

EDPS Formal comments on the draft Commission Implementing Regulation (EU) laying down rules for the application of Regulation (EU) [HZR] of the European Parliament and of the Council on paying agencies and other bodies, financial management, clearance of accounts, rules on checks, securities and transparency

1. Introduction and background

- On 1 June 2018, the European Commission adopted a Proposal¹ for a Regulation of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013 (hereinafter also “proposed Regulation”).
- Pursuant to the proposed Regulation, the European Commission would be empowered to adopt a number of delegated and implementing acts.
- The EDPS had not been consulted on the proposed Regulation.
- On 12 November 2021, the European Commission consulted the EDPS on a draft delegated act and a draft implementing act under the above mentioned proposed Regulation, which are the draft Commission Delegated Regulation (EU) supplementing the Regulation (Horizontal Regulation) of the European Parliament and of the Council with rules on paying agencies and other bodies, financial management, clearance of accounts, securities and use of euro, as well as the draft Commission Implementing Regulation (EU) laying down rules for the application of Regulation (EU) [HZR] of the European Parliament and of the Council on paying agencies and other bodies, financial management, clearance of accounts, rules on checks, securities and transparency (hereinafter also “the draft Implementing Regulation”).
- These acts are part of a package of urgent legislative acts under the new Common Agricultural Policy (CAP) that form the basis for the Member States’ CAP Strategic Plans. The legislative acts should be adopted by 31.12.2021 at the latest so that Member States can submit their CAP Strategic Plans as of 1.1.2022.
- The EDPS has responded to the consultation, as far as it concerned the draft Delegated Regulation (EU), by letter of 6 December 2021. The present comments are provided in response to the legislative consultation as far as it concerns the draft Implementing Regulation and pursuant to Article 42(1) of Regulation (EU) 2018/1725 (‘the EUDPR’)². We

¹ COM/2018/393 final - 2018/0217 (COD).

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, OJ L 295, 21.11.2018.

limited our comments below to the provisions of the draft Implementing Regulation that are relevant from a data protection perspective.

- On the other hand, the legal nature of an implementing act makes it necessary to also consider the proposed Regulation in the analysis, as far as it is relevant to evaluate the provisions of the draft Implementing Regulation, and to ascertain to which degree possible interference with the fundamental rights to privacy and data protection stem from elements already foreseen (and justified) in the basic act.
- These formal comments do not preclude any future additional comments by the EDPS, in particular if further issues are identified or new information becomes available, for example as a result of the adoption of other related implementing or delegated acts, pursuant to the proposed Regulation. Furthermore, these formal 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

2.1. General Comments

- The EDPS appreciates the efforts of the Commission to indicate in the consultation the passages of the legal act to which it attaches a possible impact on the protection of individuals' rights and freedoms with regard to the processing of personal data. The EDPS agrees with this indication and concentrates his comments therefore on Article 58 and following of the draft Implementing Regulation, regarding transparency and the publication of beneficiaries' personal data.
- For possible future urgent cases, the EDPS would respectfully suggest that the Commission makes use of the possibility to conduct a prior informal consultation so as to accommodate particular time constraints.
- The EDPS takes note of the fact that while the structure of the provisions on transparency in Article 58 and following of the draft Implementing Regulation differs from the one of the previous Commission Implementing Regulation (EU) No 908/2014³, the provisions concerning the publication of personal data of beneficiaries who are natural persons, i.e. those interfering with the fundamental right to privacy and data protection, would remain almost unchanged. At the same time, the basic act (i.e. the proposed Regulation) has

³ Commission Implementing Regulation (EU) No 908/2014 of 6 August 2014 laying down rules for the application of Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to paying agencies and other bodies, financial management, clearance of accounts, rules on checks, securities and transparency, OJ L 255, 28.8.2014, p. 59–124.

changed in specific details, affecting the implementation options available to the Commission. This issue is addressed in Sections 2.2 and 2.3 below.

- The EDPS recalls that following the judgment of the Court of Justice in *Schecke*,⁴ the Commission undertook notable efforts to find a viable balance between the desired transparency and the rights of affected natural persons to privacy and data protection that led to the solution in Regulation (EU) No 1306/2013⁵. In particular, the Commission consulted stakeholders, considered several options that were suggested by the Court in its judgment, and documented the balancing process in the preamble. In a similar vein, the Opinion of the EDPS⁶ on the Proposal for what later became Regulation (EU) No 1306/2013 dealt to a considerable degree with the justification provided in the Recitals.
- The EDPS regrets that the proposed Regulation undertakes to a lesser degree to explain the balancing act and its outcomes. Elements of such balancing included in the preamble to the 2012 regulation are no longer present in the proposed Regulation. For example, there is no equivalent to Recital 80 of Regulation (EU) No 1306/2013 on the need to examine alternative means, or to Recitals 82 and 83 on striking the balance via introducing a threshold for publishing the names. The EDPS wishes to recall in this context that the Court has in the past looked at evidence that the legislator have taken into consideration less intrusive alternatives at the time of adopting the legal acts⁷. In particular, the Court rejected the argument that the disclosure of personal data to the public served such a significant goal that the objective of transparency would automatically prevail over the right to protection of personal data⁸. The EDPS is therefore of the opinion that, almost 10 years after the previous balancing exercise, the Commission should have examined whether the assumptions of 2012 were still valid in 2021 and whether the 2012 solution found to strike the appropriate balance at the time remains appropriate today, or not, and to document that examination.

