the growing phenomenon of radicalisation leading to violent extremism and terrorism. The Proposal therefore concludes that it is necessary to enable critical entities to request background checks on persons falling within specific categories of its personnel and to ensure that those requests are assessed expeditiously by the relevant authorities.
- The Proposal provides furthermore for cooperation and consultation between the competent authorities under this Directive and other relevant national authorities, *inter alia* those in charge of the protection of personal data.
- The present formal comments of the EDPS are issued in response to the legislative consultation by the European Commission of 21 June 2021, pursuant to Article 42(1) of Regulation 2018/1725. In this regard, the EDPS suggests a reference to this consultation in a Recital of the Proposal. The comments are 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. Comments

- As indicated in the introduction, from a data protection viewpoint, Article 12 of the Proposal is the crucial provision of the Proposal. The EDPS welcomes the approach to legislate on background checks. This legislation will be mirrored at Member States level and contribute to more certainty of the law in this sensitive area. Especially, legislation describing not only the purpose, material scope, and contents of the background check, but also the personal scope would greatly decrease the risk that existing instruments meant to serve data subjects rights, such as the right to access to personal data, will be abused by (future) employers who might require data subjects to file access requests to demonstrate their fitness for a security-sensitive position. A permission for background checks will, *argumentum e contrario*, also create legal certainty when background checks of whatever kind are not allowed.
- In this respect, the Proposal has some shortcomings. The personal scope is only described as “persons who fall within certain specific categories of their personnel, including persons being considered for recruitment to positions falling within those categories” (paragraph 1). The Recitals do not increase clarity here but merely repeat the vague

wording “certain specific categories”. It even remains unclear whether the national legislator is required to further define these categories, or whether the critical entity itself can define which workplaces fall under the notion of certain specific categories of personnel, or even whether the criteria are not connected to the actual tasks but to certain biographic components. It is in the view of the EDPS that this wording requires the development of objective criteria to determine under which circumstances background checks are necessary and proportionate, and that these criteria cannot be indiscriminate and must take into account the concrete risks associated with a certain position in an entity. **It is the opinion of the EDPS that it would be desirable that such objective criteria be developed in the Proposal itself or that the Proposal at least declare responsibility of the Member States to develop them in their legislation. The EDPS therefore recommends to amend Article 12 accordingly.**

- The proportionality of the provisions of Article 12 of the Proposal depends on the requirements for their application, especially on the personal scope. It is therefore not possible for the EDPS to make a concluding comment in this regard. However, it can already be stated that, with the entry requirements of the personal scope being reduced to what is necessary and proportionate, the content of the background checks as laid out in paragraphs 2 and 3 does not encounter concerns.
- The EDPS welcomes the requirement in Article 8 of the Proposal for competent authorities and other national authorities to cooperate and consult each other. This cooperation with data protection supervisory authorities ideally would occur in a given case, for example a data breach or a controversial processing of personal data, but also strategically, shaping each supervisory authority’s understanding and knowledge by a regular exchange on problem patterns and developments. However, it seems sufficient that the Proposal has left the details of such cooperation to the actors at national level.

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(e-signed)