⁴ Joint Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR* (C-92/09) and *Hartmut Eifert* (C-93/09) v *Land Hessen*, ECLI:EU:C:2010:662.

⁵ Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008, OJ L 347, 20.12.2013, p. 549–607.

⁶ Opinion of 9 October 2012 on the Amendment to the Commission proposal COM(2011) 628 final/2 for a Regulation of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy, https://edps.europa.eu/data-protection/our-work/publications/opinions/financing-management-and-monitoring-common_en.

⁷ See *Schecke*, paras. 77 and 81.

⁸ *Schecke*, para. 85.

2.2. Comments specifically on the threshold

- The EDPS takes note that the Commission has, just like in the preceding Regulation (EU) No 1306/2013 and Commission Implementing Regulation (EU) No 908/2014, undertaken to “balance [...] the European Union’s interest in guaranteeing the transparency of its acts and ensuring the best use of public funds against the interference with the right of the beneficiaries concerned to respect for their private life in general and to the protection of their personal data in particular”⁹ by exempting beneficiaries with an amount of aid received in one year of equal or less than EUR 1250 from the publication of the beneficiary’s name in Article 96(4) of the proposed Regulation, repeated in Article 59(1) of the Implementing Regulation. For the EDPS it is not immediately clear how the required balance is achieved by maintaining the same threshold of EUR 1250. He considers that the Commission should have examined whether the amount should be adjusted for inflation, whether the structure of beneficiaries is still comparable to the one in 2012, and whether such threshold still has the same effects as expected in 2012. The EDPS recommends to document the considerations that led to the maintaining of the threshold in the Recitals of the proposed Regulation, or alternatively in the Recitals of the draft Implementing Regulation (which mirrors the proposed Regulation in this respect).
- Furthermore, the EDPS takes note that the Commission has not opted for an alternative to setting a threshold in terms of the amount of aid received. The Court had considered that a differentiation according to duration, frequency or nature of the aid received could also be mandated. The EDPS recommends to document and explain in the recitals why no alternative approach was considered appropriate.

2.3. Comments related to the use of a code to identify the beneficiaries below the threshold

- Like Regulation (EU) 1306/2013, the draft Implementing Regulation does not exempt personal data of beneficiaries falling below the threshold completely from publication. Instead, the new Article 59(1) provides that where the amount of aid received in one year by a beneficiary is equal to or less than EUR 1250, that beneficiary shall be identified by a code.

2.3.1. On the legal nature of a code to identify natural persons

- The EDPS recalls that the definition of personal data does not require the use of names as identifiers. Any information that is capable of identifying a natural person can make an otherwise anonymous data set a set of *personal* data. Article 4(1) of the

⁹Schecke, para. 77.

GDPR¹⁰ defines an identifiable natural person as one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. Using codes or pseudonyms instead of names does not create anonymous data, as long as the link between the code and the beneficiary is not fully removed. It follows from the wording of Article 59(1) of the draft Implementing Regulation that the code shall serve for the identification of the beneficiary.

- Consequently, while the replacement of classical identifiers like names by a code (also known as pseudonymisation) may reduce the severity of the interference that is inherent to the publication of the personal data, the data set is still data of an identifiable person from the perspective of the data controller; identification of the beneficiary is even the purpose of the code, according to Article 59(1) of the draft Implementing Regulation. Therefore, the information of beneficiaries below the threshold remains personal data. Its processing requires a legal basis, and the fact that the data is not anonymized will have to be considered in the balancing act.
- The EDPS recalls that all essential elements of an interference with the fundamental right to privacy and data protection must be regulated at the level of a legal act, such as the proposed Regulation or Regulation (EU) 2021/1060. New purposes of processing may not be introduced solely at the level of an implementing act.

2.3.2. On the legal basis for replacing the names with a code

- The EDPS takes note of the fact that Article 59(1) of the draft Implementing Act is not a mere repetition of the proposed Regulation; moreover, the proposed Regulation seems not to have taken over the provision authorizing Member States to create a code from Article 112 of Regulation (EU) 1306/2013.
- Article 59(1) of the draft Implementing Act cannot justify the introduction of a new processing operation that changes otherwise anonymous data (after the deletion of names prior to publication) into personal data (by replacing the names by another identifier). The EDPS is of the view that this kind of interference with the fundamental right to privacy must have their legal basis in a legislative act, and not in an implementing act.

¹⁰ 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), OJ L 119, 4.5.2016, p. 1–88.

- Therefore, the EDPS is of the opinion that, to the extent Article 59(1) first sentence of the draft Implementing Regulation has a deontological meaning, *i.e.* to the extent it intends to *prescribe* that a code be attributed to data sets below the threshold, this provision lacks an adequate legal basis in the basic act. The EDPS notes in this context there is no other provision, in particular in the proposed Regulation, that would provide for an attribution of this code. Recital 41 to the draft Implementing decision does not offer additional clarity as it merely states “[...] that Member States shall not publish the names of beneficiaries receiving an amount equal to or less than EUR 1 250. To provide information on the operation concerned, the Member State should instead use a code.” As the mechanism for attributing a code as a replacement for the civil identity for the purposes of publication is not provided for in the proposed Regulation, the EDPS believes that the code cannot be introduced at the level of the draft Implementing Regulation without amending the proposed Regulation in that respect.
- At the same time, the EDPS takes note that the proposed Regulation does no longer regulate the data categories to be published as such. Instead, it refers to Article 49 of Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 (so-called Common Provisions Regulation).¹¹ It is the EDPS’s perception that Article 49(3) of Regulation (EU) 2021/1060 does foresee the attribution of a unique code to all *operations*. According to Article 96(3) of the proposed Regulation, “operation” means for purposes of this Article measure or intervention. All data sets, whether they fall below the threshold or not, would bear such a code. However, the replacement of first name and surname by a code under certain conditions is not provided for. Insofar neither the norm text of Article 59(1) of the draft Implementing Decision is in line with the Common Provisions Regulation, nor Recital 41 of the draft Implementing Regulation, according to which the Member State should, *instead* of publishing the names of beneficiaries receiving an amount equal to or less than EUR 1250, “use a code” “to provide information on the operation concerned”.
- The EDPS is therefore of the opinion that the provision in Article 59(1) of the draft Implementing Regulation would not appear to be in line with the proposed Regulation and the Common Provisions Regulation.
- The EDPS recommends to clarify the wording of Article 59(1) of the Implementing Regulation and the corresponding recital in light of the above comments. In particular, it should become clear that the draft Implementing Regulation does not

¹¹ Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30.6.2021, p. 159–706.

aim to introduce a new type of processing of personal data (such as the publication of pseudonymised personal data of recipients falling below the threshold), nor a new purpose for an already existing processing (such as the creation of a code pursuant to Article 49(3) of Regulation (EU) 2021/1060). The Recitals should also make it clear that the draft Implementing Regulation merely intends to repeat Article 49(3) of Regulation (EU) 2021/1060 in this respect.

2.3.3. Comments regarding pseudonymisation and balancing

- The EDPS also recalls from the ruling of the Court in *Schecke* that while that case dealt with the publication of first name and surname of natural persons, the considerations of the Court on how to balance transparency against data protection did not include the option to replace highly intrusive personal data like first name and surname with less intrusive personal data like a code. The EDPS recalls that he has proposed in the context of small communities, in which also the recipients of such pseudonymised data might be able to identify the respective beneficiaries, to aggregate beneficiaries of small amounts and to publish aggregated data only.¹² The co-legislators have chosen a different path in 2013, in that they have not provided for aggregation of the data, but for the aggregation of the communities, thus solving the problems that recipients might identify a beneficiary, but not anonymizing the data itself. The current legislation follows the same path. The EDPS recommends to explain in a Recital why aggregation/anonymization of recipients of small amounts was not possible.

2.4. Conclusion from the Comments

- The EDPS recommends strengthening the explanations for legislative decisions in the field of balancing legitimate EU interests with fundamental rights of individuals, and making the necessary clarifications regarding the use of a code in Article 59(1). He furthermore recommends to consider the possibility to aggregate data from recipients of small amounts, leading to their anonymization. The EDPS also regrets not having been consulted on the proposed Regulation.

Brussels, 9 December 2021

(e-signed)

Wojciech Rafał WIEWIÓROWSKI

¹² Opinion of 9 October 2012 on the Amendment to the Commission proposal COM(2011) 628 final/2 for a Regulation of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy, https://edps.europa.eu/data-protection/our-work/publications/opinions/financing-management-and-monitoring-common_en, para. 14.